The Nature of Resource Consents: Statutory Permits or Property Rights

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The interplay between private law and public law in respect of the Resource Management Act 1991 (the RMA) centres on section 122, which declares that:

> (1) A resource consent is neither real nor personal property.
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> (2) Except as expressly provided otherwise in the conditions of a consent,—
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> (a) On the death of the holder of a consent, the consent vests in the personal representative of the holder as if the consent were personal property, and he or she may deal with the consent to the same extent as the holder would have been able to do; and
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> (b) On the bankruptcy of an individual who is the holder of a consent, the consent vests in the Official Assignee as if it were personal property, and he or she may deal with the consent to the same extent as the holder would have been able to do; and
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> (c) A consent shall be treated as property for the purposes of the Protection of Personal and Property Rights Act 1988.
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> (3) The holder of a resource consent may grant a charge over that consent as if it were personal property, but the consent may only be transferred to the chargee, or by or on behalf of the chargee, to the same extent as it could be so transferred by the holder.
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> (4) Subject to the provisions of this Act, and in particular to subsection (3), the Personal Property Securities Act 1999 applies in relation to a resource consent as if—
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> (a) The resource consent were goods within the meaning of that Act; and
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> (b) The resource consent were situated in the Provincial District in which the activity permitted by the consent may be carried out (or, where it may be carried out in more than 1 Provincial District, in those Provincial Districts).
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> (5) Except to the extent—
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> (a) That the coastal permit expressly provides otherwise; and
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> (b) That is reasonably necessary to achieve the purpose of the coastal permit,—
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> no coastal permit shall be regarded as—
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> (c) An authority for the holder to occupy a coastal marine area which is land of the Crown or land vested in a regional council to the exclusion of all or any class of persons; or
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> (d) Conferring on the holder the same rights in relation to the use and occupation of the area against those persons as if he or she were a tenant or licensee of the land.
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> (6) Except to the extent—
>
> (a) That the consent expressly provides otherwise; and
>
> (b) That is reasonably necessary to achieve the purpose of the consent,—
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> no coastal permit shall be regarded as an authority for the holder to remove sand, shingle, shell, or other natural material as if it were a licence or profit à prendre.

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The first subsection has a fine crisp sound to it, but the next five hint at complications. My topic is the complications; not so much those in these five subsections, but more generally. What is the nature of the rights under a resource consent, are they in any sense property? Can rules from property law, or principles or insights from it, rightly be brought to bear on disputes concerning what are at root statutory instruments, especially in the light of what seems to be a clear statement in section 122(1)? The issues straddle the boundary between private law and public law. There have been several recent cases, and some useful recent discussion, especially in an article by Laura Fraser.[1]

My own purposes are to offer some ideas informed by general legal principles and by law in other countries, to identify the questions of law and policy involved, and to offer some views about the way forward. My approach emphasizes the need for results that make sense in the private law that governs legal relations between parties as well as in the public law of RMA regulation. It is arguable that the private law aspects are being neglected somewhat, and with this in mind I address a wider range of natural resources law issues than the environment alone. In fields like oil and gas and minerals, for example, there is a great deal of law on transactions such as leases, options and royalties that carve different rights out of an underlying statutory permit. We may see more of such transactions in relation to resources like water.[2] At the same time I consider the policy dimensions of how we approach property claims to natural resources. This is important because of the widespread interest in managing more and more natural resources through market mechanisms, under which they are commodified, by being made the subject of individually-held rights, which are then allocated and made available for trade. How to allocate scarce natural resources is an urgent and important question in New Zealand. This paper is not about allocation, but the nature of the rights that are allocated.

I begin with a selection of recent RMA cases that have involved property law ideas. The first group have done so in order to ascertain or explain the extent of the rights held under a resource consent. The second group have done so in order to ascertain who is entitled to the rights under a resource consent. I then consider cases from Australia, Canada, and England, before moving on to consider how the courts address property claims, and how they should address them, under statutory licensing regimes.

RMA Cases: Property Concepts to Explain the Rights Held under a Resource Consent

We can start our discussion with *Dart River Safaris Ltd v Kemp*,[3] where a jetboat company with a resource consent to operate on the Dart River opposed the grant of a consent to a second company, on safety grounds. It had been proposed to impose on the second resource consent a condition that the applicant and Dart River Safaris Ltd and other operators agree on an operating memorandum that could be amended from time to time. The Environment Court had distinguished an earlier case rejecting a resource consent condition which required the

[1] L Fraser, "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991" (2008) 12 NZJEL 145.

[2] The term "resource consent" under the RMA includes land use consents, subdivision consents, coastal permits, water permits, and discharge permits: s. 87.

[3] [2000] NZRMA 440 (HC).

consent and co-operation of a third party,[4] by saying that that case concerned a land use consent which affected well-defined property rights in land law. However Panckhurst J held that the distinction was invalid, and that DRSL as first resource consent holder could not be constrained by a condition in a later consent holder's conditions.

> [27] Regardless of the merits of the situation, the fact remains that DRSL has legal rights by virtue of its resource consent. I do not accept that such rights may be deprecated because they are not founded in land law. They remain rights which may not be denied or eroded by imposition of a condition on another person's resource consent.

There was only incidental reference to section 122.

Aoraki Water Trust v Meridian Energy Ltd[5] went further. Aoraki sought a declaration that the existing hydroelectric water rights of Meridian did not preclude it from obtaining a large allocation of water for agriculture – 9,072,000 m^3 per week. Meridian's argument was in essence that the source of the water, Lake Tekapo, was already fully committed to its water rights. It had rights to take surface water from the Lake at a maximum rate of 130 m^3/s (cumecs) while the natural mean flow is only 82 m^3/s. The application for a declaration required the High Court to consider the legal nature and effect of Meridian's water permits. Aoraki's main argument was that under the RMA water permits do not have priority rights to the water in relation to others, and that a permit holder could not preclude others from obtaining later rights to the same resource. A water permit is not a property right (section 122) and does not give exclusive rights. However the Court ruled against it. First of all, Parliament had introduced a comprehensive statutory management regime for water allocation and use, effectively a licensing system, and taken to its logical conclusion Aoraki's argument would negate the purpose and effect of the licensing system. Second, the Court of Appeal in *Fleetwing Farms Ltd v Marlborough District Council*[6] had held that competing applications for a scarce resource had to be allocated in accordance with priority in time. That had to mean priority in terms of the right to use the resource. Thirdly the grant of a permit to Aoraki would devalue the grant of water to Meridian; the principle of non-derogation from a grant could be applied. The parties must have assumed that the regional council would not take any steps during the term of the permits that might interfere with, erode, or destroy the valuable economic right which the grants had created. Fourthly, the doctrine of legitimate expectation could be applied, to commit the consent authority to that grant in the sense that it is not entitled to erode the grant deliberately unless it is acting pursuant to specific statutory powers.

The Court's resort to ideas from property law was not peripheral; it began in the first paragraph of its reasoning (para 26]), with reference to the distinction between a licence (which a water permit resembled) and grants of property, referring to Hinde McMorland and Sim along with section 122. It returned to property law in the third of its reasons, observing that a number of provisions of the RMA "elevate the status of a water permit from something in the nature of a bare licence to a licence plus a right to use the subject resource. In that sense it has similarities with a profit à prendre …"[7] The features the Court referred to were the fixed

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[4] *Campbell v Southland District Council*, unreported, Environment Court W 114/94, 14 December 1994.

[5] [2005] 2 NZLR 268, [2005] NZRMA 251. The figures mentioned in the judgment for water flows are not clear; Aoraki's proposal for a maximum flow of 15m^3/s is actually the equivalent of the per week figure. The hydrological issues of availability of water under different natural flows was never explored.

[6] [1997] 3 NZLR 257.

