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TAKINGS: A RETURN TO PRINCIPLE

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TAKINGS:' A RETURN TO PRINCIPLE?

Private property and public law: when the state takes, who benefits and who pays?

I INTRODUCTION

Examples of uncompensated takings

The Government proposed in 1997 under the Maori Reserved Land Act to alter the property rights of statutory lessees by changing the review terms and removing the right of perpetual renewal. Farmers claimed a capital loss of $59m. There was fierce political opposition. A by election was pending. Eventually $67m in compensation was paid.

The Government under the Fisheries Act proposes that fishers should exchange the property right under fishing permit to catch 100% of Schedule 4 fish for quota to only 80% of the Schedule 4 fish on the argument that the quota property right is superior to a fishing permit. The Primary Production Select Committee has deferred a decision until after the election.

The Government and agencies often exceed statutory time limits for processing of applications under the Resource Management Act and other legislation.[2] These are uncompensated takings of the citizen's time and opportunities.

The Government in 1993 under the Customs Regulations removed the rights of Landowners to export native timber. Although no right to compensation was conceded, some ex gratia "adjustment assistance" has now been paid.

The Historic Places Trust in 1994 first asked the South Wairarapa District Council for a plan change to make discretionary all land use within 200m of "suspected" historic Maori sites/waahi tapu. Valuable opportunities to diversify into aquaculture or rural residential subdivision will be taken from the Farmer. No compensation is proposed.

The 1999 proposed plan for the Banks Peninsular 2 District declares over 90% of some farms to be "Significant Natural Areas" (SNAs) in which all activities including vegetation removal are discretionary. No compensation is proposed.

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[1] "Takings" is a term from United States jurisprudence originating in Magna Carta to describe all State interference with private property. In England and New Zealand the term "compulsory acquisition" is more frequent. In Canada the term "expropriation" is used since the word is common to both French and English.

[2] July 1999 survey of local authorities by Mfe finding that 22% of all resource consent applications are not processed within the statutory time limits, despite Councils being able to arbitrarily declare when an application is "officially received". The accuracy of Council response is not audited. Council requests for additional information under s92(4) RMA are often used to justify delay.

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The Threat to Property Rights

Since Magna Carta 1215 and earlier the English Common Law has required that compensation be paid for all takings. That has always been an essential check on the power of the Executive. From guaranteed property rights, the concept of prompt due process of law and individual liberties have progressively developed. In recent times the importance of property rights in the constitution has been forgotten as the power of the Parliamentary Executive has grown. As the power of the Executive, (the Crown) in Parliament has grown, Parliament has neglected its historic function as guarantor of individual liberties and property rights.

This paper reviews the authorities for the inherent right of the citizen to compensation for all takings. The influence of Magna Carta[3] in the Magna Carta legislation, the Petition and Bill of Rights, the Common Law (the Ancient Constitution) and modern caselaw is discussed. Section 21 of the New Zealand Bill of Rights 1990, giving domestic effect to international law, is considered as a further authority for the constitutional protection of property rights. The paper then examines current practice and statutory provision for compensation and contrasts the full compensation generally paid under the Public Works Act for land with inadequate provision for other property.

The conclusion is that at common law full compensation was always paid and that all statute law should provide for compensation, unless there are sound policy reasons to deny compensation. The citizen's right to compensation is a constitutional convention. The right can extend to regulatory takings.

More fundamentally this paper concludes that New Zealand already has a written constitution grounded in property rights and the philosophy of John Locke. This was the orthodox view until the positivists (such as Austin and AV Dicey) writing last century. Discussion of the full constitutional ramifications lies outside the ambit of this paper.

II THE ENGLISH RULES BASED ON MAGNA CARTA

A THE CONSTITUTIONAL AUTHORITY FOR COMPENSATION IS MAGNA CARTA

Courts at the highest level and writers throughout the Commonwealth have consistently recognised Magna Carta as the constitutional authority that full compensation should always be paid for all takings by the Crown whether of land or intangible property.[4]

> Baragwanath in Cooper v *Attorney General*[5] stated: Our constitutional safeguard for property rights is that of Ch 29 of Magna Car-ta: “No Freeman shall be taken or imprisoned, or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed ; nor will we not pass upon him, nor [condemn,(1)][6] but by the lawful judgement of his peers, or by the Law of the Land.” 4 [We will sell to no man, we will not deny or defer to any man either Justice or Right] (Imperial Laws Application Act 1988, s 3(1) and First Schedule)[7]

In *Russel v Minister* of *Lands*[8] a full bench of four Judges of the New Zealand Supreme Court declared in 1898 through Pennefather J:

> It has even been suggested that, although the Legislature provides for full compensation, yet the Compensation Court should award a smaller amount in the case of lands taken for settlement, as otherwise the bargain would not be a profitable one for the Government. To do so would be to violate the fundamental provision of Magna Carta “No

---

[4] Writers include:
Matthew Parris Sir John Fortescue Sir Edward Coke Selden
Edmund Burke Stubbs Sir Winston Churchill: History *of the* English Speaking Peoples Vol 1 Cassell 1956 202 “And when in subsequent ages the State, swollen with its own authority, has attempted to ride roughshod over the rights or liberties of the subject it is to this doctrine that appeal has again and again been made, and never, as yet, without success.”
Courts include:
Canada *Calder v* Attorney-Genera/ *of British Columbia*
34 DLR (3d) 145 (SC) per Judson J at 173 lines 31-36
“the expropriation of private rights by the Government under the prerogative necessitates the payment of compensation... Only express words...in an enactment would authorise a taking without compensation” and 203 line 28 refers to Magna Carta Australia *Ex parte Walsh* and Johnson [1925] CLR 36 HCA per Isaacs J at 79 lines 5-34

[5] Cooper v Attorney General [1996] 3NZLR 480 BaragwanathJ

[6] Chapter 29 in the 1225 reissue of Magna Carta resulted from the consolidation of Chapters 39 and 40 in the original 1215 charter. The word [condemn1] is footnoted in the Statutes of the Realm (the official statutes mentioned in the First Schedule to the 1988 Imperial Laws Application Act) to record that “the latin word mittemus while literally translated as send or deal with, is usually rendered as above”. It has connotations of “target” or “set out to destroy”. For that reason certain torts against public officials such as the tort of misfeasance in public office have a requirement of malice. (As to malice see Todd (ed) “The Law of Torts in New Zealand” Brookers Ltd 1997 at 1015)
That raises the issue as to whether private remedies in tort are merely the Courts practical recognition of the inherent rights of the individual to protection of his person and property guaranteed by the Magna Carta legislation.
A further question is whether mittemus authorises a remedy in tort with compensation for injurious affection or metaphysical taking in the sense of *Cockburn* v *Minister of* Works [1984] 2 NZLR 466 CA

[7] Chapter 29 was cited in abbreviated form in Cooper. For convenience it is now set out in full, including the words in square brackets.

[8] *Russel* v *Minister of Lands* (1898) 17 NZLR 241 at 250

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> freeman shall be disseised of his tenement except by the law of the land."

Blackstone in the "Commentaries on the Laws of England"[9] (first published in 1765) wrote:

> The third absolute right inherent in every Englishman, is that of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land
>
> ....
>
> Upon this principle the Great Charter has declared that no freeman shall be disseised, or divested, of his freehold or of his liberties, or free customs, but by the judgement of his peers, or by the law of the land
>
> ....
>
> So great moreover is the regard for private property, that . ..If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men to do this without the consent of the owner of the land
>
> ....
>
> the legislature alone can . ..compel the individual to acquiesce . ..Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained . ..even this is an exercise of power, which the legislature indulges with caution, and which nothing but the legislature can perform.
>
> ....
>
> in vain would these rights be declared...if the constitution provided no other method to secure their enjoyment . . . These are:
>
> 1. Parliament . . .
> 2. [Strict] limitation of the royal prerogative . . .
> 3. Applying to the courts of justice for redress . . .

"Magna Carta" or more accurately the Magna Cat-ta legislation has been reissued on innumerable occasions since 1215 generally on the accession of a new monarch. The right to rule was always known to be conditional on the guarantee of the fundamental freedoms and liberties. The freedoms and liberties were reserved fundamental rights in the individual, his person, his liberty, property and customs.

The first Magna Carta signed on June 15, 1215 in a marshy field at Runnymede was a peace treaty between the Crown and a broad alliance of rebels.

[9] "Commentaries on the Laws of England" Vol 1 121-123 3ed RM Kerr London J Murray 1862. The influence of Locke is clear.

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The Crown had been militarily defeated, when the City of London opened its gates to the Barons, so denying John the ability to raise cash for his mercenaries from the London merchants. The previously arbitrary authority of the Norman Kings was limited by the guarantees of liberties to the Church (article I), the Barons and Freemen (arts 2-12,14-54), the City of London (art 13), the Welsh (art 56-58) and the Scots (art 59). The Crown's obligation to respect the liberties and freedoms guaranteed by Magna Car-ta was immediately understood to mean that the Crown and Subject alike were under the Rule of Law. That accorded with the mediaeval concept that since everyone was subject to God they should equally be subject to the law sanctioned by God.

The peoples" of England had by cession and conquest regained part of their sovereignty in the form of the guarantees of their freedoms and liberties. That interpretation cannot be denied in view of art 61, providing that the elected Council of 25 barons were free to distress and distrain against the lands, castles and possessions of the Crown if the King had not remedied any breach after 40 days notice.

Contrary to popular misconception the Barons mentioned in Magna Carta were not necessarily nobles, but merely military leaders." Unusually for the age Article 60 provided that the benefit of the customs and liberties would extend to all freemen. All the "liberties, rights and concessions" in Magna Car-ta were granted "for ever" [12] ("in perpetuum" in the original Latin text). The obligations were also to be "observed in good faith and without evil intent" (bona fide et sine malo ingenio). It is interesting to compare the language with Richardson J in *Attorney General v New Zealand Maori Council* [13] 772 years later.

B THE TREATY OF WAITANGI 1840 REAFFIRMS MAGNA CARTA

The Treaty is at the same time a reaffirmation of Magna Carta and the authority under which the Maori people acceded to British sovereignty grounded in Magna Carta. The Third Article states that the Queen "extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects". Those rights were Magna Carta rights. Henry and William Williams in translating the Treaty to Maori, were influenced by Magna Carta since the Bill of Rights 1689 was still recent history and a part of English popular culture.[14]

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[10] There were many peoples in England under Norman French rule each with their distinct languages, traditions and legal systems. These included the various Celts, the Jutes, the Kents, the Angles, the Saxons and the free Scandinavian settlers along the East Coast. All welcomed Magna Car-ta as a Crown promise to respect their particular customs. The concern is strikingly similiar to contemporary Maori concern for preservation of taonga and biculturalism.
Compare n 25 Prof Brookfield: the legitimation of power.

[11] F Maitland "The Constitutional History of England" 1 ed 1963 Cambridge Univ Press 65 line 20 states that "it would seem that at this time the title baron covered all the military tenants in chief of the crown"

[12] The phrase is discussed by JC Holt in "The Roots of Liberty" Edit Sandoz Univ of Missouri Press 1993 34 line 18 to 35. Line 27 "...a grant in perpetuity was unusual between laymen....... repetition of the phrase reflected a determination that there was to be no going back, a feeling that these were once and for all concessions which at last put a wide range matters to rights."

[13] *Attorney General v New Zealand* Maori Council [1987] NZLR 641 CA Richardson J at 673 line 48 "For its part the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return gave certain guarantees. That basis for the compact requires each party to act reasonably and in good faith towards each other."

[14] The Dictionary of New Zealand Biography on Henry Williams Volume 1 (594 line 27) mirrors general historical and political opinion in stating "...his Maori version of the treaty was not a literal translation from the English draft and did not convey clearly the cession of sovereignty."

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A legitimate interpretation of the Maori version of the Treaty is that the promises of the Second Article given to the Chiefs and their hapu ("ki nga hapu") were also extended to all the people of New Zealand of whatever race ("-ki nga tangata katoa o Nu Tirani").[15] That accords with Magna Carta and modern concepts of the equality of everyone under the law.[16]

C MAGNA CARTA PART OF THE FUNDAMENTAL LAW IN NEW ZEALAND

Magna Carta has always been an official part of the law of New Zealand. The principle of full inheritance [17] was affirmed in the English Laws Act 1858.

> 1. The laws of England as existing on the [14 day of January, 1840] shall, as far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.

The 1854 and 1908 English Laws Acts were in similar language. The proviso "so far as applicable to the circumstances of New Zealand" left doubt as to which of the Imperial statutes applied.

