

How Secure are your Property Rights?



Nature of Property Rights

- Quota and ACE are valuable property rights
- “While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions or the legislation establishing them. That legislation contains the capacity for quota to be reduced. If such reduction is otherwise lawfully made, the fact that quota are a “property right”, to use the appellant’s expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned.”

New Zealand Fishing Industry Association (Inc) v Ministry of Fisheries
(unreported, CA82/97, 22 July 1997, Wellington, Justice Tipping)



Nature of Property Rights

Cont.

- “ITQ are effectively a private property right, valuable and tradeable, entitling holders to fish.”

Sanford (South Island) Limited and Others v Minister of Fisheries and Others (unreported, CP3/89, 10th, 11th, 1989, Wellington, McGechan J)



What Type of Property?

- “Fishing quota has to be regarded as a unique property right, with its characteristics determined from the provisions of the fishing legislation as set out by Justice Tipping in the New Zealand Fishing Industry Association decision referred to above.”

IRD public ruling – BR Pub 03/08



What Type of Property?

Cont.

- It is similar to, but not identical to, rights that arise under a profit à prendre
- The rights are derived from statute which means:
 - Limits to the rights that are imposed under statute and regulation
 - Statutory rights can be taken by statute



Sanfords Case

- Minister passed regulations closing areas to trawling for limited periods to protect salmon for recreational use
- Areas could only be excluded from a QMA by statute (section 28B(5) of Fisheries Act 1983)
- Commercial fishers were affected and alleged Minister had acted in complete disregard of their rights as ITQ holders and the ban on removing areas from QMAs except under statute



Sanfords Case

General Observation

- “As an opening observation, the object behind this scheme seems clearly enough to create a stable regime under which stocks of commercial fish species are conserved and under which commercial fishermen have stable and recognised rights to fish on a basis on which they can plan and make the considerable financial commitments which this industry requires. It is not a scheme set up to be dismantled or tinkered with by a Minister as a matter of whim. It is not a scheme in which the Minister is to be given any considerable leeway for adjustment by regulation; but at the same time it is a scheme which is conservation conscious.”



Sanfords Case

Limits to Regulations

- “Clearly in my view, regulations cannot be made under section 89 which goes so far as to render ineffective rights enjoyed under the QMS by ITQ holders. Parliament did not intend to give with the one hand, and then take away with the other. The property element inherent in the ITQ is to be given proper recognition, but subject to that the section 89 regulation making power can go as far as may be necessary for proper marine conservation purposes, both of ITQ and non ITQ species.”



Sanfords Case

Parting shot

- Due to the limited nature of the regulations they were lawful
- “; the way this result has been achieved the plaintiffs face possible losses without legal rights to compensation under the legislation. It does seem rather against the spirit of the QMS scheme and its intended commercial certainties. It is exacerbated by the fact that recreational fishermen and to some extent perhaps the tourist industry which support them and salmon hatcheries, bear no losses but reap all the gains, if any. Nothing in this judgment should be interpreted as endorsing that apparent unfairness. The problem is not one which can be dismissed by some hopeful view that there will be no loss. Some is possible and I draw this matter to the Minister’s attention. It is a matter within his powers and responsibilities not those of this Court. Some proper enquiry might be thought appropriate.”



Risks to Property Rights – Areas Closed or Excluded

- Marine Reserves Act 1971
- Marine Mammals Protection Act, Marine Mammals Sanctuaries
- Submarine Cables and Pipelines Protection Act, Cable Protection Zone, Fisheries Act section 11 sustainability measures
- Seamount Closures



Statutory Protection Against Closed Areas

- Statutory limits on decision which may unduly affect fishing:
 - Fisheries Act section 186C – G; the Chief Executive must be satisfied that an AMA will not have an **undue adverse affect on fishing**
 - Continental Shelf Act 1964 – exploration of the continental shelf or exploitation of its natural resources can be prohibited or restricted if it could result in **unjustifiable interference with fishing**
 - Marine Reserves Act 1971 section 5(6) – the Minister must uphold an objection if satisfied that declaring an area a marine reserve would **interfere unduly with commercial fishing**



Marine Reserves – Interfere Unduly

- Minister of Conservation and Minister of Fisheries must have regard to whether marine reserve would interfere unduly with commercial fishing
- The word “undue” involves an assessment of all the factors, one of which is the undoubted impact on the CRA3 IAI; not whether it is “significant” but whether it is “undue” which requires a balancing of the effect on some fishes against other values involved.



Possible Compensation

- No express provisions allowing for, or preventing compensation
- Chapter 29 of the Magna Carta – “no freeman shall be ... disseised of his freehold or liberties, or free customs ... but ... by the law of the land.”
- Section 21 and 27 of the New Zealand Bill of Rights Act 1990



Possible Compensation (Cont.)

- Common law right of compensation – Manitoba Fisheries Limited v The Queen (1978) 88 DLR 3D462. An Act deprived the plaintiff of a fisheries based property right and given that the Act did not specifically authorise the taking of that right without compensation, compensation was payable