[7] *Aoraki Water Trust*, para 34. Actually, the term "bare licence" is generally used to draw a distinction with a contractual licence, not an interest in land.

term of a permit, the right under a permit to remove property for its own purpose, the use of the word "grants,"[8] and the assignability of a permit with the interest to which it is coupled, namely the ownership or occupation of the site for which the permit is granted. The Court reminded itself that permits are not themselves either real or personal property (ie section 122), but then asserted that what is determinative is that "when granting the consents, the CRC created the right in Meridian to take, use or divert property, being surface water in Lake Tekapo".[9] This is startling. First it confuses property as rights over things with the things themselves – something that has been perceived to be inaccurate since Bentham's time. Secondly it is a misstatement of the vesting of all rights to divert or take or use natural water in the Crown by section 21 of the Water and Soil Conservation Act 1967, preserved by section 354 of the RMA.

Thirdly, it asserts, in effect, that even though a permit may not be property, it is a grant of a right to use property. This allowed the Court to bring in the idea of non-derogation from a grant; because that principle, it reasoned, applies to "all legal relationships which confer a right in property."[10] The notion is, apparently, that a resource consent cannot be property, but it can be the conferral of a right in property. This is cutting it fine. But, as we shall see, resistance to provisions like section 122 is not uncommon.

The principle of non-derogation from a grant is well-established in the law of property, especially as to leases and easements. A person cannot grant an estate or interest in land with one hand and take it away with the other, by acting in a manner that substantially interferes with the enjoyment of what has been granted. The principle has seen some extension into the sale of goods,[11] but its operation is in private law. In my respectful view, the Court in *Aoraki Water Trust* goes too far in saying that it governs "all relationships." It does not govern public law relationships.

What interests me in *Aoraki Water Trust* is the Court's wish to use property law principles such as profit à prendre and non-derogation from a grant. It was not necessary to do so. Something much the same as non-derogation can be derived from interpretation of a statute guided by administrative law, to the effect that the legislature did not intend a statutory power to grant a permit to be used so as to interfere with a previously-granted permit, even to the extent that a permit is exclusive. The Court used such authority.[12] But the Court was strongly attracted to a property law solution, and notwithstanding section 122 it held that a resource consent is a grant of a right to take and use property.

The next case on non-derogation from a grant was *Southern Alps Air Ltd v Queenstown Lakes District Council*,[13] another jetboat case where the operator with the earlier consent resisted the grant of another consent on safety grounds, this time on the Wilkin River. The High Court

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[8] The Court's point about "grant" was that the term is commonly employed to describe a right created by the Crown – according to Jowitt's Dictionary of English Law. But the term is so generally used in property law and statute law that little can hang on its occurrence in sections 104-104D of the RMA.

[9] *Aoraki Water Trust*, para 35. On the difficulty in the Court's statement that a water permit allows the taking of a resource owned by the Crown, see David Grinlinton, "The Nature of Property Rights in Resource Consents" [2007] RMB 37.

[10] *Aoraki Water Trust*, para 36.

[11] *British Leyland Motor Corp Ltd v Armstrong Patents Ltd* [1986] AC 577 at 641 per Lord Templeman.

[12] *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 2 All ER 277 at 282, applied in *ABC Containerline NV v NZ Wool Board* [1980] 1 NZLR 372 at 383.

[13] [2008] NZRMA 47 (HC. Special leave to appeal further was refused, CA85/08, [2008] NZCA 212, 16 June 2008.)

developed the non-derogation principle. First, following the standard lease and easement cases, derogation must be substantial; mere interference with convenience or amenity is not enough.[14] Secondly, the derogation must be from the rights actually conferred by the first resource consent, not derogation from the chance and circumstance of being the sole operator on the river. In this case, the first consent did not grant exclusive use. Thirdly, the extent of derogation must take into account the regulatory obligations to which the first consent holder was always subject, or potentially subject (in this case, under Part 80 of the Maritime Rules, which included co-operation and communication with other river users).[15] Fourthly, trade competition must be excluded from the consideration of impact on the prior consent holder's rights. These are all sensible constraints. The non-derogation principle, which did not actually figure in *Dart River Safaris Ltd v Kemp*, is now refined, and channelled, but put in a central place in the RMA law on resource consents. The language of property comes easily to courts and counsel, as they discuss the bundle of rights under a consent, and how a consent is akin to a property right.[16]

In contrast, in *Marlborough District Council v Valuer-General*,[17] Ronald Young J gave effect to section 122(1) in holding that a coastal permit for marine farming (and the exercise of rights under a permit) is not land or an interest in land. Nor is the componentry installed by the permit holder under the authority of the permit. The permit was therefore not subject to the payment of rates under the Local Government (Rating) Act 2002. The Judge referred to *Aoraki Water Trust v Meridian Energy Ltd*, *Dart River Safaris Ltd v Kemp* and *Armstrong v Public Trust* (which we come to shortly), in respect of observations in those cases that section 122(1) prevents the courts from recognizing any property rights, real or personal, except to the extent that Parliament has provided for them. (A reader will note that those cases said a good deal more than that about property ideas.) Ronald Young J relied on *Hume v Auckland Regional Council*[18] in its analysis of section 122(5) and the limited extent to which a coastal permit confers an exclusive right of occupancy; coastal permits are different from other resource consents. On the facts of this case (in contrast to those of *Auckland City Council v Ports of Auckland Ltd*[19] and *Waahi Paraone Ltd v Far North District Council*[20]) there was no exclusive occupation reasonably necessary to achieve the purpose of the permit. The Foreshore and Seabed Act 2004 strongly supported the view that the coastal permit had effected no alienation of land.

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[14] *Southern Alps Air Ltd*, para 50, following *Mt Cook National Park Board v Mt Cook Hotels Ltd* [1972] NZLR 481 (CA); *Nordern v Blueport Enterprises Ltd* [1996] 3 NZLR 450; *Tram Lease Ltd v Croad* [2003] 2 NZLR 461 (CA).

[15] *Southern Alps Air Ltd*, para 53. Earlier in the judgment, para 36-37, Panckhurst J observed that the import of the Maritime Rules had been overlooked in his earlier decision *Dart River Safaris Ltd v Kemp*, so that the decision was robbed of its precedent value as to derogation. But as the Judge goes on to say, *Dart River Safaris Ltd* was decided not on derogation but on the apparent inability of the Environment Court to impose obligations on an existing consent holder.

[16] *Southern Alps Air Ltd*, paras 30 and 33.

[17] [2008] NZRMA 165 (HC).

[18] [2002] NZRMA 422 (CA).

[19] [2003] 3 NZLR 614 (CA).

[20] [2005] 1 NZLR 525.

RMA Cases: Property Concepts to Determine Ownership of a Resource Consent

While the previous group of RMA cases concerned the extent of the rights that could be exercised and defended under a resource consent, this second group concerns competing claims to hold the consent, or the rights under the consent.

Armstrong v Public Trust[21] concerned two coastal permits in the name of a father and son to authorize whitebait stands in the coastal marine area on the Moeraki River in South Westland. The official record of ownership was simply "J & A Armstrong." On the father's death, the son contended that he was entitled to be recognized as the sole holder of the permits by reason of the common law right of survivorship of a joint tenant. The Public Trust, as executor of the father, argued that there was no joint tenancy, and that the permit vested, presumably as to a one-half share, in the Public Trust, for transmission to his daughter under his will. The Trust relied on the absolute character of section 122(1), that a resource consent is neither real nor personal property, and on section 122(2)(a) as a specific and comprehensive provision, so that an interest capable of being held by the personal representative arose only as and upon the consent holder's death.

However Fogarty J did not agree. He held that the purpose of section 122(1) is to prevent the unfettered transfer of resource consents except where specifically provided. But whether the consent was held by one or more persons raised no readily ascertainable generic resource management issue. Such a matter is normally a result of private arrangements. Section 122(2)(a) implicitly recognizes the private ordering of affairs, including arrangements such as joint ownership, and there was no reason that the common law on joint tenancies should not apply, including the right of survivorship. That meant that on his father's death the son became the sole owner.

The decision is a good simple illustration of how a court must decide a dispute between parties not related by contract even though the legislation provides no direct guidance. It also illustrates something to which we will return; the reluctance in legal thinking to oust property law as a means of dealing with such disputes. It shows a willingness to draw a line between the public aspects of a statutory scheme for the allocation of rights, where significant questions of policy are at stake, for which the legislature receives all due deference, and the private questions, where policy issues are less at stake, for which rather less deference is given.

