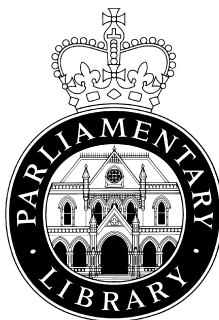


# BILLS DIGEST

**NEW ZEALAND BILL OF RIGHTS (PRIVATE PROPERTY RIGHTS)  
AMENDMENT BILL 2005**  
*(Member's Bill – Gordon Copeland)*

**Date of Introduction: 07 April 2005**

**Bills Digest No. 1252**



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<b>NEW ZEALAND BILL OF RIGHTS (PRIVATE PROPERTY RIGHTS) AMENDMENT BILL 2005</b>
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Date of introduction: 07 April 2005  
Member: Gordon Copeland  
Select Committee: As at 19 April, 1<sup>st</sup> reading not held

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<b>PURPOSE</b>
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The aim of the Bill is to amend the New Zealand Bill of Rights Act 1990 “to provide a right to own property and the right to compensation in the event of deprivation of property” (*Clause 3 of the Bill, the purpose clause*).

<b>BACKGROUND</b>
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**The New Zealand Bill of Rights Act 1990**

The New Zealand Bill of Rights Act 1990 (the Bill of Rights) does not contain any explicit reference to a right to property. However, Section 27 of that Act does state that every person has a “right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person’s rights, obligations, or interests protected or recognised by law” (*Section 27(1)*) and every person affected by such a determination has a right to apply for a judicial review of that determination (*Section 27(2)*). Also, “every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals” (*Section 27(3)*).

The Bill of Rights Act has very limited legal effect. It applies only to acts done:

- by the legislative, executive, or judicial branches of the government of New Zealand; or
- by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law (*Section 3*).

In relation to another enactment (i.e. an Act or regulation), no court may (whether the enactment is passed or made before or after the commencement of the Bill of Rights):

- hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- decline to apply any provision of the enactment

by reason only that the provision is inconsistent with any provision of the Bill of Rights (*Section 4*).

Subject to Section 4 of the Bill of Rights, the rights and freedoms contained in it may be subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (*Section 5*).

Section 6 of the Bill of Rights provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning.

Section 7 of the Bill of Rights provides that where any Bill is introduced into the House of Representatives, the Attorney-General must:

- in the case of a Government Bill, on the introduction of that Bill; or
- in any other case, as soon as practicable after the introduction of the Bill,

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.

### **Common law rights to compensation**

The common law does provide some protection for the citizen in relation to statutes which take private property. If a statute is silent respecting compensation, it will be interpreted by the Courts as implicitly requiring compensation to be paid<sup>1</sup>. Two Canadian cases provide examples of this. The Supreme Court of Canada in *Manitoba Fisheries v. the Queen* (1978)<sup>2</sup> held that the establishment of a Crown monopoly of fish exporting amounted to a taking of the property of a private fish exporter who had been put out of business by the statute that established the monopoly. The Court held that the exporter was entitled to compensation, despite the silence of the statute on that question. In another Canadian case, *The Queen v. Tener* (1985)<sup>3</sup> it was held that park legislation restricting plaintiffs’ ability to exploit mineral rights was a taking that had to be compensated under provincial expropriation law.

However, if the statute clearly states that no compensation is to be paid, then the common law presumption set out above has no application.

### **Forests Amendment Act 1993**

An example<sup>4</sup> of a New Zealand statute which could be said to have taken private property rights is the Forests Amendment Act 1993. This statute provided, amongst other things, that generally indigenous timber on private land may not be milled or exported unless it is harvested under a Sustainable Forest Management Plan approved by the Secretary of Forestry (“the Secretary”). The Secretary could only approve plans which imposed specified ecologically-based controls with the net result that the rights

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<sup>1</sup> Peter W. Hogg, *Liability of the Crown*, Law Book Co., North Ryde, NSW, 1989, p. 105.