The 1879 Revision of Statutes Act resulted in the publication in 1881 under the authority of the New Zealand Government of "A Selection of the Imperial Acts of Parliament apparently in force in New Zealand...." This included Magna 8 Carta 1297, the Petition of Right 1627 and the Bill of Rights 1 689.[18]

The Imperial Laws Application Act 1988 removed all doubt. Section 3 declared that all Imperial enactment's in the First Schedule are "part of the laws of New Zealand", while enactment's not listed are excluded. Extracts from the Magna Carta legislation (and the Petition of Right and Bill of Rights 1688) are listed as

Such opinion is unfair in that it does not consider the political and social context of key words such as "sovereignty" and "land". I find support for this view in

1 Dr PG M'Hugh "The Historiography of New Zealand's Constitutional History" 344 at 363-367 published in essays on the Constitution ed PA Joseph. Brooker's 1995

2 Dr R Epstein "Indigenous People's Rights and the Treaty of Waitangi" a lecture given at the Institute of Policy Studies and the Stout Centre VUW on 25 March 1999

"...legal archaeology....was indeed a strong Lockean document, which is the more congenial because Lockeans did not think that title started with the Crown and worked its way down to the people through feudal conveyances. People like Hobson and the missionaries may not have been sophisticated, but at least they were reasonably familiar with current political ideas."

[15] The linguistic issues are important since the Court of Appeal in the New *Zealand* Council v *Attorney* General cases placed great importance on them. Eg [1987] 1 NZLR 641
Cooke P at 660-668 esp 662 line 28 to 663 line 44
Richardson J 671 line 24 to 672 line 32
Bisson J 713 line 5 to 715 line 26
See also
"Waitangi Maori & Pakeha Perspectives of the Treaty of Waitangi" Ed IH Kawharu esp Bruce Biggs at 300
"Constitutional and Administrative Law in New Zealand" PA Joseph Law Book Company.

[16] 1948 Universal Declaration of Human Rights Arts 2,7,21 to which NZ is a State Signatory.

[17] *Constitutional and Administrative Law* in New Zealand PA Joseph The Law Book Company 1993 Sydney at 13 line 18.

[18] Section III was omitted from the reprint of the Bill of Rights 1688. This omission is later discussed at III B.
In their preface to the 1881 reprint at iv the Commissioners remark that "the omission of any such enactment is not equivalent to an authoritative affirmation that it is not in force or applicable."

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"Constitutional Enactment's". Clearly Parliament passes legislation to have effect and it is hard to perceive the useful purpose of a reaffirmation of the Magna Carta legislation if it is to have no constitutional effect in the interpretation and administration of the law.

> Section 5 of the Imperial Laws Application Act stated: After the commencement of this Act, the common law of England (including the principles and rules of equity) so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand.

That proviso preserves the great body of Judge made caselaw ultimately founded on Magna Cat-ta principles determined by the House of Lords and Privy Council.[19]

D THE FIDUCIARY DUTIES OF THE CROWN FROM MAGNA CARTA

Fiduciary duty is the concept drawn from the law of equity that those exercising authority should behave with the utmost good faith to everyone vulnerable to an abuse of that authority. It is similar to the trustee/beneficiary relationship.

Magna Carta 30 EDWARD, I. AD 1275 (First Schedule of the Imperial Laws Application Act 1988) is the Parliamentary authority for fiduciary duty (and the equality of all under the law.)

> FIRST the King willeth and commandeth, That the Peace of Holy Church and of the Land, be well kept and maintained in all points, and that common Right be done to all, as well Poor as Rich, without respect of Persons.

> The belief in Crown benevolence, now expressed as the fiduciary duty is of ancient origin and can be traced to the laws of the Anglo Saxons.[20]

Traditionally in the context of takings fiduciary duty includes all the courtesies and good faith required of the Crown in persuading Landowners to voluntarily leave their land. It necessarily includes the desirability to negotiate in good faith to reach a voluntary bargain in preference to litigation or other measures of State coercion.[21]

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[19] The history of the Imperial legislation in New Zealand is described in Law Commission Report No 1 "Imperial Legislation in force in New Zealand" and the Commentary in RS Volume 30 reprinting at 1 Nov 1994 all the Imperial Legislation recognised by the New Zealand Government as remaining in force.

[20] *Ancient Laws and Institutes of England* Vol 1 1840 Commissions of the Public Records of the Kingdom

[21] The sole purchaser "friendly negotiation" test originating in *G/ass v /n/and Revenue* [191 5] *SC 449* and *Raja Vyricherla Narayana Gajapafiraju v The Revenue Divisional Officer Vizagapafam* [1939] AC 302 JC, 318 line 3 was applied in *Turner v Minister of Public Instruction [l* 956] *95* CLR 245, *Tawharanui Farm Ltd v Auckland Regional Authority [l* 976] 2NZLR 230,235 and discussed and affirmed in *Jacobsen Holdings* v *Drexel* [1986] 1 NZLR 324 CA Cooke P 328 Ins 8-12, 329 Ins4,50, Somers J 334 Ins 15-20, Casey J 335 line 39 and then remitted to the HC [1987] 2 NZLR 52 Pritchard J 54 Ins23-40
Also S18(d) P Works Act 1981 requires good faith negotiation.

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The fiduciary duty was described by Richardson J in NZ Maori Council v Attorney General[22] in the context of the State-Owned Enterprise Act 1986 as requiring good faith and reasonable behaviour.

Since the acquisition of limited sovereignty by the Crown under the various reissues of Magna Carta and under the Treaty of Waitangi are essentially the same, similar fiduciary duties should apply.

22 New Zealand Maori Council v Attorney General Above n13

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III THE PETITION OF RIGHT 1627 AND BILL OF RIGHTS 1689[23] THE DECLARATION OF RIGHTS 1689

The Bill of Rights (Act) 1689 was Parliament's response to the Petition of Right 1627 formally accepted by Charles 1 in the Round Parliament and then by subsequent action repudiated. That repudiation lead to the English Civil War. Both the Petition of Right and Bill of Rights 1689 remain part of the law of New Zealand under the First Schedule to the Imperial Laws Application Act 1988. Together they are commonly said to be the authority for the Supremacy of Parliament as law of the land. The history of both is plainly told by Winston Churchill *"A History of the English Speaking Peoples"*[24]

For England at the time the Declaration of Rights 13 February 1689 was more important since the Lords, Commons and Monarch assembled together while it was read and then the Crown was formally offered to William and Mary. The Declaration was a constitutional instrument.

A PARLIAMENT IS SUBJECT TO THE LAW

The claimed supremacy of Parliament

Parliament is not "supreme",[25] since its authority is limited by the fundamental liberties of the person, of property and of prompt due process reaffirmed by the Bill of Rights 1689. Parliament took power in the self proclaimed "Glorious Revolution" conditional upon those liberties, which have never been removed by a later revolution or broad consultation of the people.[26] The right to full compensation for all takings in the Westminster model of democracy is and always has been the most effective check to the inevitably despotic power of the State. It has often been overlooked by political commentators arguing for limited government.[27]

Fitzgerald v Muldoon[28]

23 Commonly year numbered 1688,but in fact passed in 1689

24 "A History of the English Speaking Peoples" Cassell and Company 1956 Volume II 119-327.

25 Contrary to the views of AV Dicey "An Introduction to the Study of the Law of the Constitution" 10 ed 1975 Macmillan Press. Dicey's view of the Petition of Right and the Bill of Rights is expressed in a footnote at 200:
"The Petition of Right, and the Bill of Rights, as also the American Declarations of Rights, contain . ..proclamations of general principles . . . ..judicial condemnations of claims or practices on the part of the Crown, which are thereby pronounced illegal. It will be found that....nearly every, clause...negatives some distinct claim made on behalf of the prerogative....." Dicey does however concede the role of interpretation. Dicey's views are now untenable in the UK following the UK accession to the EEC. See R v Secretary of State for Transport ex p Factor-tame [1988] 1 ALL ER 735

26 The requirement for "common consent" to a new constitution was satisfied for the new South African constitution by widespread consultation from 1993 to 1996. Compare with the minimal consultation (10 submissions received) when the NZ Constitution Act 1986 was passed.
Fundamental legal rights can also develop by peaceful acquiescence. This was argued in the context of Moana Jackson's radical claims for Maori sovereignty by Professor Brookfield "Parliament, the Treaty, and Freedom- Millenial Hopes and Speculations" "The Legitimation of Imposed Power"
44-49 in "Essays on the Constitution" ed PA Joseph Brookers 1995. Respect for custom is consistent with Magna Car-ta. The question remains however as to what period of time must elapse before a "prescriptive" constitutional custom can be recognised.

27 eg Sir Geoffrey Palmer
"Unbridled Power" 1 ed 1979 and 2 ed 1987
"Bridled Power: New Zealand Government under MMP"
3ed 1997 Geoffrey and Matthew Palmer All NZ Oxford Univ Press.

28 Fitzgerald v Muldoon [1976] 2 NZLR 615 Wild CJ
The restrictions on parliamentary law making are further discussed by David M'Gee in The Legislative Process and the Courts 84-

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Chief Justice Wild in 1976 in Fitzgerald v *Muldoon* confirmed that the Executive in Parliament was subject to the law and the Bill of Rights 1689. He declared that Mr Muldoon had breached the Bill of Rights 1689 ("the pretended power to suspend the law") by announcing that contributions to Government Superannuation should cease before Parliament had changed the law. By direct analogy Parliament must be subject to all the provisions of the Bill of Rights including the omitted Section III guaranteeing all the liberties of property and the individual.

Reaffirmation of the rights and liberties of the subject from Magna Carta

The Petition of Right and the Bill of Rights are written in such blunt language that they make no sense unless they are recognised as reserved fundamental law binding the Crown Executive in Parliament to comply with Magna Cat-ta and accepted by the Crown as fundamental law.

1. The Petition recites 250 Edwl c29 1297 (identical to Hen.3 M.C.c.29) in Section 3 and 280 Edw III in Section 4. It also refers to "the laws" and "customs" of "this realm" (section 2 and 7) and "the Great Charter and the laws of the land" (section 7).
2. The preambles to the Petition of Right and Bill of Rights dictate a purposive interpretation premised on Magna Carta.

The preamble to the Petition of Right reads:

> . The Petition . . . . ..concerning divers Rights and Liberties of the Subjects, with the King's Majesty's Royal Answer thereunto in full Parliament.[29]

The First Preamble to the Bill of Rights reads:

> An Act declaring the rights and liberties of the subject, and settling the succession of the Crown.

The further preambles read (Underlining added):

> AND WHEREAS . ..in order to such an establishment as that their religion, laws, and liberties might not again be in danger of being subverted...
>
> AND THEY DO CLAIM, DEMAND, AND INSIST UPON all and singular the premises, as their undoubted rights and liberties

The word "establishment" shows a clear intent to found a new political order guaranteeing ancient rights and liberties.

The conditional tender of the Crown to William and Mary

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111 in Essays on the Constitution ed PA Joseph Brooker's 1995. M'Gee's discussion was expressly approved by the Court of Appeal in Shaw v Shaw CA 218/97 at 5 line 6 "Parliament is subject to law just like every other person and body in New Zealand; it is bound by statutory requirements."

Also Prebble v TVNZ 3 [1993]3NZLR CA and [1994]3NZLR 1 JC

29 The first preamble to the Petition of Rights 1627 is recorded in the Statutes of the Realm, but was excluded from the 1881 reprint and hence Law Commission Report no 1 and RS 30 (Reprinted Statutes) reprinted at 1 November 1994.

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Parliament had seized power in the Glorious Revolution and months later offered the Crown to William and Mary conditional upon the guarantee of ancient liberties. The Bill of Rights expressly records

> The Tender of the Crown" was made conditionally:
> [in the] intire confidence that His said Hignesse the Prince of Orange will perfect the deliverance so farr advanced by him, and will preserve them from the violation of their rights . ..and from all other attempts upon their religion, rights, and liberties...

The tender of the Crown conditional upon the guarantee of the ancient Magna Carta rights was a traditional pattern given added political significance by the writings of John Locke (1632-l 704) on the Social Contract. John Locke's principle work "An Essay concerning Human Understanding" was finally published in 1690.

No takings except by the unequivocal direction of Parliament

The Petition of Right and Bill of Rights are the direct constitutional authority for the insistence of the Courts that the fundamental rights of the citizen are only to be taken at the unequivocal direction of Parliament with a strong presumption of compensation. Magna Carta from 1215 had confirmed that the Crown could only take from the citizen on payment of compensation or by law of the land. The Bill of Rights confirmed in addition that only Parliament could authorise taxation. The insistence in all the cases (some later examined) that property can only be taken by the unequivocal direction of Parliament are based upon the taxation provisions in the Petition of Right 1627 and the Bill of Rights 1689.