The Favourite Ltd v Vavasour[22] brought out in the RMA context the title scenario that is familiar in property law; A grants an interest to B, A then grants an interest or sells to C; does B have priority over C? The item in question was a water permit for vineyard irrigation in the Awatere Valley, in the hands of Vavasour (A). The Favourite Ltd (B) alleged that Vavasour held the permit as agent, or as trustee, for it, and took proceedings when Vavasour transferred the permit to Awaroa Vineyards Ltd (C). The proceedings were a strike-out application brought (successfully) by the District Council so there was no need to resolve the A-B-C

[21] [2007] 2 NZLR 859, [2007] NZRMA 573 (HC). The case has attracted commentary by David Grinlinton, "The Nature of Property Rights in Resource Consents" [2007] RMB 37 and Laura Fraser, "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991" (2008) 12 NZJEL 145 at 166.

[22] [2005] NZRMA 461 (HC). On cases of this kind, see two useful notes by N McIndoe, "Who is the Consent Holder?" Resource Management News, August 2008 p 21, November 2008 p 32.

question, whether under principles from property law or otherwise. The Council could not be said to be owe a duty of care to The Favourite, whose alleged interest was unknown to it – there was no proximity – and it could not be said to have derogated from a grant, because The Favourite held no grant. The decision is indeterminate about the use of property law; what is interesting is the fact situation. One can easily see similar allegations of agency or trustee duties arising again in the future.

Ferguson v Canterbury Regional Council[23] dealt with the failure of a vendor of a rural lot at Halkett to transfer a water permit to a purchaser. During proceedings in the Environment Court for an enforcement order and declaration, the vendor agreed to make the transfer, so the matter became one of costs. The vendor's water permit included a condition that on the sale of the property the holder shall arrange for the transfer of the consent to the new owner; so the matter could well have been disposed of on RMA grounds without having to venture into contract or tort law. The agreement for sale and purchase of the property did not include an express obligation to make the transfer, and the Court observed that it would have been prudent for the purchaser's lawyer to check on the resource consent situation.

Hampton v Hampton, decided earlier this year, can also be analyzed in terms of an A-B-C dispute, and indicates the procedural and jurisdictional questions that will arise in many such disputes. SJM (Simon) Hampton obtained a water permit for his farm near Ashburton. His cousin, WR (Robert) Hampton, owned an adjacent farm. The application referred to use of the water to irrigate Robert's farm as well as his own, but the permit was issued in Simon's name only. Later, Simon advertised the water relating to Robert's land for sale or lease, and entered into discussions with Stewart & Burke Ltd to transfer rights to it. Robert alleged an agreement or understanding that he and Simon would be holders of the permit together, or an agreement that Robert would be protected, but Simon did not accept this assertion. Robert applied to the Environment Court for an enforcement order to amend the water permit so that he would become a joint owner with Simon. The Environment Court held that it had jurisdiction to resolve who is the proper holder of a resource consent. It observed that it might need to determine interests in or rights associated with resource consents and the obligations and rights of parties in respect of transfers under section 136, and (perhaps less open to argument) that it was not for it to determine issues of equity or contract between the parties.[24] It also decided that it had jurisdiction to issue an enforcement order. On appeal, the High Court held on this latter point that the Environment Court did have jurisdiction to amend a resource consent as to owner, but by means of a declaration under section 310, rather than by means of an enforcement order, which would require there to be a contravention.[25] The High Court went on to decide that the Environment Court did have jurisdiction to determine the application, because it was being asked to interpret the Act and the Plan and say whether the water permit should be in the joint names. Whether there was an enforceable contract between Simon and Robert was not essential to the outcome.[26]

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[23] Environment Court, C101/2008, Bollard EnvJ, Comsrs Watson & Bunting, 5 September 2008.

[24] *Hampton v Hampton*, Environment Court C102/2008, Smith EnvJ, Comsr Manning, 12 September 2008, paras 21, 34-35.

[25] *Hampton v Hampton*, High Court Christchurch CIV-2008-409-2394, Chisholm J, 9 March 2009, paras 44 and 47, referring to s 310(c) as debatable but s 310(h), any other issue or matter relating to the interpretation, administration, and enforcement of this Act, as beyond doubt wide enough.

[26] *Hampton v Hampton*, High Court, paras 55-64. If there is to be co-ownership, one can observe, especially in the light of *Armstrong v Public Trust*, that tenancy in common may suit arms-length parties rather better than joint tenancy.

One can see several difficulties with this path. How exactly does one use Part 2 of the RMA and provisions of a regional plan to decide who should be the holder of a consent? How sure can one be that the Environment Court can reach a just result when it cannot consider the relations between the parties in contract, tort or equity? Will it be different if transactions such as Simon to Stewart & Burke Ltd have been completed, leaving Robert and that transferee in dispute? Without any contractual or tortious nexus between them, the matter will presumably be one of property law alone. Procedurally, how does a person with a claim on a water right commence proceedings? It will be clumsy if they have to take place in both the Environment Court and the District or High Court.

Legislative History

We therefore have a set of cases where legal thinking gravitates towards ideas from property law, even though the rights are granted under a statute, and even though the statute says with some vigour that the rights are not property. How should we understand this? Is it reckless enthusiasm or sound development of the law? Where will it take us?

Section 122, of course, should be our starting point. It has only been slightly amended since 1991. It had no predecessor in the Water and Soil Conservation Act 1967 or Town and Country Planning Act 1977. It appeared as clause 103 in the Resource Management Bill at its first reading, in much the same form as now. At the second reading stage, the provisions in clause 103 concerning charges under the old personal property legislation were elaborated, and grants of exclusive rights of occupation or possession of coastal marine area were constrained. Although complete research will have to wait for another day, there does not seem to have been any real interest in the matter in debate in Parliament. In the law reform process, tradeable rights were discussed as an alternative to administrative procedures in allocating rights to resources.[27] Transferability of development rights and water rights was discussed, but the legal nature of the right that could be transferred did not loom large.

The Broader Context of the Question

Our difficulties with the RMA are an example of a broader issue. The granting of rights to resources is common in all aspects of natural resources law, whether the resources are oil and gas, minerals, water, or grazing land. The resources themselves are commonly publicly-owned, and rights to them (whether called resource consents, licences, permits, or something similar) are granted by a minister or a departmental official, under the procedures and on the terms set forth in a governing statute. Some aspects of the nature of such rights have been apparent for many years. A good deal of scholarly effort, for example, went into developing an understanding of oil and gas rights in different countries. It showed that in many cases an oil or gas permit or agreement (whatever its actual name) combined elements of statutory regulation and of contract.[28] Other aspects have emerged only more recently. Not all important natural resources are the subject of property law regimes,[29] but we are seeing a

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[27] *People, Environment, and Decision Making: the Government's Proposals for Resource Management Law Reform* (Wellington: Ministry for the Environment, December 1988), pp 30, 38.

[28] Eg, Terence Daintith, ed, "The Legal Character of Petroleum Licences: A Comparative Study" (Dundee: Univ of Dundee and Energy and Natural Resources Ctee of the International Bar Association, 1981).

[29] K Gray, "Property in Thin Air" [1991] Cambridge L J 252.

gradual "propertizing" of many natural resources. Policymakers and legislatures in many countries are adopting schemes for environmental and resources management that are based on ideas from economics. They suggest that pressure on fisheries resources, water resources, water quality, air quality, and global climate can be addressed by market-based approaches such as "cap-and-trade" systems.

There are different reasons why a court may need to determine whether a statutory permit of this kind has the character of property. One category of reasons is whether the statutory permit comes within the statutory definition of property in another statute, such as a bankruptcy statute. A second is whether the permit holder is entitled to the special protection that property rights may enjoy, under the constitution provisions that are found in many countries (although not New Zealand), or under investment treaties. The third category is the broadest, and, I would argue, the most basic; whether the general law of property may be applied to the permit. A property right is an entitlement that is good against persons with whom we have no contract, in short, strangers.[30] A contract can be enforced only against a party who is privy to the contract; in contrast, a proprietary right can be enforced against anyone who interferes with it.