<sup>2</sup> [1979] 1 S.C.R. 101.

<sup>3</sup> [1985] 1 S.C.R. 533.

<sup>4</sup> Another example might be the Resource Management Act 1991 where rights to compensation are supplied only in limited circumstances.

of landowners to commercially realise timber located on land were reduced. The sense of grievance of some landowners was particularly acute because the Crown had, when export controls had been imposed under the Customs legislation, implemented a system of compensation for landowners and others who were actively involved in the business of logging, milling and exporting. Landowners who were not actively in the business at the time the export controls were imposed, were not eligible to apply for that compensation.

Section 8 of the Forests Amendment Act 1993 provided explicitly that the Crown was not liable to pay compensation to any person in respect of the export controls under the Customs Act or the provisions of the Forests Amendment Act itself<sup>5</sup>.

### **Summary**

In summary, the protections for private property in New Zealand are not very great and property rights can be expropriated under statute without compensation. The New Zealand Bill of Rights Act 1990 and the common law cannot, in the final analysis, withstand a clearly drafted statute of Parliament.

### **Recognition of rights in other jurisdictions**

Private property rights have been subject to specific protection in some overseas jurisdictions such as the United States Bill of Rights and the 5<sup>th</sup> amendment to the constitution of that country. The Canadian Bill of Rights of 1960 provided that there exists as “a human right and fundamental freedom”, the right to enjoy property “and the right not to be deprived thereof except by due process of law”<sup>6</sup>.

### **International Conventions and Agreements**

The right of everyone to own property has been proclaimed in the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. The United Nations General Assembly and the United Nations Commission on Human Rights have examined the issue of a right of property.

In 1987, the Commission on Human Rights dealt with property rights in two resolutions. In the first resolution (resolution 1987/17), it urged States to provide, where they had not done so, adequate constitutional and legal provisions to protect the right of everyone to own property alone as well as in association with others and the right not to be deprived arbitrarily of one's property.

In the second resolution (resolution 1987/18), it reaffirmed the statement in article 6 of the Declaration on Social Progress and Development, that social progress and development require the establishment, in conformity with human rights and fundamental freedoms, and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which

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<sup>5</sup> *Mangawaro Enterprises Ltd v. A-G* [1994] 2 NZLR 443, 458.

<sup>6</sup> *Canadian Bill of Rights*, 1960, c. 44, Appendix III to R.S.C., 1985.

preclude any kind of exploitation of man, ensure equal rights to property for all, and create conditions leading to genuine equality among people<sup>7</sup>.

### **Another view**

At least one serious legal scholar can see no grounds, for all practical purposes, to justify treating a right to private property as a basic human right. “Under serious scrutiny, there is no right-based argument to be found which provides an adequate justification for a society in which some people have lots of property and many have next to none. The slogan that property is a human right can be deployed only disingenuously to legitimise the massive inequality that we find in modern capitalist countries”<sup>8</sup>.

## **MAIN PROVISIONS**

### **Right to own property**

The Bill provides for two new sections of the Bill of Rights. One provides that everyone has the right to own property, whether alone or in association with others. The other provides that no person is to be deprived of the use or enjoyment of that person’s property without just compensation (*Clause 4, New Sections 11A and 11B of the New Zealand Bill of Rights Act 1990*).

### *Comment*

The amendments to the New Zealand Bill of Rights Act as proposed by the Bill would only have as much legal effect as that Act has. A fully effective property right would need to be stated in a Bill of Rights statute which had fundamental legal status in New Zealand as does, for example, the constitution of the United States in the law of that country.

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<sup>7</sup> Edward Lawson (comp.), *Encyclopedia of Human Rights*, 2<sup>nd</sup> edn, Taylor & Francis, Washington, 1996, pp. 1206-1209.

<sup>8</sup> Jeremy Waldron, *The Right to Private Property*, Clarendon Press, Oxford, 1990, p. 5.