> **The Petition of Right 1627**
> Reciting that by (25) 34 Edw.l st.4 c.1, by authority of Parliament holden 25 Edw.3, and by other laws of this realm, the King's subjects should not be taxed but by consent in Parliament.

> **The Bill of Rights 1689**
> Levying money-That levying money for or to the use of the Crowne by pretence of pereogative without grant of Parlyament for longer time or in other manner than the same is or shall be granted is illegal

B THE OMISSION OF SECTION III OF THE BILL OF RIGHTS.

Compensation must always be paid for reserved fundamental rights since parliamentary sovereignty is subject to them.

The Bill of Rights 1689 (as recorded in Statutes of the Realm) comprises three sections of equal importance:

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Section I declares the Rights and Liberties of the Subject. Section II outlaws the Crown prerogative to suspend the application of statutes by "Dispensation by Non obstante"

Section III preserves all previous charters, grants or Pardons, (including the issues of Magna Carta) Technically Magna Carta 1215 is a Charter and Grant and is more fundamental than a statute.

Section III states:

> Provided that noe Charter or Grant or Pardon granted before [23 October 1689] shall be any wayes impeached or invalidated by this Act but that the same shall be and remaine of the same force and effect in Law and noe other then as if this Act had never beene made.

The importance of the Third Section in preserving Magna Carta can be assessed from the Debates in the House of Commons and the House of Lords.[30]

Sir Robert Howard, a member of both Treby's and Somer's Rights Committees of the House of Commons considering the form of the Bill of Rights stated:

> "Rights of the people had been confirmed by early Kings both before and after the Norman line began. Accordingly, the people have always had the same title to their liberties and properties that England's Kings have unto their Crowns. The several Charters of the people's rights, most particularly Magna Carta, were not grants from the King, but recognition's by the King of rights that had been reserved or that appertained unto us by common law and immemorial custom".

However disregarding this proud history and the special status of Magna Carta as a Charter the Law Commission in its first report "Imperial Legislation in Force in New Zealand" stated "Section III, a savings provision, is omitted as spent". On the basis of this misinformation, the NZ Parliament in the 1988 reaffirmation of the Magna Carta legislation, excluded Section III. The Rights and Liberties of the Subject can never be "omitted as spent."

Section 29 of the Evidence Act 1908, amended in 1998 states however:

> (1) Every copy...of any Imperial enactment . ..being a copy purported to be printed . ..under the authority of the New Zealand Government shall...be deemed -
> To be a correct copy of that Act of Parliament

30 Journals of the Houses of Lords and Commons 10:126
Cobbett debates

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> (2) Every copy of any Imperial enactment . ..being a copy purporting to be printed . ..by the Queen's ...printer...shall...be deemed -
> a) To be a correct copy of that enactment

Statutes of the Realm containing the missing preambles and Section 111 are acknowledged by the New Zealand Parliament as authentic. The omitted Section III remains part of the statute law of New Zealand along with the other Imperial legislation.

At the least Section III gives rise to the strongest presumptions of interpretation in favour of compensation. It can however be strongly argued that since Parliament's authority originates from the Bill of Rights 1689, Parliament would be acting unconstitutionally and ultra vires if passing Acts confiscating private property without properly providing for compensation. It would equally be beyond Parliament's powers to repeal Section III without very wide constitutional consultation and in practical poltical terms a referendum.

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IV THE COMMON LAW METHOD: THE REFINEMENT OF MAGNA CARTA PRINCIPLES THROUGH THE JUDICIAL POWER OF INTERPRETATION

How existing rights and the right to compensation have been maintained in the Common Law

Section 5 of the Imperial Laws Application Act 1988[31] states that the common law of England (including the principles and rules of equity) shall continue to be part of the laws of New Zealand. It is expressly preserved by Section 28 of the New Zealand Bill of Rights:

> **28 Other rights and freedoms not affected** An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

The term "common law" defies ready definition, since Judges for generations have preferred that the principles of the Common Law generally derived from the Magna Carta legislation remain elastic, so that the black letter of statute can be more efficiently interpreted to accord with the changing needs of society and morality. Significantly the Concise Oxford Dictionary defines the common law as "law derived from custom and judicial precedent rather than statutes". This is not a definition of the term, but only an explanation of its origin.

Judicial freedom to interprete the law is usefully 15 described as a convention by Justice Baragwanath in *Cooper v Attorney General*[32] (later discussed). That freedom as a matter of constitutional convention is partly codified in the Evidence Act 1908 and the Acts Interpretation Act 1924.

> Section 28 of the Evidence Act
> **28 Judicial notice of Acts of Parliament.** Judicial notice shall be taken by all Courts and persons acting judicially of all Acts of Parliament.[33]
>
> An example of the Conventions from the Interpretation Act 1999

31 Given in full above at IIC and discussed n18

32 Cooper v Attorney General [1996] NZLR 480 VF 30

33 The convenient belief common among Planners that the Resource Management Act is a "pure statutory regime" is untenable in view of Section 28 of the Evidence Act. The writer encountered this in questions from the bench in WRC v DTS Riddiford ENF 172/95, involving the jurisdictional extent of the coastal marine area. Later the tapes of evidence were first stated to be "destroyed" and then following an Ombudsman enquiry merely "mislaid." The Minister of Courts was however unable to help in their production. Magna Carta had been argued.

Recent cases from the Environment Court indicate a rethinking of property rights:

1 The concept of "reverse sensitivity"
eg Wairoa Coolstores v Western Bay of Plenty DC A01611998
Millark Properties v Perpetual Trust A30/98

2 Decisions on S85 of the RMA
Steven v Christchurch City Council C38/98
Deegan v Southland District Council Cl 1 0/98

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Section 17 **Effect of repeal generally –**
(1) The repeal of an enactment does not affect –
(b) An existing right, interest . . . title....

Sections 20 and 20A of the previous Acts interpretation Act were in similiar terms. The wording is similiar to Section III of the Bill of Rights Act 1689. The word "right" in Section 17 echoes Magna Carta.[34]

The Law Commission paper on the Acts Interpretation Act 1924[35] comments that "The provisions, contained in Sections 20 and 20A, conform with the common law presumption that new statutes do not have retroactive operation". Magna Carta is the origin of that presumption.

The "Ancient Constitution" of the Common Law facilitated Judicial Freedom of Interpretation toward fundamental moral precept and the duty to compensate

Magna Car-ta and its reaffirmations since 1215 reflect community opinion on fundamental moral and political principle. Those basic principles have been refined by Judges to become established common law precedent. Refined precedent has often reemerged in statutory codifications or reform measures.[36] The process continues today with the New Zealand Bill of Rights Act 1990.[37]

J.G.A. Pocock in *The Ancient Constitution and the Feudal Law*[38] a historiographic study examined the fierce controversy in the 1600's between the common lawyers asserting that the constitution was "immemorial"[39] and the few professional historians addressing history critically.

The common lawyers defended the "Ancient Constitution", despite it being a legal fiction, as a means of allowing the hard letter of Parliamentary statute and the law to be ameliorated by reference to ancient moral precept.

34 Colonial Sugar Refining v Melbourne Harbour Trust Commissioners [1927] AC 343 The Privy Council applied the equivalent provision to S17 Interpretation Act 1999 for the State of Victoria and the principle that a statute should not be held to take away rights of property without compensation and ruled that the clear words of Statute could not remove property rights obtained by limitation.
Followed by the House of Lords in Hartnell v Minister of Housing [1964] AC 1134 holding that uncompensated controls on a caravan site should be cut back due to existing use rights.

35 Law Commission Paper NZLC PP1 "Legislation and its Interpretation The Acts Interpretation Act 1924 and Related Legislation" 23 lines 34-35 and generally 15-31

36 Ch 20 of Magna Carta 1215 is an example:
"A free man shall not be ammerced for a trivial offence,
except in accordance with the degree of the offence; and for a serious offence he shall be ammerced according to its gravity, saving his livelihood.." "Ammerced" is fined or charged costs.

37 David A Strauss in Common Law Constitutional Interpretation Univ of Chicago Law Review Vol 63 No 3 Summer 1996 877-935 describes the same common law process of interpretation for the American Constitution. He first explains at 879 that American constitutional debate divides between "textualism" (literalism) and "originalism" (the founders'intentions). He then states that "common law constitutional interpretation" has two components "traditionalist" (follow precedent always) and "conventionalist" (follow precedent to avoid unproductive controversy). He concludes that the common law approach based on precedent and convention is the reason that the constitutions of England and the United States are similiar.

38 J.G.A. Pocock "The Ancient Constitution and the Feudal Law" led Camb Univ Press 1957 and reissue 1987 with retrospect

39 "Time immemorial" meant to before 1189 the beginning of the reign of Richard I. This is reflected in the law of prescription (adverse occupation) part of the law of New Zealand under the Prescription Act 1832.

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The Roots of Liberty[40] describes the profound influence of Chief Justice Sir John Fortescue (c 13851479) on the Common Law. Fortescue acknowledged that the law of nature was universal, as taught by Aristotle and Thomas Aquinas and argued that the laws and customs of England were very ancient. He explained that all human law is "law of nature, customs, or statutes, which are also called constitutions [constituciones]" Chief Justice Coke was influenced by Aristotle and Thomas Aquinas through Sir John Fortescue. Coke acknowledged that Fortescue's *De Laudibus Legum Angliae* was of such "weight and worthiness" that it should be "written in letters of gold".

John Locke (1632-1704) filled the philosophical void left after the idea of the Ancient Constitution fell into disrepute. All his major works were first published in England in 1689 after the arrival of William of Orange. His concept of the Social Contract clearly influenced the formal tender of the Crown to William and Mary conditional upon the guarantee of all the liberties of the Ancient Constitution. After that the legal fiction of the Ancient Constitution was unnecessary.

Lord Cooke in promoting the concept of *Fundamentals*[41] "some statement of accepted ideals rather more contemporary and comprehensive than Magna Carta or the 1689 Bill of Rights...for a unifying expression of values accepted by the whole community" is working in the time honoured method of the Common Law and the Ancient Constitution.

Economics now influences Judicial decisions.[42] Inevitably John Locke will have a further influence through public choice theory (the application of economic ideas to legislative and judicial decisions). John Locke is a major influence on Professor Richard Epstein of Chicago University, a leading advocate of public choice theory and the important role of the 4th Amendment takings clause in the American Constitution. [43]

40 The Roots of Liberty Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law n 12 above esp Introduction by Sandoz at 10.

41 Fundamentals Sir Robin Cooke NZLJ May 1998 158 at 159 1 col line 45. See also
The Suggested Revolution Against the Crown now Lord Cooke of Thorndon 28-40 in Essays on the Constitution edit PA Joseph Brookers 1995

42 Cooper 484 lines 8-9 refers to the American Business Law Journal discussing the economic and philosophical debate over Lucas v South Carolina Coastal Council.

43 RA Epstein Takings Private Property and the Power of Eminent Domain Harvard Univ Press 1985
Simple Rules for a Complex World Harvard Univ Press 1995

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v THE ENGLISH RULES CASELAW

The English Rules are the substantial body of Judge made caselaw from the House of Lords and Privy Council governing the law of takings and compensation, whenever statutory provision is imprecise or inadequate. Since there are strong constitutional presumptions of interpretation in favour of the citizen the influence of Judges has remained stronger and the body of caselaw more universal than in other areas of the law. The often unspoken influence of Magna Carta and the general political utility of property rights as argued by John Locke are clear factors in the more significant decisions.[44]

This section examines the leading decisions (obliquely mentioning Magna Carta) affirming the constitutional presumption that full compensation must always be paid in the absence of an unequivocal direction from Parliament. The concomitant obligation on the Crown is expressed in a 1993 Crown Law opinion:

> There are many types of rights taken away by the State that give rise to compensation and unless there are good policy reasons for not paying compensation it should be provided for?

A CENTRAL CONTROL BOARD V CANNON BREWERY

The dictum of Lord Atkinson in *Central Control Board (Liquor Traffic) v* Cannon Brewery *Limited* (7979) *HL* [46] is often repeated. The Board had taken under statutory powers the fee simple of licensed premises. The underlinings throughout this paper are added:

> . ..the principle recognised as a canon of construction by many authorities . ..is . ..that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms.

I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to a sum ex gratia, it cannot be so confined.

44 Burmah Oil v Lord Advocate [1965] AC 75 IVD below Viscount Radcliffe 117 C to 118 D quotes John Locke.
45 Crown Law Opinion on Fishing Permits MAF 042/143
46 Central Control Board (Liquor Traffic) v Cannon Brewery [1919] AC 744 Recent examples of the Courts' insistence on "unequivocal intention to take property" can be seen in Mabo v State of Queensland (2) [1992] 107 ALR 192 HCA Brennan J In 42 Toohey J 152 In 35-153 ln4 (refers to Cannon), Te Runanganui o Te Ika Whenua Inc Society v Attorney-General 2 NZLR 20 CA 25 Ins 9-25 Yanner v Eaton www.austlii.edu.au/au/ /cases/cth/highct/1999/53 paras 34,35 106-l 18
Justice Barker stated as obiter in Falkner v Gisborne District [1995] NZLR 622 at 633 line 12 that the Resource Management Act in terms of Cannon Brewery "contains no such unequivocal intention" to remove the right to compensation.