So, for example, if a person who holds a permit grants an interest in the permit to a second person, such as a lease or an overriding royalty, and then conveys the permit to a third person, is the permit in the hands of that third person bound by the lease or royalty? If that sounds strange, then bear in mind that section 92 of the Crown Minerals Act 1991 is the same as section 122 of the RMA, as to its first three subsections. Although there appear to be no cases decided under section 92 yet, questions of this kind have always been a concern to petroleum and mining lawyers.[31]

In dealing with these matters, the courts are often inclined to turn to classical statements of the nature of property. *National Provincial Bank Ltd v Ainsworth* is one such, in considering the extent to which possible personal rights between spouses in a marriage breakdown could produce a new equitable interest in a property that would be binding on third parties: lord Wilberforce observed:[32]

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence and stability.

Another classical source that is frequently referred to is the set of standard incidents (or characteristics) identified by A M Honoré in his essay "Ownership":[33] the rights to possess, to

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[30] B Rudden, "Economic Theory v Property Law: The *Numerus Clausus* Problem" in J Eekelaar and J Bell, eds, *Oxford Essays in Jurisprudence, Third Series* (Oxford: Oxford University Press, 1987) p 239.

[31] In recent years the legal status of overriding royalties has become a more important question in the mining industry as they have become used in new ways to finance mineral exploration and development. The classic Canadian case on overriding royalties in minerals is *Saskatchewan Minerals Ltd v Keyes* [1972] SCR 703, where Court of Appeal held that a Crown mineral lease, and a royalty granted out of it, were interests in land and was binding upon a subsequent assignee of the lease – it ran with the land. The majority of the Supreme Court of Canada decided the case on other grounds, but Laskin J agreed with the Court below. *Bank of Montreal v Dynex Petroleum Ltd* [2002] 1 SCR 146 (Alta) vindicated Laskin J's view, in relation to a royalty created by a lessor of privately-owned minerals; so the case does not shed light on the status of stautory licences.

[32] [1965] AC 1175, 1247-48.

[33] A M Honoré, "Ownership" p 107 in A G Guest (ed), *Oxford Essays in Jurisprudence (First Series)* (Oxford: Clarendon Press, 1961).

use, to manage, etc. However exactly how such enunciations can be used to solve problems about the nature of statutory intention is by no means clear. (In fact observations by Honoré, rather later in his essay, about rights in variable collections of things, and of funds, seem to be more useful.)

It seems that in common-law jurisidictions there is no generally-accepted body of law for ascertaining whether the attributes of property ownership attach to permits granted under statutes. But it is useful to take a brief look at instances in other countries concerning different natural resources.

Newcrest Mining (WA) Ltd v Commonwealth

There are two main kinds of case in the Australian law on the characterization of resource tenures. The first is on the Commonwealth of Australia Constitution Act, section 51(xxxi), empowering the Commonwealth Parliament to enact laws for the acquisition of property on just terms, which operates to provide protection to property rights. One of the key cases is *Newcrest Mining (WA) Ltd v Commonwealth*[34] which concerned 25 mineral leases under the Mining Act 1980 (NT). In 1989 and 1991, the Commonwealth government extended the boundaries of Kakadu National Park to include the leased areas. In the Park, the *National Parks and Wildlife Conservation Act* 1975 (Cth) applied, prohibiting operations for the recovery of minerals. Newcrest sued for compensation on the ground that there had been an acquisition of property from it without just terms. By a majority, the High Court of Australia agreed. The main analysis of the character of the resource right was by Gummow J. Australian courts have considered mining leases in different ways over the years. They have taken note of the observation of Lord Cairns in *Gowan v Christie*[35] that a mining lease is really, when properly considered, a sale out and out of a portion of the land, but that it gives a liberty or licence to an individual for a time to go into the land and get minerals if they can be found, and to take them away, just as if he had bought so much of the soil. Windeyer J had made the link between these observations on the general law and mining leases granted under statute.[36] Gummow J endorsed this link. Newcrest's leases could not therefore be dismissed as no more than statutory privileges under a licensing system, as was the fate of some such claims.[37] Nor was there mere impairment; Newcrest's rights were effectively sterilized. Toohey and Gaudron JJ agreed with Gummow J, while others either noted that the leases under the Mining Act were property, or did not dwell on the matter.

The High Court of Australia reached a different result the next year in *Commonwealth v WMC Resources Ltd*[38] in respect of petroleum permits under the *Petroleum (Submerged Lands) Act* 1967, partly because the permits were on the continental shelf and therefore not carved out of the Crown's radical title, and partly because the statutory regime was more flexible and

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[34] (1997) 147 ALR 42, 71 ALJR 1346, 190 CLR 513. See M Crommelin, "The Legal Character of Resource Titles" (1998) 17 AMPLJ 57.

[35] (1873) LR 2 Sc & Div 273. In fact a mining lease can be a conventional lease with additional rights to mine and remove minerals.

[36] In *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177.

[37] *Newcrest* 147 ALR 42, 130, referring to *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; *Bienke v Minister for Primary Industry and Energy* (1996) 63 FCR 567.

[38] (1998) 194 CLR 1.

exposed the holder to a greater range of administrative actions; they were "inherently unstable."[39]

Wik Peoples v State of Queensland

The other main reason to inquire into the character of resource dispositions in Australia has been to determine whether the issue of a disposition has had the effect of extinguishing aboriginal title. *Wik Peoples v State of Queensland*, a year or two before *Newcrest Mining (WA) Ltd*, decided by a majority that pastoral leases did not confer exclusive possession on the leaseholder in a way that would exclude the interests of the indigenous inhabitants. The effect of a pastoral lease under the Land Act had to be ascertained by reference to the langauge used in the Act and reflected in the instrument of lease. It was not a necessary consequence of the description of the instruments as leases that they conferred a right of exclusive possession on the lessee. Whether a lease has been granted is determined by reference to the substance of the rights conferred. Gummow J is particularly useful.[40]

> To reason that the use of terms such as "demise" and "lease" in legislative provisions with respect to pastoral leases indicates (i) the statutory creation of rights of exclusive possession and that, consequently, (ii) it follows clearly and plainly that subsisting native title is inconsistent with the enjoyment of those rights, is not to answer the question but to restate it.

Gummow J went on to refer to numbers of Australian cases that have emphasized that the rights under statutory dispositions under Land Acts and the like must be ascertained by reference to the statute, without attaching too much significance to similarities to interests under the general law. He quoted from Mason J in *R v Toohey ex p Meneling Station Pty Ltd*[41] "[L]and law is but one area in which, while statute may appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature has done so only on particular terms."

Wik Peoples was followed by *Ward v Western Australia*; notwithstanding "its common law connotations, the nomenclature of a 'lease' (when used as a descriptor for pastoral leases) does not of itself grant exclusive possession."[42]

Matthew Storey has tackled the challenge of bringing the numerous Australian cases into some kind of order.[43] His central contention is that the characterization of a resource title should stem from an assessment of the attributes of the interest in question, and not from a comparison of these attributes to an interest "known" to the general law. An undue focus on "interest in land" (as a route to compensation and as a basis for the existence of rights *in rem*) has distorted the consideration of the nature of resource titles. He proposes five classes of statutory property as a means of analysis:

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[39] Gummow J at para 194.

[40] (1996) 141 ALR 129 (HCA), 241.

[41] (1982) 158 CLR 327 at 344, quoted at p 242 of *Wik Peoples*.

[42] (2002) 213 CLR 1, 191 ALR 1, 76 ALJR 1098, para 180. On whether a pastoral lease grants a right to exclusive possession, the New Zealand High Court has recently diverged from the main Australian cases: *NZ Fish & Game Council v Attorney General* (unreported, High Court Wellington CIV 2008-485-2020, 12 May 2009, Simon France J). It emphasized the overlay in the Australian cases of the issue whether there was an alienation by the Crown sufficient to extinguish aboriginal title, and the presence of clear words from the legislature to do so. It also analyzed differences in the legislation and in the general context, and therefore distinguished *Wik Peoples v Queensland* and *Western Australia v Ward*, and preferred *Wilson v Anderson* (2002) 213 CLR 401.

[43] Matthew Storey, "Not of this Earth: The Extraterrestrial Nature of Statutory Property" (2006) 25 ARELJ 51.

1. Statutory replication of a common law title. *Newcrest Mining (WA) Ltd v Commonwealth*.
2. Defeasible statutory replication of a common law title. *Harper v Minister for Sea Fisheries*.[44]
3. Statutory property bearing no common law parallel. *Commonwealth v WMC Resources Ltd*, *Western Australia v Ward*.
4. Statutory licence, which only makes an act lawful which without it would be unlawful.[45]
5. Public right created by statute, without any permanence or capability of being assigned to third parties, conferred by the legislation on all members of a class, without the need for a grant.

Storey accepts that cases like *WMC Resources* and *Wik Peoples* cast doubt over key parts of his classification; but at a minimum the classification stimulates thought about the similarities and differences between the cases.

Saulnier v Royal Bank of Canada

More useful, in my view, are two cases where judges sought to identify the characteristics of statutory licences that would require them to be treated as property. Both dealt with disposition of the licence in an insolvency.

Saulnier v Royal Bank of Canada[46] decided whether a commercial fishing licence under the Fisheries Act of Canada constituted "property" available to a trustee in bankruptcy under the Bankruptcy and Insolvency Act (BIA), or to a creditor who has registered a general security agreement under the Personal Property Security Act (PPSA) of Nova Scotia. The bankrupt fisher argued that the licence was merely a privilege to that which would otherwise be illegal, and therefore did not pass to either such person. For the Supreme Court of Canada, Binnie J began his analysis with a reminder – relevant to us in New Zealand – that the question was one of statutory interpretation, not one of the concept of property in the abstract. Its task was to interpret the definitions of property in the legislation in a purposeful way. It also cautioned that a fishing licence could be within the reach of the statutory definitions in the BIA and PPSA even if it did not qualify as "property" for the general purposes of the common law. "For particular purposes Parliament can and does create its own lexicon."[47] It then proceeded to observe that a fishing licence is more than a mere licence to do that which is otherwise illegal, it is a licence coupled with a proprietary interest in the harvest from the fishing effort – a point to which it would return. It was extremely unlikely that a simple licence could be property at common law. The Court then outlined the three different approaches that could be seen in the case law.

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[44] (1989) 168 CLR 314. The Court held that the fees payable under commercial abalone licences under the Fisheries Act were analogous to the price of a profit à prendre, and so not a duty of excise.

[45] This phrase is used by Gummow J in *WMC Resources Ltd* at 71 [189], and acknowledging its origins in *Thomas v Sorrell* (1673) Vaugh 330, 351, 124 ER 1098. *R v Toohey ex p Meneling Station Pty Ltd* (1982) 158 CLR 327 is an example.

[46] (2008) 298 DLR (4th) 193 (SCC).

[47] *Saulnier*, para 16.

The Traditional "Property" Approach. Earlier cases concerning fishing licences and quotas to grow tobacco, such as *National Trust Co v Bouckhuyt*,[48] had referred to the traditional indicia of property, such as permanence or a significant term. The Court accepted that the PPSA required a broader concept of property, and that common law notions should not be a stumbling block to the recognition of licences and quotas as property for statutory purposes. In any event there was some analogy to a profit à prendre, and the Court noted that the Australian High Court in *Harper v Minister for Sea Fisheries* had noted this too, but with the warning that the licence is nevertheless a statutory creation.[49]

The Regulatory Approach. *National Trust Co v Bouckhuyt* resulted in a line of cases in which licences were held to be property if the regulatory authority was obliged, or almost obliged, to grant a renewal, showing that the licence is more than transitory and ephemeral. But the Supreme Court decided that this approach was of limited value; a lease of land is a property right even if only for one day or one hour, and there were no criteria to determine how much of a "fetter" on the discretion is enough to transform a mere licence into a property right. The prospect of renewal was not determinative.

The Commercial Realities Approach. This view found favour at trial, where the evidence was that fishing licences, particularly for lobster, are commonly exchanged between fisherment for a great deal of money; fishing vessels of questionable value are traded for small fortunes because of the licences that are anticipated to come with them. "To ignore commercial reality would be to deny creditors access to something of significant value in the hands of the bankrupt. That would be both artificial and potentially inequitable."[50] Other decisions from Canada and England have followed this approach. However the Supreme Court of Canada did not agree. Many things that have commercial value do not constitute property, while the value of some property may be minimal. There is no necessary connection between proprietary status and commercial value. Binnie J said:[51]

> I agree with the Court of Appeal that "commercial realities" cannot legitimate wishful thinking about the notion of "property" in the *BIA* and *PPSA*, although commercial realities provide an appropriate context in which to interpret the statutory provisions.

Having exposed the wishful thinking, Binnie J turned to his Preferred Approach. The holder of a licence acquired more than merely permission to do that which would otherwise be unlawful. "The holder acquires the right to engage in an exclusive fishery under the conditions imposed by the licence, and, what is of prime importance, a proprietary right in the wild fish harvested thereunder, and the earnings from their sale."[52] One must look at the substance of what was conferred; a licence to participate in the fishery coupled with a proprietary interest in the fish caught, which bore a reasonable analogy to rights traditionally considered at common law to be property, so, reasonably, within the statutory definition of property in the BIA and PPSA. Essentially it is the first approach, the Traditional Property approach.

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[48] (1987) 61 OR (2d) 640 (Ont CA).

[49] *Saulnier*, para 33.

[50] *Saulnier*, para 41, quoting Kennedy CJSC at trial.

[51] *Saulnier*, para 42. On no necessary connection, he cited T G W Telfer, "Statutory Licences and the Search for Property: the End of the Imbroglio?" (2007) 45 Can Bus L J 224. On the earlier law on this matter, see RCC Cuming, C Walsh, RJ Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2005) p 109.

[52] *Saulnier*, para 43. Also see para 34.

In this analysis, old common law terminology won an unusual significance. A "licence" is defined in classical terms of private law as the right to do that which would otherwise be trespass, or illegal. The Court also relied on the old term for a profit à prendre, "licence coupled with a grant" to shape the two factors that apparently made it possible to declare the Fisheries Act licence to be property.[53] The Court did not say that they are *necessary* factors.

Re Celtic Extraction Ltd

In 1999 the English Court of Appeal had to determine whether a waste management licence granted under the Environmental Protection Act 1990 might be property for the purpose of an insolvency. Two waste disposal licences were in issue. In each case the company became insolvent, and the official receiver applied to the court for directions whether he could and should disclaim the licence. (While the trustee in bankruptcy in *Saulnier* wanted to get in the licence, the receiver here wanted to get rid of it.) In the Insolvency Act 1986, section 178 allowed a liquidator to disclaim any "onerous property." Property was defined in the Act in very general terms, and many decisions had emphasized the importance of ensuring that a liquidator had access to the full range of the bankrupt's assets. The word "property" is not a term of art but takes its meaning from its context. The key passage of Morritt LJ, speaking for the Court of Appeal, is as follows.[54]

> [33] It appears to me that these cases indicate the salient features which are likely to be found if there is to be conferred on an exemption from some wider statutory prohibition the status of property.
>
> First, there must be a statutory framework conferring an entitlement on one who satisfies certain conditions even though there is some element of discretion exercisable within that framework …
>
> Second, the exemption must be transferable …
>
> Third, the exemption or licence will have value …

The Judge found that each criterion had been met in terms of the provisions of the 1990 Act. As for value, the trial Judge had observed that there was a market in these licences, and it was common ground that money changed hands between transferor and transferee. The very substantial fees that the Environment Agency charged licensees was a good indication of the substantial value that a waste management licence possesses for the owners or occupants of the land to which it relates. (But it seems that there was little actual evidence on the matter.) The licences were therefore property. The effect was that the official receiver could disclaim the licences, without the costs of remedial works being a charge on the creditors' assets.