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> The dictum of Lord Atkinson was supported by Lord Parmoor [47]: It is not necessary in a case of this character to base the decision on any presumption in favour of construing an Act of Parliament so as to give compensation where property is compulsorily acquired for public purposes, but the presumption is too well established to be open to doubt or question. The prerogative of the Crown was referred to in argument, but it is contrary to a principle enshrined in our law at least since the date of Magna Cat-ta, to suggest that an executive body, such as the Central Control Board, can claim, under the prerogative, to confiscate, for the benefit of the Crown, the private property of subjects
>
> Lord Wren bury [48]:
> The power to take compulsorily raises by implication a right to payment, and that right is neither conferred by, nor governed by, nor in any way affected by the Proclamation and later [49]:
>
> The true effect of the legislation is that existing rights of compensation are left untouched and that new provision is made for compensation ex gratia.

B ATTORNEY GENERAL V DE KEYSER'S ROYAL HOTEL

A year later the House of Lords in *Attorney General v De Keyser's Royal Hotel* [50] considered a similiar wartime taking of a hotel under the Defence of the Realm Regulations.
The Crown had argued in part that it was entitled to take the Hotel under the War Prerogative.

Lord Dunedin records that the "Master of the Rolls in his judgement" had searched the court records as to whether past practice had been to pay compensation and notes:

> He has divided the time occupied by the search into three periods-the first prior to 1788, then from 1788 to 1798, and the third subsequent to 1798. The first period contained instances of the acquiral of private property for the purposes of defence by private negotiation, in all of which, it being a matter of negotiation, there is reference to the payment to be offered for the land taken. With the second period we begin the series of statutes which authorise the taking of lands, and make provision for the assessment of compensation, the statutes being of a local

47 Cannon Brewery Lord Parmoor 760 lines 23-33
48 Cannon Brewery Lord Wrenbury 763 lines 24-26
49 Cannon Brewery Lord Wrenbury 764 line 11
50 Attorney General v De Keyser's Royal Hotel Limited [1920] AC 508

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> and not a general character, dealing with the particular lands proposed to be taken. The third period begins with the introduction of general statutes not directed to the acquisition of particular lands, and again making provision for the assessment and payment of compensation?'

There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. [52]

> Similarly Lord Atkinson stated I desire to express my complete concurrence in the conclusion at which the late Master of the Rolls arrived as to the nature of the searches made by the Crown it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative. [53]

None of the Judgements mentioned *Cannon Brewery* but all emphasised "the well established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment".
(Lord Parmoor).[54]

> Similarly Lord Atkinson:
> The recognised rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a citizen without compensation. Bowen LJ in *London and North Western Ry. Co v Evans [1893] 1 Ch 16,28* said "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is compulsorily taken from him. Parliament in its omnipotence can, of course override this ordinary principle....but, it is not likely that it will be found disregarding it, without plain expressions of such a purpose."[55]

51 De Keyser Lord Dunedin 524 lines 20-34
52 De Keyser Lord Dunedin 525 lines l-3
53 De Keyser Lord Atkinson 538 lines 31-33
Similiarly
Lord Moulton 552 line 30 to 553 line 2
Lord Sumner 562 line 33 and all 563
Lord Parmoor 573 line 25-29
54 De Keyser Lord Parmoor 576 line 15-19
55 De Keyser Lord Atkinson 542 lines 19-32
Similiarly
Lord Dunedin 529 line 35
Lord Sumner 559 line 22-29

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The House of Lords in *Bank Voor Handel En Scheepvaart v Adrninisfrafor of Hungarian Property [1954]* [56] extended to enemy aliens the duty to compensate for all takings under the war prerogative and expressed its understanding of De *Keyser:* From that decision it appears clear that:

> there was never a prerogative to confiscate the property of a subject in time of war . ..Further, if the royal prerogative in the days of it's full vigour did not extend to confiscation of a subject's property in time of war, I am not prepared to assume that the legislature intended to confer a statutory power to confiscate a subject's property in 1939. Such a power would have to be very clearly shown by the language of the statute and never to be presumed.

C BURMAH OIL V LORD ADVOCATE[57]

The Crown duty to compensate when taking under the war prerogative was again considered by the House of Lords in 1964 in *Burrnah Oil v Lord Advocate.* This was an extreme case. Oil wells, buildings, plant and machinery in Burma were destroyed in 1942 to deny them to the invading Japanese. Assets in Rangoon were destroyed the day before the Japanese arrived. All five Judges approved De *Keyser* and agreed that the Crown was under a general duty to compensate. All of the Judges agreed that there was an exception for battlefield damage[58] and two of the Judges, Lords Radcliffe and Hodson considered that in the circumstances the battlefield exception precluded compensation for the destruction of Burmah Oil's assets in the face of an advancing enemy.

Despite the exigencies of war the cases reveal a clear obligation to compensate in the absence of statutory provision and a willingness to interpret statute to ensure compensation[59]

The preroga tive

Dicta in *Burmah Oil* on the nature of the prerogative assist in understanding Crown takings (of land, property or other rights), when there is no "statutory provision". They evidence the strong constitutional obligation to pay compensation. Lord Reid defined the prerogative as "really a relic of a past age, not lost by disuse, but only available for a case not covered by statute." [60]

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56 Bank Voor Handel En Scheepvaart v Administrators of Hungarian Property [1954] 584 at 637,638 (638 line 11 ,12 and 21-26)

57 Burmah Oil v Lord Advocate [1965] AC 75 HL ECS Wade and AW Bradley Constitutional Law 10 ed 1985 remarks that Burmah Oil "established that where private property was taken under the prerogative, the owner was entitled at common law to compensation from the Crown; but the [UK] War Damage Act 1965 retrospectively provided that no person shall be entitled at common law to receive compensation in respect of damage to or destruction of property caused by lawful acts of the Crown during war". Burmah Oil remains good authority that at common law the Crown is obliged to fully compensate for all takings.

58 Burmah Oil exception for battlefield damage following Vattel Lord Ratcliffe 130
Lord Hodson 142 A
Lord Pearce 162 F

59 De Keyser and Burmah Oil were followed in Nissan v Attorney General [1968] 286 1 QB 286 Eng CA

60 Burmah Oil per Lord Reid 101 C at lines 17-19

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Lord Radcliffe repeated an extract from John Locke's "True End of Civil Government"" and commented that

> The essence of a prerogative power, if one follows out Locke's thought, is not merely to administer existing law- but to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.[62]

Lord Pearce made the point that the King was always subject to the rule of law and so unable to take anything except by their ordinary consent or common consent in Parliament and even then subject to the duty to compensate:

> Bracton's theory that the Crown was subject to the rule of law has, after some vicissitudes in Stuart times, prevailed . ..And even in Stuart times, Crooke J in his dissenting judgement in Hampden's case in 1637, after referring to Magna Carta said: "Fortescue Chief justice[63] setteth down what the law of England is in that kind . . . He cannot take anything from them, without their ordinary consent; their common consent it is in Parliament . ..Show me any book of law against this, that the king shall take no man's goods, but he shall pay for it, though it be for his own provision;[64]

An interesting question arises as to whether a Plaintiff should draft his pleadings on the basis of seeking full compensation in terms of the common law and the Crown Prerogative as a way of avoiding the increasingly restrictive payouts available under modern clauses of statutory provision for compensation. Would Judges in terms of the canon of liberal construction prescribed in Cannon Brewery and the other authorities be inclined to then read down the modern statutory provision to permit common law compensation or find that the plaintiff had more than one avenue for compensatory redress? [65] In that case their action would be founded directly on Magna Carta.[66]

Recent New Zealand decisions (not on property takings) argued on Magna Carta such as *Shaw* v Commissioner of *Inland* Revenue [67] and The Queen v *Richard John Cresser* [68] 24 have shown the Courts reluctant to have Magna Carta

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61 Burmah Oil Lord Radcliffe 117D-118B

62 Burmah Oil Viscount Radcliffe 118 B,C lines 1 l-l 6

63 Sir John Fortescue (c1385-1479) discussed above at IIIC3 17

64 Burmah Oil Lord Pearce 147 line 37 to 148 line 18

65 See further discussion on the prerogative in Wade and Bradley n 56 extracted in Chen and Palmer at 260 and on the Royal Prerogative Halsbury's Laws of England Vol 8 (2) paras 367-381

66 Consider Canada Sisters of Charity of Rockingham v The King [1922] AC JC 315 at 322 lines 7-8 "Compensation claims are statutory and depend on statutory provisions". The words are dicta. Presumably statutory provision in Sisters of Charity was sufficiently comprehensive to have abridged the common law right to compensation.

Consider Australia Newcrest Mining (WA) Ltd v The Commonwealth of Australia 147 ALR 42 (HCA) discussed by K Ryan "Compensation for Removal of Property Rights in Australia" (December 1997) 5 Resource Management News 17. In Newcrest Kirby J 149 line l-5 discounted the clear words of the Australian Constitution and stated that "Historically, its roots may be traced as far as Magna Cat-ta 1215, Art 52..."

Consider USA RA Epstein Takings (n41) 42 line 27 "The rights of action...should be considered not as a matter of legislative grace, but as constitutionally mandated under the takings clause. The conclusion may appear radical, but it is supported not only in principle but also by a diverse range of authority...Armstrong v United States 364 US 40 (1960)".

67 Shaw v Commissioner of Inland Revenue CA 218/97 Richardson P Henry J Blanchard J

68 The Queen v Richard John Cresser CA 39/98 per Blanchard J

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argued on a regular basis, but careful to ensure that it is respected and not forgotten.

D BELFAST CORPORATION V O.D. CARS HL: REGULATORY TAKINGS[69]

The Respondents owned land on which for many years they had operated a service garage. Their application to erect shops on the street frontage and factories in the rear was declined by Belfast Corporation on the basis that it did not comply with the zoning of the site as shops limited to a height of 25ft in the front and residential use in the rear.

They claimed compensation under the Government of Ireland Act 1920 which stated that the Parliament of Northern Ireland could not make laws which would "take property without compensation". The House of Lords decided against the Respondents on the narrow ground of statutory interpretation that planning rights to build could not be described as "property" in terms of the Government of Ireland Act 1920.

The importance of the case lies in the dicta (unnecessary to the issue in hand) supporting the *Cannon Brewery* [70] line of authority and emphasising that in an appropriate case a regulatory taking would be treated as a confiscatory taking obliging the authority to compensate. A regulatory taking of property destroys or limits the use rights as distinct from the occupancy rights.

> Lord Radcliffe: [71]
> A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in it's place. Acquisition of title or possession was "taking". Aspects of this principle are found in the rules of statutory interpretation devised by the courts which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or importing an intention to give compensation and machinery for assessing it into any Act of Parliament that did not purposively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual libertv. It would be a mistake to look on it as representing any conflict between

69 Belfast Corporation v O.D. Cars [1960] AC 490 HL(NI)
70 Belfast Corporation v OD Cars Viscount Simonds 517 line 39 to 518 line 3
71 Lord Radcliffe 523 lines 7 to 33

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> the legislature and the courts. The principle was...common to both.

The words last underlined reflect the belief that the requirement for compensation is a constitutional convention binding on both the Courts and the Legislature. The words "machinery for assessing it" suggests that the role of the Court is to make up for Parliament's omission in not providing statutory compensation. The concept of convention is a major feature of *Cooper v Attorney General* (discussed at IVE)

Lord Radcliffe continues:

> Side by side with this, however...came the great movement for the regulation of life in cities and towns in the interests of public health andamenity.. ."police powers".[72] . ..interference with rights of development and user...was not [generally] treated as a "taking" of property.[73]

Lord Radcliffe hints at a possible distinction between "police" functions and amenity values:

> When town planning came in eo nomine in 1909 the emphasis had shifted from considerations of public health to the wider and more debatable ground of public amenity.[74]
>
> I do not imply by what I have said that I regard it as out of the question that on a particular occasion there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a "taking" of the land affected for the benefit of the public.[75]

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72 Lord Radcliffe 523 26-33. Mr Paul Cassin in "Compensation: An Examination of the Law" Working Paper 14 prepared for the Ministry for the Environment November 1988 cites this later passage at 21, but surprisingly does not put it in context, by reporting the earlier passage. The report extending to 106 pages is defective in that it confines itself to statutory provisions and does not discuss the common law presumption of compensation or the economic and utilitarian arguments for compensation. The report leaves the misleading impression that in terms of OD Cars there would never at Common Law be compensation for a regulatory taking.