The Court of Appeal's list of three features has a precise look about it, but in truth it is rather loose. Are the features of general application? The Court relied on cases from a general range, not confined to environmental regulation. Are the criteria both necessary and sufficient; if one establishes all three criteria, is the licence property? Property for all purposes, or only insolvency? Is it the test for disclaimer only? The question of the value of the licence seems little explored. Taken together, the criteria are easy to meet. A wide range of licences, exemptions and permits under environmental, economic and social legislation can meet these tests. The first is so wide as to encompass much of the work of the modern regulatory state.

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[53] On this *Saulnier* para 30 quoted Megarry and Wade, *The Law of Real Property*, 4th ed 2008(?); see 4th ed, 1975, p 779.

[54] *Re Celtic Extraction Ltd (in liq)* [2001] 1 Ch 475. The passage is repunctuated, and references to cases and the relevant sections of the legislation have been omitted.

The second criterion, transferability, is present in much economic and environmental regulation. The third, value, is often easy to establish, and, in any event, is more a matter of remedies and relief than of substance. There is something of a self-defining character about it.

One difference between *Re Celtic Extraction Ltd* and the other cases that we have been considering is that the waste management licence did not allow any publicly-owned natural resource to be taken. It is quite different from *Saulnier v Royal Bank of Canada*, where the Court set much store by the coupling of the regulatory licence with the obtaining of a proprietary right in the fish caught. There is no equivalent of the analogy with property interests known to general law, such as profits à prendre, mining leases or grazing leases, that was important in some of the Australian cases. Nor was there any equivalent of the grant of rights out of the Crown's radical title that was important in others. The requirement to obtain a waste management licence was a restriction on the use of all land that had no private law equivalent, however regular and ordinary as a matter of public law.

How Do We Decide?

If we continue in this broader context, considering different countries and a variety of legislation, we seem to find five main candidates for a rule or principle for deciding whether a statutory licence is property of some kind. They are not easy to separate from each other. I do not offer a firm view about which one or combination is right, although it is reasonably easy to say which approaches need more attention.

(1) Assimilation

If the statutory right can be assimilated to a property right known to the general law, then it must clearly be a property right. It is not *like* a lease or a profit à prendre, it *is* one. This is only sometimes seen. A variation, dependent on the meaning of "land" in a land tax act, the Rating Powers Act 1988, is *Telecom Auckland Ltd v Auckland City Council*[55] where the Telecommunications Act provided for ownership of lines by the network operator when they were in the soil, which was held to be an exclusive right of occupation, beyond an easement, and fell within the meaning of "land." Telecom failed in its argument that it was wrong to assimilate rights created by statute with rights known to the general law.

A striking difference of opinion on assimilation occurred in *Wik Peoples v State of Queensland*. Brennan CJ maintained that where the Crown lands legislation used technical legal terms such as "lease," the ordinary principles of statutory construction suggest that is exactly what was meant. "To regard interests derived from the Crown as a mere bundle of statutory rights would be to abandon the whole foundation of land law applicable to Crown grants."[56] The majority replied that they were not turning their backs on centuries of history, nor impugning basic principles of property law; rather they were recognizing historical development, the changes in law over centuries, and the need for property law to accommodate the very different situation in the particular country.[57]

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[55] [1999] 1 NZLR 426 (CA).

[56] (1996) 141 ALR 129, 155 (HCA).

[57] Ibid per Toohey J, p 174.

(2) Analogy

Analogy has always been a method of legal analysis on a matter or in a field that is not covered by existing rules or principles. The courts have often asked whether the statutory right in contention is like a proprietary right known to the general law. It is a lower test than assimilation. In *Harper v Minister for Sea Fisheries*[58] Brennan J drew an analogy between the commercial abalone licences under the Fisheries Act of Tasmania that were in issue and the profit à prendre, particularly a profit of piscary. Other Judges in the case, Mason CJ, Dean and Gaudron JJ, agreed, but were more careful to emphasize that the licence was "an entitlement of a new kind."

It is reasonably easy to identify common law analogies where a statutory licence grants a right to take a natural resource such as fish or minerals or grazing rights. It is less easy to do so with mineral exploration licences that do not grant any right to extract the minerals, or with water, for the common law did not know rights to take natural water other than under riparian rights. Still less easy is it to do so with new rights like emission units. This will lead to strange results, because legislatures devising such new rights sometimes go to great lengths to ensure that the rights are as stable and transferable as other kinds of property.

(3) One Incident or Another of Property

Another way to pose the question is whether the statutory licence displays the key one or more characteristics of property rights as known to the general law. Just what those key characteristics may be, of course, is eminently open to debate. Exclusivity has its advocates.[59] But natural resources law dispositions often only show exclusive rights in relation to the particular activity prescribed. In respect of fisheries quota or emissions units, it is a great deal less useful as a criterion. Term or duration is another such incident of property that is often sought in statutory licences, on the basis that property rights, as was said in *National Provincial Bank v Ainsworth*, must have some degree of permanence and stability. However under the common law, an estate of leasehold if properly created has the same legal status as a form of property whether it is for one hour or for one thousand years. In *Saulnier*, Binnie J discusses this aspect, under the possibly confusing heading of a "regulatory" approach. Transferability is another incident of property that is often resorted to. Many statutory natural resources rights are transferable but subject to restrictions of one kind or another. Again, the common law basis of the criterion is not free from difficulty. The law has long been familiar with restraints upon alienation. Strict settlements, for example, restricted the alienation of much of the land of England in the eighteenth and nineteenth centuries.[60] Leasehold estates are very commonly subject to a covenant not to assign without the consent of the lessor first had and obtained, and indeed the law is content with a covenant that simply declares that the leasehold shall not be assigned.[61]

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[58] (1989) 168 CLR 314. This was quoted in *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251 (HC) para 29.

[59] Laura Fraser, "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991" (2008) 12 NZJEL 145, discusses exclusivity thoroughly, but her context is clarification of the RMA rather than ascertaining the existence of property characteristics.

[60] E Spring, "Landowners, Lawyers, and Land Law Reform in Nineteenth-Century England" (1977) 12 Amer J Legal History 40, 50. In 1872, 80% of the land in Britain was in the hands of 7000 persons; and most of that would have been held under strict settlements which limited transferability and user.

[61] GW Hinde, NR Campbell and P Twist, *Principles of Real Property Law* (Wellington: Lexisnexis, 2007) para 11.101.

A more useful form of this approach is to take a full view of all the incidents conferred by the statute, not only one. Taking such an overview, a court considers all the incidents (ie rights and obligations) that the statute confers on the holder of a consent or licence, including certainty of term (or expectation), exclusivity as suitable to the subject matter, security, transferability, involuntary disposition, registration, and so on. With such an integrated view, a court may be able to come to a conclusion on the substance and reality of what the legislature has done. The overview avoids an unproductive focus on any one incident of property. To some extent, *Aoraki Water Trust*[62] and *Armstrong v Public Trust*[63] both pursued this approach. It seems to be one of the more effective approaches that a court can take; but it is evaluative, and provides no one simple touchstone.

(4) Administrative or Statutory Aspects

In *Re Celtic Extraction Ltd*, one of the three criteria offered was that there must be a statutory framework conferring an entitlement on one who satisfies certain conditions, even though there is some element of discretion exercisable within that framework. It was also noted that the entitlement exists as an exemption from a statutory prohibition. *Saulnier v Royal Bank of Canada* found value in the same criterion; the licence to participate in the fishery was coupled with a proprietary interest in the fish caught. However, as a criterion this does not seem a helpful way in which to distinguish some kinds of statutory rights from others, because it simply describes one of the elementary characteristics of any system of statutory regulation. Systems of regulation, of which the RMA is one, invariably proceed by first identifying with some care a particular kind of conduct or activity – fishing, exploring for or extracting minerals, emitting pollution – and then prohibiting persons from engaging in it except on terms that the designated regulatory agency allows, whether by a general rule or by a particular permit or licence.