73 Lord Radcliffe 524 line 36

74 Lord Radcliffe 524 lines 26-33

75 Lord Radcliffe 525 lines 27-31

Viscount Simmonds

Lord Radcliffe's last remark as to regulatory taking so extreme as to warrant compensation is echoed in the judgement of Viscount Simmonds.

> .... the distinction that may exist between measures that are confiscatory, and that a measure which is ex facie regulatory may in substance be confiscatory . . .[76]

Earlier he had quoted and approved the dictum of Holmes J of the United States Supreme *Court* in *Pennsylvania Coal Co v Mahon* [77] that "The general rule . ..is. that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking."

Compensation for regulatory ta kings

Regulatory takings under the Fifth Amendment of the United States Constitution have generated a huge and expanding jurisprudence in the United States.

> No person shall be . ..deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[78]

The Commonwealth approach has been more restrained. Compensation for regulatory taking has been awarded throughout the Commonwealth.

In *Manitoba Fisheries v The Queen* [79] the Supreme Court of Canada ordered compensation to a fish company which had been forced to close by the creation of a statutory monopoly fish export business. The Court considered that the goodwill of the business was property, which could be compensated.

Turners & Growers Exports v *CJ Moyle*[80] was factually similiar. The 4 exporters were to lose their licences to export kiwifruit on formation of the New Zealand Kiwifruit Marketing Board in 1989. The 1953 Primary Products Marketing Act barred claims. The new regulations made no provision for compensation. M'Geghan J introduced "machinery" for compensation by finding that "as a matter of procedural fairness before the Minister recommended Regulations to the Governor General in Council opportunity should have been given to the exporters to make representations as to compensation."[81]

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76 Lord Radcliffe 520 lines 2-5

77 Pensylvania Coal Co v Mahon (1922) 260 US 393,417
quoted by Viscount Simmonds at 51 lines 19-22

78 See discussion in Should the RMA Include a Takings Regime? Kathleen Ryan NZJEL Vol 2 1998 63 69-73
Lucas v So Carolina Coastal Council(l992) 505 US 1003, 112 S Ct 2886 and discussion in the American Business Law Journal 1995 Vol 33 153 Lucas v South Carolina Coastal Council, discussing the influence of Richard Epstein's Takings: Private Property and the Power of Eminent Domain (1985) Harvard Univ Press. Cooper n99 484 referred to Lucas and the American Business Law article.
See generally Laurence H Tribe Chapter 9 587-628 American Constitutional Law 2 ed 1988 Foundation Press
George Skouras Takings Law and the Supreme Court 1998 Amazon
Robert Meltz The Takings Issue 1999 Amazon.

79 Manitoba Fisheries Limited v The Queen [1979] 1 SCR 101

80 Turners & Growers Exports Limited v CJ Moyle CP 720/88 M'Geghan J

81 Turners & Growers Exports Limited v CJ Moyle CP 720/88 at 67 lines 14-18

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M'Geghan J (conscious that his decision would conflict with the clear will of Parliament) stated that "relief in review proceedings is discretionary" giving him a choice between (i) making orders (ii) refusal of relief or (iii) adjournment pending legislative solution as in *Fitzgerald v Muldoon*. He decided that "the Minister should [now] receive representations from the applicants on compensation matters, giving such representations a fair hearing". [82] After the judgement Sir Wallace Rowling was appointed by the Labour Government to negotiate compensation, which was duly paid.[83]

In *Newcrest Mining (WA) Ltd v The Commonwealth of Australia*[84] regulatory taking of Newcrest's mining leases occurred through the combined effect of the National Parks...Act 1987 (Commonwealth) outlawing the recovery of minerals in Kakadu National Park and expressly providing that no compensation was to be paid and proclamations extending the Park's area to include the mining leases. A majority of the High Court of Australia found that under the Australian constitution there was an obligation to compensate for takings despite the clear letter of statute (the National...Parks Act). The minority felt they were bound by the precedent of *Teori Tau v Commonwealth* [85] *a previous decision of the High Court denying "just compensation" under the constitution for Federal Government taking of minerals in Papua New Guinea.*

The judgement of Kirby J is notable for it's reference to Magna Carta 7275 [86] *and the statement that "Where the Constitution is ambiguous, this court should adopt that meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights".*[87] *He then refers to Australia's obligations to compensate under Article 77 of the Universal Declaration and traverses international law.*[88]

The Queen v Tener [1985] SC *Can*[89] is factually similiar to *Newcrest.* The Crown refused to renew a park use permit preventing the Appellant from exploring or using their mineral claims. The Supreme Court of Canada ruled that compensation under the Park Act should be paid for the regulatory taking. It expressly followed De *Keyser.*[90]

La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius [91] involved Government amendment to the long-term sharecropping contracts for sugarcane on the Island of Mauritius. The same issues arose as with the statutory lessees under the New Zealand Maori Reserved Land Act, except that it was the Landlords who objected.

The Privy Council found against the Landlords on the facts and approved the dictum of Holmes J in *Pennsylvania Coal Co v Mahon* [92] *that "if regulation goes too*

82 Turners & Growers Exports Limited 72 lines 25-27
83 MAF 0421143 para 24 6 lines 27-30
84 Newcrest Mining (WA) Ltd v The Commonwealth of Australia (1997) 147 ALR 42 (HCA) 42
85 Teori Tau v Commonwealth (1969) 119 CLR 564
86 Newcrest Kirby J 149 lines l-2
87 Newcrest 147 lines 21-25
88 Newcrest 148 lines 25-27 and generally 147 line 21-32
89 The Queen v Tener [l 985] 1 SCR 533 17DLR (4th) 1
90 Attorney-General v De Keyser's Royal Hotel [1920] AC 508
91 La Compagnie Sucriere de Bel Ombre Ltee and Others v Government of Mauritius [1995] 3 LRC 494 per Lord Woolf
92 Pennsylvania Coal Co v Mahon (1922) US 393 at 415-416

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far it will be recognised as a taking" [93] *and stated following Sporrong v Sweden* [94] a European Court case that:

> on an issue of this nature...[it]...will extend to the national court a substantial margin of appreciation. Similarly...[it would respect] the national legislature's judgement as to what is in the public interest when implementing social and economic policies unless that judgement is manifestly without foundation.. . [95]
>
> and added that there may be substantial deprivation of property.. .if because of the lack of any provision for compensation, they do not achieve a fair balance between the interests of the community and the rights of individuals.. [96]
>
> and approved the statement of the Mauritius Supreme Court that . ..although there may not be deprivation as such, nevertheless the restrictions and controls are such as to be disproportionate to the aims which may be legitimately achieved.. .as to leave the property a valueless shell.. . .a "constructive deprivation" [97]

. Despite the provisions of Section 85(1) of the Resource Management Act that "(l) An interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act," Justice Barker in *Falkner v Gisborne District Council* [98] stated

> It was . . . submitted for the residents that an intention to take away property without giving a legal right to compensation is not to be imputed to the legislature unless that intention is expressed in clear and unambiguous terms . ..*Cannon Brewery..* .The Act contains no such unequivocal intention (Underlining added)

Compensation may be available under the Resource Management Act. It is significant that neither Magna Carta or *Simpson v Attorney Genera/ [Baigent's case]* **(later discussed VIE** 39) were argued in *Falkner.* Despite the decision in *Falkner*, none of the offending sea protection works have been removed by the Council since the case. In June 1999 the Gisborne Council at it's own expense did some maintenance on the works at the south end of the beach. [99] That suggests that the Gisborne Council recognises that compensation may be payable.

93 Compagnie Sucriere de Bel Ombre 502 h-i
94 Sporrong v Sweden [1982] EHRR 35 at 50
95 Compagnie Sucriere de Bel Ombre 503 d-e
96 Compagnie Sucriere de Bel Ombre 504 i-505 a
97 *Compagnie Sucriere de Bel Ombre* 505i-506a
98 *Falkner* v Gisborne DC [1995] NZRMA 462,478 lines 22-26
99 *Anecdotal from one of the residents funding the case.*

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E COOPER V ATTORNEY GENERAL [1996] [100]

In *Cooper* Justice Baragwanath faced an extreme claim by representative fishermen asking the court to overrule an unequivocal direction from Parliament that they should receive no extra quota. Parliament had reversed the benefit for them of an earlier Court of Appeal decision in *Jenssen v Director-Genera/ of Fisheries* [101] by passing Section 28ZGA of the Fisheries Act imposing a condition precedent that the fishers must already be a holder of the relevant fishing permit. The decision record's extracts from Hansard that the fisheries could not be sustained if quota were issued for the additional "30,000 tonnes of quota . ..with a current market value of $85 million".[102] The fishermen had argued on the authority of Cooke J by way of dicta in four cases that Parliament could not remove their deep common law rights, principally of access to the courts (the "Rule in *Chester v Ba teson").* [103]

1 The conventions

Justice Baragwanath addresses the issue immediately:

> The settled rule of law that the Courts will give effect to an Act of Parliament according to its terms provides the answer to these cases. They also illustrate why both Parliament and the Courts observe, and must clearly be seen to observe, the conventions whose acceptance in New Zealand has substantially avoided the constitutional friction that is a feature of the arrangements of other societies.[104]

Justice Baragwanath's deliberate use of the word "conventions" with constitutional overtones is significant. It suggests in context that the presumption that full compensation should be paid for every taking unless Parliament uses unequivocal language is a part of the constitution. The approach to constitutional convention adopted by Justice Baragwanath in *Cooper* was approved by the Court of Appeal in *Shaw v* Shaw. [105] The word "convention" is defined in the Concise Oxford Dictionary as "general agreement" and "customary practice".[106] The word implies Magna Cat-ta 31 and respect for established customs and rights.[107]

It remains to be seen how hard the New Zealand Judiciary will fight to defend the Conventions. What other relevant principles can be drawn from the case?

[100] Cooper v *Attorney* General [l 996] 3 NZLR 480
[101] Jenssen v *Attorney General* CA 313/91 16 September 1992 Wellington
[102] *Cooper* 491 line 32
[103] *Chester v Bateson (1920) 1* KB 829
104 Cooper v Attorney General 483 lines 7-9 See also 485
105 Shaw v Shaw unrep CA 218/97 Richardson P Henry J. Blanchard J at paras 14 and 17
106 Concise Oxford Dictionary 292 9 ed 1995 Clarendon Press Oxford.
107 G Marshall Constitutional Conventions 1984 Oxford Univ Press 9 line line 14 ". ..the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyranical way."
Consider Cooke P in Prebble v TVNZ [1993] 3NZLR 513 at 517 lines 35-40 "...the conventions applying to the relationship between the Courts and Parliament. The legislative, executive and judicial arms of the state do not intrude into the spheres of one another except when that is essential to the proper performance of a constitutional role. There is a principle of mutual restraint."

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2 The Court's power of interpretation

The usual New Zealand and English approach to constitutional issues is to confine the Court's role to interpretation of statute and avoid direct conflict with unequivocal direction from Parliament. That approach has been continued in Sections 5 and 6 of the New Zealand Bill of Rights Act 1990 directing that interpretation consistent with the Bill of Rights is to be preferred. Justice Baragwanath:

> There is no basis under the guise of construction to avoid the obvious intent of the measure . ..The sole issue, in every realistically conceivable case, is not of Parliament's jurisdiction but of construction." [108]

But note however the phrase "realistically conceivable case".

3 Intervention in extreme cases

After considering the dicta of Cooke J in *Tay/or v New Zealand Poultry Board* [109] *and extra-judicial writings in "Fundamentals" Justice Baragwanath stated (the underlining is added):*

> Cooke J [delivering the majority judgement] does not however suggest that property rights conferred on a citizen bv statute mav not be taken awav by another statute; nor in my view is such a proposition arguable.
> Nor, properly construed, does the amendment:
> "...take away the rights of citizens to resort to the ordinary Courts of law for determination of their rights" in the sense Cooke J had in mind because despite the language in which the amendment is expressed the dominant purpose is to
> extinguish the rights: not just bar a remedy I am accordingly relieved from venturing into what happily remains in New Zealand an extra-judicial debate, as to whether in any circumstances the judiciary could or should impose limits on the exercise of Parliament's legislative authority to remove more fundamental rights."'
>
> Again
> Whether in New Zealand a bill of attainder would fall into Cooke J proscribed category is fortunately unlikely to be tested; it is inconceivable that our Parliament would infringe the rule of law so as to destroy any right that is truly fundamental."'