(5) Commercial Reality, Expectations, Intention of the Parties

Wishful thinking, according to the Supreme Court of Canada in *Saulnier*, will not justifiy a "commercial realities" approach to bringing a property right into existence. There is obvious truth in that; the fact that a result is commercially difficult does not mean that it is bad law. Commercial convenience is not a touchstone for property, although the Court agreed that it was desirable to interpret legislation in the light of such considerations. But the matter does seem to call for further thought, especially in cases where the law is unclear. Commercial reality seems to blend into commercial expectations, and that in turn takes us to the intention of the parties. The mere intention of the parties, it is generally agreed, is insufficient to turn an arrangement into a proprietary one. But the thwarting of expectations at a more general level may lead to unjust results.[64]

Overriding royalties in the mining industry, previously mentioned, help to explore commercial realities. Take a case where the parties express their intention that royalty runs with the land, where the purchasers of the property have notice of the royalty, and where there

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[62] *Aoraki Water Trust v Meridian Energy Ltd* [2005] NZRMA 251 (HC) para 34.

[63] [2007] NZRMA 573 (HC). *Clarkson v Wishart* [1913] AC 828 (PC), discussed below, relied strongly on this approach.

[64] What the Supreme Court of Canada decided in *Saulnier v Royal Bank of Canada* about the unacceptability of commercial reality is not easily reconciled with what it decided in *Bank of Montreal v Dynex Petroleum Ltd* [2002] 1 SCR 146 (Alta), where the context and customs of the oil and gas industry were taken into account in recognizing a new form of property right that could bind third parties.

is evidence of commercial expectations within the industry that such royalties are intended to to bind successors in title, and that the particular purchaser knew of this expectation. At what point should the purchaser be excused on the mere ground that the law does not recognize that the statutory mining lease, or the royalty carved out of it, is property? The same can happen in relation to dealings in water permits: "they knew when they bought the farm that it was burdened with a water share agreement where I get one-third of the water, and everyone knows that you have to honour these agreements." In fact a case like *The Favourite Ltd v Vavasour* show that such claims are quite foreseeable.

At the risk of being taxed for failing to fulfil any promise implied in a heading "how do we decide?" it seems necessary to admit that it is easier to see the shortcomings in any one of these criteria, or combinations of criteria, than to pronounce which of them is the right one. The law cannot be said to have emerged from the cases with any clarity. There are relatively few cases to draw on. Nor is there any sizeable body of academic analysis either. What is possible is to consider a set of points that may make it possible for us to understand what issues seem to be in play.

Difficulty of Separating Property and Statute

Argument by analogy or by assimilation causes one to realize that we face a familiar question, whether statutory rights and common law rights are entirely separate. Do they exist in two different realms, so that ideas from the one should not be taken into the other? If that is absolutely so, then of course our main question would not need an answer; statutory rights and property are quite different, and a statutory right has proprietary characteristics only if the statute says so, and only in a sense that is not really the same at all as ordinary proprietary rights. But the argument breaks down very quickly. At the very heart of the English common law of real property, for example, the estate in fee simple is actually a creature of the statute of *Quia Emptores* of 1290. The legislature has been active ever since, and it would take a great deal of courage to say of measures such as the Statute of Frauds that "this is common law, but that is statute." Registration statutes completely dominate the law of title to land and goods. Environmental law provides examples as well; one is the difficulty the High Court expressed in *Springs Promotions Ltd v Springs Stadium Residents Association Inc*[65] in drawing a line between RMA public law and doctrines of waiver, estoppel and election, and another is the interplay between nuisance and RMA amenity, explored in *Ports of Auckland Ltd v Auckland City Council*[66] and *Hawkes Bay Protein Ltd v Davidson.*[67] At the same time we must avoid any old-fashioned rearguard defence of the common law against legislative intrusion. If then property and statute are not entirely different realms, it seems possible to envisage statutory rights that include property characteristics.

There does not seem to be any way to draw a clear bright line between the realm of entitlements in administrative law from those in property. A statutory entitlement, so relied on in *Re Celtic Extraction Ltd*, is a commonplace in legislation. Much of administrative law is devoted to protecting entitlements of different kinds, including privileges and expectations. It has been argued that entitlements for social security benefits and the like must be regarded as

[65] [2006] NZRMA 101 (HC).

[66] [1999] 1 NZLR 601.

[67] [2003] 1 NZLR 536.

property.[68] The law of substantive legitimate expectation, has a potential to merge into property law, a potential that would be desirable to explore in detail.[69]

Inadequate Statute Law

The legislation that should govern these matters is often weak. Certainly, there will always be gaps in a statutory scheme, which the courts will try to fill, drawing what inferences they can as to the intention of the legislature. The courts will also always be obliged to determine the relationship of a statute with other bodies of law. But the problem seems to be deeper than that. Legislatures often pay little attention to the property characteristics of the licences that can be granted under an Act. In fact, in section 122, the RMA is actually clearer than many other natural resources statutes internationally. Some legislative efforts are downright obscure. For example, some mining legislation sharing a Commonwealth heritage declares that the interest of the holder of a licence or claim under the Act is a "chattel interest." This could be chattels real (leases) or chattels personal. Australian and British Columbia courts held that this meant personal chattels.[70] The New Zealand Court of Appeal in *Tainui Maori Trust Board v Attorney General*[71] held that it meant chattels real, so that a coal mining licence was an interest in land. Either interpretation is credible; the legislative statement is deficient.

Legislatures often seem reluctant to say whether the licences are proprietary in any sense. A reason may be a wish to avoid claims for compensation for the infringement of property rights. Section 122 of the RMA may well have been included in order to deter such claims; that is an interpretation that would fit with section 85, which declares that interests in land are not taken or injuriously affected by provisions in plans. Certainly one can detect in the drafting of the RMA an intention to keep at a distance from all matters concerning the ownership of land, and, at least to some degree, ownership of other natural resources.

Why are legislatures so uninvolved? It may be that policymakers who are concerned with environmental and natural resources matters are little engaged with such questions, dismissing them as "lawyers' law" and of no real interest to their ministry. Environmental agencies do not think much about private law and commercial transactions. In my view, it would be healthy for our public law and private law alike if that changed somewhat.

Even in cases where the establishment of tradeable property rights is accepted as an important element of the policy design, we see little real legislative effort going into the definition of licence rights. The Fisheries Act 1996 does not contain a clear statement of the character of quota.[72] However it provides in detail for the allocation, holding, and registration of quota and transactions in quota. Some of the provisions for the registration of quota are plainly taken from the Torrens system in the Land Transfer Act 1952.[73] In 1997 the Court of Appeal

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[68] C Reich, "The New Property" (1964) 73 Yale L J 733.

[69] *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 relied on substantive legitimate expectation alongside non-derogation; an expectation that council was committed to its grant in the sense that it could not deliberately erode the grant unless acting pursuant to specific statutory powers.

[70] *Adamson v Hayes* (1973) 130 CLR 276 (HCA) as to the Western Australia Mining Act 1904-1971; *Cream Silver Mines Ltd (NPL) v British Columbia* (1986) 2 BCLR (2d) 392 (BC SC); further proceedings (1993) 75 BCLR (2d) 324 (BC CA).

[71] [1989] 2 NZLR 513 (CA).

[72] It did until 1999; in section 27; but the statement was removed.

[73] Fisheries Act 1996, ss 155 to 173 in particular.

accepted without elaborate analysis that "quota are undoubtedly a species of property": *NZ Fishing Industry Association v Minister of Fisheries*.[74] In *Antons Trawling Co v Smith*, Baragwanath J for the Court of Appeal referred to quota as "a statutory chose in action."[75] but again the occasion did not require an explanation of the point. Rather like the Fisheries Act, the Climate Change Response Act 2002 identifies New Zealand Units (NZU) as "a unit issued by the Registrar and designated as a New Zealand unit" without more; but as the Fisheries Act does, it provides in detail for transfer, registration, and security.[76]

To wait for the legislature to change its ways may not be very realistic.[77] For one thing, the pattern of inadvertance seems to be widespread, nationally and internationally. For another, it is unlikely, even with the best intentions, that legislatures and the government ministries behind them will address all questions that individuals and companies may bring to the courts; the diversity and unforeseeability are too great.