Certain property rights not conferred by statute, such as land rights, may not be removable on the statutory whim of Parliament or perhaps only on payment of

108 Cooper 496 lines 1 O-l 8
109 Taylor v New Zealand Poultry Board [1984] 1 NZLR 394
110 Cooper 484 lines 36-50
111 Cooper 498 lines 17-l 9

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full compensation. The first phrase underlined above implies this. Since Justice Baragwanath (also President of the Law Commission) is aware of the debate over Magna Catfa and the Bill of Rights 1689, it is probable that he is aware that the Sovereignty of Parliament conceded by the Bill of Rights 7689 is conditional upon the fundamental liberties and rights affirmed in the preambles and in the omitted third section.

This conclusion is reinforced by the reference to a bill of attainder in the next quotation. [112] *Historically a bill of attainder was the forfeiture of land and civil rights as a result of a sentence of death for treason or felony. Arbitrary confiscation of land without full compensation would obviously fall into the Cooke J proscribed category.*

Use of the phrase "conferred on a citizen by statute" suggests a possible distinction between property rights of recent possession and those possessed for a long time. It is also consistent with a distinction between fundamental rights guaranteed by section III of the Bill of Rights 7689 and rights of recent creation.

4 Sustainability of the fishery

Sustainability of the fishery and the impact upon the property rights of existing quota holders are an important public policy factor. In searching for the intention of the Legislature Baragwanath J was influenced by sustainability and protection of the rights of existing property (quota) holders) He quotes with approval the remark of the Labour party Spokesman on Fisheries[113] repeated by the Attorney General[114] . . . . ..an unrestricted right to challenge past decisions almost inevitably will result in an allocation of additional quota and permits to an extent that will adversely impact on not only the fishery itself but also on existing quota and permit holders.

The remarks on sustainability are important since both the Fisheries Act 1996 and the Resource Management Act 1991 declare sustainable management as their purposes. [115]
Sustainability may be argued in the future as a policy ground to deny compensation.

Property rights protected by the Magna Carta guarantees of prompt due process [116] and compensation however best ensure environmental commitment. A

112 Cooper 498 lines 17-19
Attainder is generally discussed at 497 line 1 to 498 line 20
113 Cooper Mr G Kelly 492 lines 46-49
114 Cooper 495 lines 46-49
115 Fisheries Act 1998 Section (1)
"The purpose of this Act is to promote the utilisation of fisheries resources while ensuring sustainability"
Section 5 (1) Resource Management Act 1991
"The purpose of this Act is to promote the sustainable management of natural and physical resources"
116 First Schedule Imperial Laws Application Act 1988
250 Edw III AD 1351
280 Edw III AD 1354
420 Edw III AD 1368

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common misconception is that Magna Carta property rights are absolute and thus out of touch with the needs of modern society. However Magna Carta rights are all subject to law and through the law the needs of neighbours represented by the State. They are not libertarian. A modern view of Common Law Magna Carta rights was eloquently expressed in *Ex Walsh and Johnson* [117] by Isaacs J in the High Court of Australia:

> . ..certain fundamental principles which form the base of the social structure of every British community....Magna Car-ta. Chap 29 . . .recognises three basic principles, namely:
> (1) . ..every free man has an inherent right to his life, liberty, property and citizenship
> (2) his individual rights must always yield to the necessities of the general welfare at the will of the State
> (3) the law of the land is the only mode by which the State can so declare its will . ..The first corollary . . .an initial presumption in favour of liberty The second corollary is that the Courts themselves see that this obligation is strictly . ..fulfilled before they hold that liberty is lawfully restrained.

5 The Rule in Chester v Bateson

The rule in *Chester v Bateson* [118] is a convention that Parliament is presumed never to intend in statute that citizens should not have their rights determined in Court. It can be traced back to Magna Cat-ta and the Bill of Rights 1689. [119] It is significant that Baragwanath J treated the right to resort to the courts as more fundamental than property rights.

He emphasised that the true intent of the Statute was not to "...take away the rights of citizens to resort to the ordinary Courts of law for determination of their rights", but to remove quota rights.[120]

Early in his judgement [121] he approved *New Zealand Drivers' Association v Road Carriers* [122] where the full Court of Appeal had stated:

> . ..we wish to underline the importance of the rule in Chester v Bateson. Indeed we have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights.

Magna Car-ta had been argued in *Chester v Bateson* the rule is worth remembering in view of an increasing government preference for arbitration as a

117 Ex parte Walsh and Johnson In Re Yates [1925] CLR 79 lines 5-34 HCA per Isaacs J.
118 Chester v Bateson 1 KB [1920] 829
119 Bill of Rights 1688 Ecclesiastical courts illegal- That the commission for erecting the late court of commissioners for ecclesiastical causes and all other commissions and courts of like nature are illegal and pernicious.
120 Cooper 495 lines 15,16 and lines 37-39
121 Cooper 484 lines 23-265
122 New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374 CA at 398

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means to settle compensation disputes. S162A of the Biosecurity Act is an example. Arbitration avoids publicity and precedent unfavourable to the Crown, but impoverishes the caselaw.

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VI THE NEW ZEALAND BILL OF RIGHTS ACT 1990

The Bill of Rights Act 1990 contains no express guarantee of property rights. This is curious in view of the fact that most individual liberties historically developed from property rights.[123] The probable reason lies in political concerns over inclusion of the Treaty of Waitangi and earlier proposals that the Bill should give the Judiciary the power to strike down legislation as unconstitutional.[124] An equally valid explanation could be that the rights are so deeply engrained in the common law that it would be both difficult and unwise to attempt to codify them.

Can protection of property be implied from the Bill of Rights 1990 as passed by Parliament?

A SECTION 28 OTHER RIGHTS AND FREEDOMS NOT AFFECTED

Section 28 of the Bill of Rights 1990

> Other rights and freedoms not affected- An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

This section preserves the Rights and Liberties of the Subject guaranteed by the Bill of Rights 1689 and the Magna Cat-ta legislation and preserved in the Common Law. At the very least they are available as aids in interpretation. They will influence how “reasonable” in Section 21 of the New Zealand Bill of Rights 1990 should be interpreted.[125]

B INTERNATIONAL COVENANTS TO WHICH NEW ZEALAND IS A STATE SIGNATORY

Article 12 Universal Declaration of Human Rights 1947

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation....

Article 17 Universal Declaration of Human Rights 1947

> 1 Everyone has the right to own property alone as well as in association with others.
> 2 No one shall be arbitrarily deprived of his property.

123 F. Maitland “The Constitutional History of England” Cambridge Univ Press 1 ed at 23.

124 Lord Cooke of Thorndon in the preface to Property and the Constitution ed Janet M'Clean first page line 27 states it was “because of a fear of generating disputes.”

125 Chapter 6 The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation 108-147 in Property and the Constitution ed Janet M'Lean Hart Publishing 1999 investigates whether property should be protected in formal constitutions. 117-129 Andre der Walt relates the determination of the Supreme Court of India to interprete the Indian Constitution to require the payment of full compensation defying unambiguous constitutional amendments from Parliament.

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Significantly Section 21 of the New Zealand Bill of Rights has added "property" to the wording of Article 12. It is reasonable to assume that Parliament intended to protect all (Art 12 and Art 17) property interests in the one provision." Unreasonable" has been substituted for "arbitrary".

C SECTION 21 OF THE BILL OF RIGHTS 1990

Section 21 [126] of the New Zealand Bill of Rights 1990:

> **Unreasonable search and seizure -** Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

It is clear from the Parliamentary White Paper and the Interim Report of the Justice and Law Reform Select Committee that the intention of the Committee was to protect the privacy of the individual and to reaffirm a deeply established body of English and American caselaw against unreasonable Government search stemming from the "great" case of *Entick* v *Carrington (1765)*.[127]

Section 21 should not be narrowly restricted to privacy or law enforcement "search and seizure" in the *Entick* v *Carrington* sense, since those values will ultimately be undermined if property does not receive constitutional protection. Those values are an aspect of the general constitutional convention of property protection. This paper examines *Entick* v *Carrington* and *Attorney General v* Simpson *[Baigent's case]* to show that the broad interpretation of Section 21 to protect property generally is unavoidable and desirable.

The issue will arise sooner rather than later since the Crown's liability in tort is well hedged with statutory immunities, while the new "independent cause of action against the Crown" (M'Kay J in Attorney General v Simpson [128]) is clear of procedural immunity. For this reason Section 21 was argued by Sir Geoffrey Palmer in 1997 on behalf of the statutory lessees [129] and is a feature of the High Court proceedings filed by the Schedule 4 fishers scaled back to 80% of quota.[130]

126 None of the articles on Section 21 of the Bill of Rights Act consider "reasonableness" in terms of the established common law and conventions.
The Scope of s 21 of the New Zealand Bill of Rights Act 1990: Does it provide a general guarantee of property rights? NZLJ Feb 1996 58. Andrew Butler presents the arguments on both sides. As an argument favouring a broad scope for Section 21 he points to the need for the Bill of Rights to receive the broad interpretation mandated by the Court of Appeal. Crown Colony of Hong Kong [1991] 1 NZLR 429 (CA) and Noort v MOT;*Curran* v Police [1990-92] 1 NZBORR 97, 139, 141 (Cooke P). As arguments against he traverses the modern contextual background of the provision. He personally concludes that "the Courts should favour a narrow scope for the provision", but gives no reasons for this opinion.
See also Search and Seizure: An update on s21 of the Bill of Rights Scott Optican [1996] NZLR 215
127 A Bill of Rights for New Zealand A White Paper
1985 103-l 07 uses the phrase "great 18th century case of Entick v Carrington" at para 10.145
128 Simpson v Attorney General [1994] 3 NZLR 667. The majority confirmed that the new public law remedy against the Crown was not fettered by statutory immunity. See n 143.
129 Sir Geoffrey Palmer Submissions on the Maori Reserved Land Amendment Act 1997 paras 201-204 at 63-65
130 Sanford v Attorney General CP /99 Para 40.3 annexed to Submission 6 8 99 of Mr Tim Castle Barrister to the Primary Production Select Committee. Discussed later at VIIIB 44.

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D ENTICK V CARRINGTON[131]

Lord Camden stated the principle:

> If it is law, it will be found in our books. If it is not to be found there, it is not law. The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes...wherein every man by common consent gives up that right, for the sake of justice and the general good.[132]

Lord Camden is expressing the general principle of property guaranteed by the Magna Carta and the Bill of Rights 1689 in terms that echo John Locke and Blackstone. Property can only be taken “for the general good” “by positive law” and “by common consent".[133]

Cannon Brewery, De *Keyser, Burmah* Oil and Cooper
Perpetuate the established tradition of the common law in searching for the unequivocal language of the positive law, before accepting there must be an uncompensated taking.

Lord Camden continues:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.[134]

The law of tort lies at the heart of the law of takings on the basis of the maxim *ubi* jus *ibi remedium*, meaning where there is a right, there must also be a remedy.

Again Lord Camden continues:

> If he admits the fact, he is bound to shew by way of justification that some positive law empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgement.[135]

131 Entick v Carrington 19 St Tr (1765) 1030
132 Entick v Carrington 1067 lines 3-l 7
133 Entick v Carrington “Common consent” refers to Parliament and echoes John Locke’s thinking that an elected Parliament was the contractual means by which the citizen could express his will.
134 Entick v Carrington 1067 lines 17-25
135 Entick v Carrington 1067 lines 25-35

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This is the traditional common law evidential presumption in favour of the subject, reflected in *Cannon* Brewery and the later authorities. It follows from the Magna Carta conviction that inherent in every (wo)man are (her)his person, liberty, property and customs.

Entick v *Carrington* ruled that compensation of L300 should be paid for the temporary entry on private property for just four hours and the removal of private papers. There is no logical basis for the view that the permanent occupation and confiscation of private land would not warrant payment of similiar or greater compensation.

> Lord Camden founds his decision on Magna Carta:
> . ..I could have wished that upon this occasion the revolution had not been considered as the only basis of our liberty. The Revolution restored this constitution to it's first principles. It did no more. It did not enlarge the liberty of the subject; but gave it a better security.[136]
> [It is part of] the ancient immemorable law of the land [137]

These phrases resonate the ideas of the Ancient Constitution earlier discussed in Section **IV B**

E -ATTORNEY GENERAL V SIMPSON [BAIGENT'S CASE] [1994] CA

Each stage in the reasoning of the Court of Appeal in *Attorney-General v Simpson*[138] in developing a new public law remedy in damages for breach of the Bill of Rights equally apply to the argument that Section 21 should be acknowledged to protect all property rights. Within the framework of Bill of Rights jurisprudence the classic *Cannon Brewery* presumptions of construction would be available to expand the horizons of what was "unreasonable". Uncompensated confiscation or any taking lacking the Magna Carta protections of prompt due process [139] would be "unreasonable".

In 1991 a party of police officers made a warranted search of Mrs Baigent's home looking for drugs. The police had obtained wrong information from the local Energy Board the Second Defendant. It was alleged that when PC Drummond was informed that the address was wrong and the search illegal he had responded "We often get it wrong, but while we are here we will have a look around anyway".

Allegations in tort of negligence in procuring the search warrant, trespass by entering and remaining without lawful justification and abuse of process/misfeasance in office were resisted by claims of Crown statutory immunity.

136 Entick v Carrington 1067 bottom -1068 line 7
137 Entick v Carrington 1068 line 37
138 Attorney General v Simpson [Baigent's case] [1994] 3 NZLR 667; (1994) 1 HRNZ 42 CA.
139 280 Edw 111 1354 250 Edw. Stat.5 c 4-10 1351
Anno 420 Edward, 111. A.D. 1368

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The Court of Appeal found that there was a new cause of action not in tort, but in public law against the State and that the statutory immunity provided in Section 6(5) of the Crown Proceedings Act and elsewhere did not apply. The Court found that monetary compensation was the appropriate remedy for an innocent person ("somewhat less than $70,000" was indicated by Cooke P). Gault J dissented and argued that the remedy should be in tort rather than creating a new public law remedy. To this end he stated that leave should be granted to recast the allegations in tort to be outside the immunities.

The decision of Cooke P contains elements common to all the majority judgements:

1 In previous Bill of Rights cases I have tried to emphasise the importance of a straightforward and generous approach to the provisions of the Act....MOT v Noort; Police v Curran.[140]

2 By it's Long Title the Act is:"(a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand" [and (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights][141]

3 [Article 2 of the International Covenant on Civil and Political Rights 1966 provides that Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity
(b) . . .to develop the possibilities of judicial remedy.
(c) . ..to ensure that the competent authorities shall enforce such remedies when granted].[142]

4 . ..international authority...that the redress of breaches of affirmed human rights is a field of it's own. Compensation awarded against the State for such breaches by State servants, agents or instrumentalities is a public law remedy and not a vicarious liability for tort. Thus in Maharaj v A-G of Trinidad and Tobago [1979] JC . ..cases to similiar effect . ..in judgment of Hardie Boys J.143

Attorney General v Simpson [Baigent's case]
140 1 Cooke P 676 In 1-5 Casey J 690 In 35-47 Compare Hardie Boys J 703 1-25 "a rights centred approach"
141 2 Cooke P 676 In 34 Casey J 692 In 11-14
Hardie Boys 699 In 15-22 M'Kay J 717 In 46-55
142 3 Cooke P 676 In 34 Casey J 690 In 56 - 691 In 10
Hardie Boys J 699 In 28-37
M'Kay J 718 In 4-12
143 4 Cooke P 677 In 26-35 Casey J 692 In I-37
Hardie Boys J 699 In 37 and following
At 699 In 50 he quotes from Valasquez Rodriguez
"It is a principle of international law, which jurisprudence has considered "even a general principle of law", that every violation of an

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> *Crown Immunity does not apply to the Public Law Remedy*
> 5 Section 3 of the New Zealand Act . .."otherwise specially provides" within the meaning of s5(k) of the Acts Interpretation Act 1924...[and] applies to acts done by the Courts.[144]

[Section 5(k) of the Acts Interpretation Act 1924 provides that "No . . .Act shall in any manner affect the rights of [Her Majesty..] . ..unless it is stated therein that [Her Majesty] shall be bound thereby].

F LAW COMMISSION REPORT 37: CROWN LIABILITY AND JUDICIAL LIABILITY AND JUDICIAL IMMUNITY A RESPONSE TO BAIGENT'S CASE AND HARVEY V DERRICK

The Law Commission report on Crown Liability was published in 1997 and clearly reflects the thinking of the Judiciary through the Commission's President Justice Baragwanath, who decided *Cooper.* The Law Commission provides the Judiciary with the opportunity to influence the formation of new legislation. The report (inter alia) recommends:

1. No legislation should be introduced to remove the general remedy for breach of the Bill of Rights Act held to be available in *Baigent's* case.[145]
2. Parliament should also not intervene to codify the principles, which would best be developed by the Judiciary.[146]
3. Under Section 3(a) of the Bill of Rights the Crown should be liable for all breaches of the Executive eg Government Departments.[147]
4. Under Section 3(b) the Crown should be liable for the acts of persons performing "public functions" to the extent that it was a party to the relevant conduct.[148]
5. There should be a systematic review of existing legislation conferring immunity on Crown Agencies not enjoyed by citizens. These immunities should be kept to the minimum.[149]
6. The present immunity from suit of High Court Judges should be extended to District Court Judges.[150]

The Law Commission Report suggests that the Judiciary recognise that the new Bill of Rights action (not a tort) may develop as a useful judicial check on the power of the Executive if Parliament does not intervene.

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international obligation which results in harm creates a duty to make adequate reparation [by] compensation."
M'Kay J 718 In 36

144 5 Cooke P 676 In 38-42 Casey J 691 In 56
Hardie Boys 701 In 28-40
M'Kay J 718 In 40-50

145 Law Commission Report 37 "Crown Liability and Judicial Immunity A response to Baigent's case and Harvey v Derrick" at at 2 para 4

146 Law Commission Report 37 at 25 line 4 para 4

147 Law Commission Report 37 at 2

148 Law Commission Report 37 para 4 at 2

149 Law Commission Report 37 para 4 at 2

150 Law Commission Report 37 para 4 at 2

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VII STATUTORY PROVISION IN NEW ZEALAND FOR LAND: THE PUBLIC WORKS ACT 1981

The law of compensation for takings of land in New Zealand has been settled for many years. The English Rules caselaw from the House of Lords and Privy Council has shaped the Public Works Act 1981 and its daily administration.

The pattern of statutory provision in England falling into three periods, described by Lord Dunedin in *De Keyser*[151] was also true for New Zealand.

Lord Dunedin described a second period with a series of statutes of a local character authorising the taking of lands and assessment of compensation for particular works. In New Zealand that period ended in 1876 on the passing of the Public Works Act. The Schedule to the Public Works Act of 1876 lists 3 pages of specific legislation repealed.

The third period in England began with the (UK) Land Clauses Consolidated Act 1845 and successive legislation not directed to the acquisition of particular lands. Similarly general provision commenced in New Zealand with the Public Works Act 1876.

The practical work of valuation for Public Works purposes is typically completed by Valuers familiar only with the small text "Land Compensation" by Squire L Speedy and the two Casebooks published by the New Zealand Valuers Institute. (M'Veagh and Babe Land Valuation Case Book and Land Valuation Cases 1965-I 992).

Issues not resolved by negotiation can be referred to the Land Valuation Court, a division of the District Court. There are further rights of appeal to the Administrative Division of the High Court.

The Government has been reluctant to extend the settled regime of the Land Valuation Tribunal and the English Rules to property, which is not land.[152] In terms of the constitution all takings should however be equally compensated, irrespective of their nature. It appears that the Government considers that the English Rules are too generous to the citizen.[153] The only logical distinction between land and other forms of property is that the Landowner has the sole occupation to the exclusion of all others (as well as use rights) and so is in a stronger tactical position

151 Attorney General v De Keyser's Royal Hotel [1920] AC 508 Lord Dunedin 524 lines 20-34 discussed above VB 19.

152 Access to the Land Valuation Tribunal was reluctantly conceded to the statutory lessess under the Maori Reserved Lands Act 1997.

It has never been proposed for the Schedule 4 Fishers losing 20% of their fishing rights.

It is only available under the Resource Management Act 1991 under s197 (heritage orders) and s237H by s124 of the Resource Management Amendment Act 1993 (esplanade strips).

It was proposed by officials, but rejected for S162A of the Biosecurity Act 1997 introducing compensation.

153 Whangarei District Council v FP Snow AP 3/96 HC Cartwright J. The District Council and Valuer General argued whether compensation of 50% x $10,800 land value paid to Mr Snow a subdividing Farmer compelled to lose an esplanade strip along a river was excessive, after first paying Mr Snow. Mr Snow of course did not appear in Court. In his absence the Court declared that he should only have been paid 33%

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than the State. At a theoretical level moreover land rights are reserved fundamental rights to which Parliamentary supremacy is subject.[154]

154 Janet M'Lean in Property as Power and Resistance Chap 1 of Property and the Constitution Hart Pub 1999 discusses the Roman law distinction between Imperium public government and Dominium the power of ownership. Possession of land inevitably creates elements of imperium in the landowner.

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VIII STATUTORY PROVISION IN NEW ZEALANR FURTHER EXAMPLES

Lord Dunedin in De Keyser [155] stated that there was a "universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708." The examples given below however demonstrate that:

1. Where there is no political pressure statutory provision invariably cuts back or excludes the compensation that would be payable at common law. In this respect many of the compensation provisions are functionally similar to Manufacturers' warranties, which belie their names and are intended to remove rights available under Consumer Protection legislation.
2. Official advice is rarely based on the legitimacy of property rights (inherent in the individual) and never on the Magna Cat-ta based common law duty to compensate. The Bill of Rights 1990 is never mentioned. Policy is driven by fiscal expediency.
3. Some policy advice on pragmatic grounds accepts however that compensation is an inevitable expectation and encourages useful cooperation by individuals. The amendment to the Biosecurity Act 1997 is a good example of this.

A STATUTORY LESSEES UNDER THE MAORI RESERVED LAND ACT

The National lead Administration proposed by statute to remove the right of perpetual renewal and reduce the review term of the statutory leases from 21 years to 7 years. The lessees represented by Sir Geoffrey Palmer argued for compensation on the basis of Blackstone, Crown Law opinion on fishing permits MAF 042/143, Section 21 of the New Zealand Bill of Rights Act, international law and legitimate expectation.[156]

A tractor convoy travelled to Wellington. In the face of that pressure and a pending by election the Maori Reserved Land Amendment Act 1997 as passed provided compensation to the lessees and solatium payments to both Lessors and Lessees "as if the Act had not been enacted."[157] Compensation for loss to the market value of the lessee's interest could be decided by the Land Valuation Tribunal.

155 Attorney General v De Keyser's Royal Hotel Limited [1920] AC 508 Lord Dunedin 524 lines 20-34
156 Submission to the Parliamentary Select Committee
157 A Guide to the Maori Reserved Land Amendment Act 1997 Pub Te Puni Kokiri 13

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B FISHERIES ACT

Sections 28 OF to 28 00 of the Fisheries Act provide a compensation regime to accommodate the Treaty of Waitangi Fisheries Settlement Act 1992 requiring 20% of new fish quota to automatically pass to the Maori. Government assurances were given to Fishers at the time of the "Sealord deal" that they would not be prejudiced.

The Bill before Parliament proposes to grant quota property rights to 80% of the Schedule 4 (non quota) species in exchange for their present right under fishing permits to catch 100% of these species. No compensation is proposed.

22 representative fishers have now filed High Court proceedings through Chapman Tripp.[158] Interestingly Sealord Products Ltd and Moana Fisheries Ltd, both Maori companies are among the plaintiffs. Claim is made on the basis of:

1 Assurances (para 26) given to the Industry at the time, affirmed by subsequent actions (para 32) and relied upon by the Industry (para 35).

2 A Crown fiduciary obligation (para 36) "in settling, and in implementing the settlement of, claims brought by Maori as a consequence of breaches by the Crown of the Treaty of Waitangi".
- not to mislead or deceive third parties
- to act honourably and in good faith
- to act in a manner consistent with the principles and spirit of the Treaty of Waitangi when dealing with the rights and interests of third parties potentially affected by a proposed settlement, one such principle being that "it is out of keeping with the spirit of the Treaty of Waitangi that the resolution of one injustice should be seen to create another".

3 The "compulsor[y] acquisition proposal", is contrary to assurances, in breach of fiduciary obligation and contrary to section 21 of the New Zealand Bill of Rights 1990.

Declarations are sought that
- in the absence of express legislation to the contrary, the Crown has an obligation to act in a manner consistent with the assurances
- fiduciary obligation
- the Crown's compulsory acquisition proposal would amount to an unreasonable seizure of the plaintiff's property contrary to Section 21 of the New Zealand Bill of Rights Act 1990.

158 A copy of the proceedings is annexed to the submission of 6 8 99 of Barrister Mr Tim Castle to the Primary Production Select Committee.

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C TIMBER

In 1990 the Customs Regulations were changed to prohibit the export of native timber. Logging native timber was made uneconomic. Although no right to compensation was conceded, limited ex gratia adjustment assistance was paid to Forest Owners and Contractors, who could show evidence of contractual commitments. The total paid of $30 million has preserved 1.3 million hectares of privately owned native forest from logging.[159] A relatively small amount of "compensation" has proved to be an effective policy tool. In 1993 the Forest Amendment Act outlawed the unsustainable logging of native forest.[160]

D RESOURCE MANAGEMENT ACT

Failure to provide statutory compensation in the Resource Management Act has destroyed the credibility of the Act and with it Landowner support for many of its purposes. [161] The proposed reforms do not address the structural imbalance, caused by the lack of a compensation provision. Section 32 cost benefit analysis does not work as intended.[162] Instead the National Administration has directed DOC to withdraw from all environmental advocacy except where the DOC estate (e.g. a National Park) is directly involved.[163]

Compensation a dirty word for some in the environmental movement is now being repackaged as "economic incentives". Guy Salmon writing in Maruia Pacific:[164]

> Rural demands for compensation have arisen, ironically, because of the Government's own fiscal meanness about incentives for nature conservation. For many years, Maruia has been pressing for financial incentives to encourage landowners to implement voluntary protection and management of native forest.

Federated Farmers have asked that the present heritage provisions Sections 187-198 of the Resource Management Act be used to protect on farm amenity values. These require Councils to acquire heritage sites if they are to be

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159 Mr Mike Jebson Ministry of Forestry

160 Adjustment assistance is also to be paid under the Forest amendment Bill 1999 (clause 26) to the owners of "South Island Landless Natives" land (SILNA) following their successful High Court action CP140/97 9/6/99 to challenge the export ban under the Customs Regulations affecting them. Wild J declared the Regulations to be repugnant to the SILNA exemption in S67A Forests Act 1949.

161 Federated Farmers eg Federation letter of 30 June 1998 to the Minister for the Environment objecting to the need for the "organisation to have to commit a minimum of $700,000 of staff costs each year to help protect farmers from the excesses of the district and regional planning processes."

162 Analysis of submissions on Proposals for Amendment to the Resource Management Act for the Minister for the Environment March 1999 Mfe

See discussion in Think Piece Owen M'Shane 30-40 and critiques by R Nixon 7 Ken Tremaine 5-7 Guy Salmon 6th section unnumbered urging economic incentives.

Report of the Minister for the Environments Reference Group Sept 1998 Appendix Philip Donnelly "Rationale for Introducing Compensation for Land Use Controls" l-l 9.

163 A senior DOC Planning Officer to the writer.

164 Maruia Pacific Nov 98 at 5 col 2 lines 3-11, 35-41 and 12-l 3 See also on economic incentives Maruia Pacific June 1998 8 col 2 In 29-33 and 9 col 3 In 6

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preserved.[165] The principle of equality before the law dictates that Rural Landowners should receive equal treatment to Urban Landowners regulated in the use of heritage or historic sites.[166]

165 Federated Farmers'
-Submission to the Ministry for the Environment on Land Use Control under the Resource Management Act 30 June 1998
-Submission to Ministry for the Environment on Proposals for Amendment to the Resource Management Act 1991 29 Jan 1999
-Federated Farmers Presentation to the Government Agriculture Caucus 27 May 1999.

166 Universal Declaration of Human Rights Arts 2 and 21(2) to which New Zealand is a State Signatory

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IX CONCLUSIONS

A CONCLUSIONS ON THE LAW

There is in New Zealand a Common Law duty for the Crown to compensate, whenever it takes an individual or property right. At the margin this has in recent times been expressed as the fiduciary duty of the Crown to the subject and the concomitant duty to consider all legitimate expectations. This duty is part of New Zealand's written Constitution expressed in the Magna Carta and Bill of Rights legislation.

The duty to compensate extends to regulatory takings. The dictum of Holmes J in *Pennsylvania Coal Co v Mahon* [167] 47 that "if regulation goes too far it will be recognised as a taking" has been approved by the House of Lords in Belfast *Corporation v OD Cars* [168] and the Privy Council?'

The test for excess regulation has been described by the Privy Council as "constructive deprivation" when by "lack of any provision for compensation [statutory restrictions] do not achieve a fair balance between the interests of the community and the rights of the individuals whose property interests are adversely affected". [170] The philosophy can be traced to John Locke. On many occasions a remedy in judicial review might also be available since such regulation may lack a public purpose. Regulation under the Resource Management Act as delegated legislation is especially subject to this caselaw.

It is inevitable that Section 21 of the New Zealand Bill of Rights 1990 "unreasonable search and seizure" will be recognised as the constitutional authority for compensation, since "unreasonableness" will be interpreted in the light of Common Law conventions for compensation. The cause of action is attractive, because statutory immunity does not apply. It is uncertain whether the Court of Appeal will extend its ruling in *Attorney Genera/ v Simpson* that immunity clauses will not protect the Crown to unequivocal directions from Parliament not to compensate.

Taking in terms of Magna Carta 1297 includes all acquisition, tort or exercise of statutory powers harming the rights or property of the subject. It can include indirect effect without gain to the Crown.[171]

The concept of property is broad. Historically in terms of Magna Carta 1215 or 1297 it includes "Liberties" and "free customs". Property as a bundle of compensatable rights includes:

(1) use rights
(2) exclusion rights

167 Pennsylvania Coal Co v Mahon (1922) 260 US 393,417.
168 Belfast Corporation v OD Cars [I 960] AC 490 519 ln1 9
169 Sucriere de Bel Ombre v Mauritius Government [1995] 3 LRC 507 AT 502 h-i.
170 Sucriere de Bel Ombre v Mauritius Government [1995] 3 LRC 494 505 a. See also Newcrest 133 30-35.
171 See 27 and n 79 Manitoba Fisheries v The Queen [1979] 1 SCR 101, 1 IO-I 18 Taking includes depriving without gain to the Crown. Compensation may be paid for partial takings.

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(3) rights of free disposition [172] The High Court of Australia recently in *Yanner (1999)* [173] drew upon the work of Professor Gray and described property as "a legal relationship with a thing" and "legally endorsed concentration of power over things and resources".

B RECOMMENDATIONS FOR PARLIAMENTARY REFORM

Property rights legally protected by the Bill of Rights 1689 and philosophically justified by John Locke are the primary constitutional defence of the liberties delivered by the Westminster Model of democracy. Recent statutory reform such as the Resource Management Act and the Fisheries Act has been heavily influenced by public choice economic theory. The promised efficiency gains from rationally assessing costs and benefits will not be fully realised until Community attitudes toward property rights change.[174] It is Parliament's responsibility to achieve that by ensuring that full compensation is readily obtained whenever takings occur.
The cost of compensation now payable is a fraction of the transaction cost in excessive regulation.

Community attitudes toward property rights are more important than specific changes in the law. The following proposals for changes to statute will assist that:

(1) The NZ Bill of Rights should be amended to clearly protect property rights so that all uncompensated takings and Crown immunities will in future have to be reported to Parliament by the Attorney General in terms of S7 of the NZ Bill of Rights.

(2) Parliamentary Standing Orders should be amended to require all legislation to be scrutinised for takings of private property interests and unjustified immunities. The onus should always be on the Crown to clearly and publicly justify a failure to compensate. That would bring Executive practice in Parliament into line with the existing conventions and New Zealand's international obligations.

(3) The Resource Management Act should be amended to expressly provide for compensation. Compensation should be paid, when resource consent is refused and there are no significant effects on others. The test of "significant effects" would accord with existing caselaw on notification in terms of Section 94 of the Act.

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172 Takings RA Epstein n78 74-92 discusses this generally. The potentiality" in the English Rules.
Inland Revenue Commissioners v Clay [I 914] 3KB 466.
172 Yanner v Eaton n46 para 17 line 2 para 18 line 4
See also matrimonial cases National Provincial Bank v Ainsworth [1965] 1175 per Lord Wilberforce at 1247 and
Z v Z [1997] 2 NZLR 258 CA full bench where property included non assignable interests, but not future earning capacity.
ACTV v Commonwealth of Australia (1992) 108 ALR 577
Ex parte Menaling Station Pty Ltd (1982) CLR 327
"transferrability is not an essential element of the concept." right of free disposition is described as "Adjoining owner potentiality" in the English Rules.
Inland Revenue Commissioners v Clay [1914] 3KB 466.
173 Yanner v Eaton n46 para 17 line 2 para 18 line 4
See also matrimonial cases National Provincial Bank v Ainsworth [1965] 1175 per Lord Wilberforce at 1247 and
Z v Z [1997] 2 NZLR 258 CA full bench where property included non assignable interests, but not future earning capacity.
ACTV v Commonwealth of Australia (1992) 108 ALR 577
Ex parte Menaling Station Pty Ltd (1982) CLR 327
"transferrability is not an essential element of the concept."
174 A Regulatory Responsibility Act and Regulatory Impact Statements [CO (98)5 12 May 1998] recently proposed by the Hon Mr J Luxton Minister of Commerce would be unnecessary if all takings were promptly recognised and compensated.

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"The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protections of the rights to which they are entitled." - A.G. Nova Scotia and A.G. Canada, 1951 S.C.R. 31 at p. 34.

PREFACE

One of the most important aspects of Canada's Constitution (in distinction to its Constitution Acts) is its pronouncement (within the English Bill of Rights, 1689) "That the levying of money for or to the use of the crown, by pretense of prerogative, without grant of parliament, for longer, or in other manner than the same is or shall be granted, is illegal". Bowles v. Bank of England [1913] 1 Ch. 57 affirmed that provision — as well as similar provisions within Magna Carta (1225), Statutum de Tallagio non Concedendo (1297) and Petition of Right (1628) — when Justice Parker stated: "By the statute 1 W. & M. , usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions".

A review of the events that surrounded passage of the GST legislation will show that there is no Act of Parliament requiring the payment of a Goods and Services Tax in Canada for the body which enacted the GST legislation, although in part composed of MPs sitting in the House of Commons, was not Parliament. - D.S.D.

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INTRODUCTION

In Reference re Bill C-62, the Alberta Government asked a number of questions seeking a pronouncement on the constitutionality of the GST. The Attorney General of Ontario joined the process as an intervenor and attempted to question the validity of the rules by which the Mulroney Government brought the GST into being, but, in the process of doing so, the courts informed them that they had failed to abide by the rules governing judicial references. Thus, as the rules governing Ontario's conduct were the same rules governing the conduct of the courts, Ontario's failure to abide by the rules precluded the courts from addressing Ontario's concerns. The courts felt that the constraints of rules were paramount.

Rules define the laws that give rise to lawful societies. Without established rules there can be no law.

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When reading the words of the Alberta Court of Appeal in this reference two things are perfectly clear: that the Court was asking the Attorney General of Ontario to correct the procedural flaws inherent to their participation in the case (a task as simple as initiating another reference to the Courts so that they would not be constrined by the parameters of the questions asked by Alberta) and to forego the incorrect assertion that a breach of procedural constraints by Parliament makes subsequent enactments unconstitutional, ultra virus (the Court even provided the correct diction for the argument by asserting that a breach of procedure simply results in a nullity). - D.S.D.

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ON THE SUBJECT OF THE REFERENCE RE BILL C-62 AND WITH REGARDS TO STANDING ORDERS 57 AND 78(3) OF THE HOUSE OF COMMONS.

THE FACTS (as set out in the Attorney General of Ontario's Factum to the Supreme Court of Canada).

- 11. The GST Act was introduced into the House of Commons as Bill C-62 on January 24, 1990.
- 12. Despite the complex nature of the Bill, which contains several hundred sections, debate on it was kept to a minimum and it was steered through the House of Commons in rapid stages. Those stages were as follows:
- 13. First reading took place on 24 January, 1990, without debate.
- 14. Second reading, debate in principle, took place from 29 to 31 January and 5 to 7 February. On 7 February, after only 7 ½ hours of actual debate, the government invoked closure to end debate and send the Bill to Committee.
- 15. The Standing Committee on Finance reviewed the Bill during February and March 19990. After about 30 hours of consideration, the Chair of the Committee took unprecedented steps to conclude the Committee's work and send the Bill back to the Commons.
- 16. The Committee reported to the House of Commons on March 30. The government then unilaterally imposed, through time allocation rules, a limit of one day each for the report and third reading stages. Pursuant to this schedule, Bill C-62 was debated on April 9 and 10, then passed by the government majority in the House.
- 17. During this process Members of the Opposition challenged the government's conduct in using closure and time allocation to cut off debate at every stage of the Bill's passage. Their points of order and privilege were dismissed by the Speaker.
- 18. In his challenge to the use of closure on second reading, Mr. Nelson Riis argued that the closure rule violated s. 18 of the Constitution Act, 1867. On this point, the Speaker ruled: "That may or may not be, but the authorities for many, many years back make it quite clear that I cannot rule on a legal or a constitutional issue".
- 19. The GST Act was passed by the House of Commons as Bill C-62 on 10 April, 1990.

GST: Act of Parliament? Seminar material for sale