The Response of the Courts

If the role played by the legislature in this is often one of inadvertence, then that played by the courts is a more active one. It is possible that lawyers and judges see questions about property rights and consequences in private law as being more properly in their sphere of expertise and constitutional responsibility, rather than in that of the legislature. They distinguish the public law and the private law aspects of environmental and natural resources legislation. In the public law aspects, they are content to defer entirely to the direction of the legislature. They do not intrude on matters such as a discretionary decision to make a disposition of publicly owned resources. They do not substitute their views for that of the legislature or an agency about the proper level at which to set the total allowable catch of a species of fish, or the proper cap to impose on the emissions of greenhouse gases from different sectors. However, they are less deferential about the implications of legislation in private law. They appear to make a greater claim for the autonomy of the law in this respect.

Armstrong v Public Trust[78] discloses this claim to autonomy in respect of private ordering.

> This Court will not find that the legislature has so intervened to displace the common law position as to joint tenancy, by a side-wind, when pursuing control over the allocation of scarce resources, as it is doing in the RMA. To the extent that it does in fact allow property rights under the RMA, the common law as to real and

[74] Unreported, Court of Appeal CA82/97, 22 July 1997, p 16. Similarly in *Sanford Ltd v NZ Recreational Fishing Council*, unreported, Court of Appeal [2008] NZCA 160, CA163/07, 11 June 2008, para 16; appeal dismissed without reference to this matter *NZ Recreational Fishing Council v Sanford Ltd*, unreported, SCNZ SC 40/2008, [2009] NZSC 54, 28 May 2009. Generally on this subject, see C Stewart, *Legislating for Property Rights in Fisheries* (Rome: Food and Agriculture Organization of the UN, 2004).

[75] [2003] 2 NZLR 23 para 5.

[76] Climate Change Response Act 2002, as amended by the Climate Change Response Emissions Trading Amendment Act 2008, ss 4, 18-30A. Generally see D Vogler, "Linking the New Zealand Emissions Trading Scheme to Other Emissions Trading Schemes" unpublished LLM dissertation, University of Waikato, 2009. Also note amendments made by the 2008 Act to the Personal Property and Securities Act 1999, and the Settlement Systems, Futures, and Emissions Units Bill, Bill 252-2, introduced 2 September 2008.

[77] Laura Fraser, "Property Rights in Environmental Management: The Nature of Resource Consents in the Resource Management Act 1991" (2008) 12 NZJEL 145, makes a strong case for statutory amendment. I agree that reform is necessary, but like her consider that it will not resolve all problems.

[78] [2007] NZRMA 573 (HC) para 23.

> personal property will apply, subject to constraints in the specific provisions of the statute.

These words show resistance to general claims that the legislature has occupied the field. They show an intention to assert a degree of autonomy for the law against the regulatory authority of state agencies.

A similar claim to autonomy at the Privy Council level, in giving a narrow reading to a statutory declaration of the nature of a licence, is *Clarkson v Wishart*.[79] It held that a mining claim was "lands" exigible under the Execution Act even though a section of the Ontario Mining Act stated that the holder was only a tenant at will of the Crown. The section was held not to constitute an exhaustive enumeration of the rights of the holder of an unpatented mining claim. The reference to tenancy at will dealt solely with the claimholder's relationship with the Crown. "But such denomination, in [their Lordship's] view, cannot be allowed to destroy the substance and reality of the rights in the claimant as against other subjects of the Crown if such rights be in truth conferred by the Act."[80] The Act gave the claimholder a right to work the claim and to transfer it; a certificate of record that gave protection against forfeiture; recording of instruments. It provided for recording to be deemed to be actual notice (provisions "radically inconsistent with a mere tenancy at will"); and protected a claim of a deceased miner. One looks at what the legislature does, not what it says. The reasoning is strikingly similar to *Armstrong v Public Trust*.

Formalism

An unexpressed rationale for this distinctive claim for judicial autonomy may lie in formalism; the perspective, as expressed by Weinrib, that private law must be treated as an internally intelligible phenomenon by drawing on what is salient in juristic experience and by trying to make sense of legal thinking and legal discourse in their own terms.[81] Formalism seems to provide a framework that explains or justifies four aspects of what we see. Firstly, formalism emphasizes the role of the internal coherence of the law. Legal thinking seeks to develop the law in ways that increase, not decrease, its intellectual coherence. Different rules and principles, and different bodies of doctrine, are to be reconciled and made to work together in a rational manner. It is arguable that judges see themselves in having a greater role in that effort than does the legislature. The legislature can impose its will on the law, but it does not always do so intelligently. Weinrib argues that the law, especially private law, is an engagement of thought, of intelligence, not power.[82] In relation to our present question, this serves as a reminder that we seek a coherent evolution of the law, with rules that will make sense at a general level, at a variety of contexts, reconciling the intention of the statute with the dictates of particular problems. We can do without decisions that give us results such as "it's property for the purposes of bankruptcy but not land taxes, except that if it's a coastal licence it's the other way round." If we can avoid irrational distinctions and unnecessary exceptions, so much the better. The ideal, perhaps, would be that if a statutory licence is determined to be property or statutory property, then a certain accepted set of consequences should follow, unless the legislation or the dictates of fairness require another result.

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[79] [1913] AC 828 (PC Ont).

[80] *Ibid.* at 836.

[81] Ernest J Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995).

[82] Weinrib, p 14.

Secondly, because this coherence of law is an internal feature, with no external referent, law is argued to have an autonomous character. The standard view is that law is not an autonomous body of learning; law cannot be separated from politics; legal concepts need not be taken seriously in their own right, but can only be properly understood in terms of external disciplines such as political or legal analysis. Weinrib argues that this view must be reconsidered. It is not necssary for us to decide how completely we agree on the question of the autonomy of the law. What we can perhaps agree on is that in making decisions about the legal character of statutory licences, especially their incidents in private law, the courts are more than usually willing to protect the autonomy of the law than in making decisions about the instrumental or policy-laden aspects of legislation.

This takes us to a third point, that it is desirable to distinguish the treatment of private law from public law. Again, the formalist view seems to have some explanatory power. The courts seem to be ready to make this distinction to one degree or another.

The fourth insight from formalism is its emphasis on the connection that private law makes between two particular parties through the phenomenon of liability. It reminds us that in the final analysis the question of property rights is not a discussion of a statutory framework, or a policy debate about natural resources and environmental management. If property rights are rights between persons in relation to things, then the ultimate question is which of two persons with competing claims to the thing will prevail. It can be considered the ultimate question in the sense that other meanings of the word "property" must come back to it. Thus, if there exists a constitutional protection of property, then, unless the term is to be treated as purely self-defining (which is obviously unsustainable), then it must be given legal content by reference to the legal understanding of property, as a matter of private law.

Liability or rights between parties is an aspect of the property rights debate that has in my view fallen out of sight. This is certainly unfortunate for causing the matter to become unduly obscure, but also, and more importantly, for overlooking the fundamental matter of justice between parties. We need to ensure that fairness between claimants does not sink out of our sight as a criterion by which to judge the development of the law.

At this point the matter of commercial expectations or commercial realities seems to reappear. Expectations do not come out of nowhere. Nor can they be dismissed as wishful thinking, especially if they are shown to be spread right through an industry, and not merely the product of a plaintiff's hopefulness. Expectations that are based on a general perception of what are fair outcomes need more consideration than they have received thus far.

The general result is that formalism, in spite of being the subject of fashionable abuse for decades, appears to have a good deal of explanatory and normative power in respect of claims of proprietary incidents for statutory licences.

Restrictions on the Creation of New Kinds of Property Right

Directly related, in my view, is the idea that there is something natural and inevitable in the number of interests that legal systems recognize as proprietary. Bernard Rudden observes that

all non-feudal legal systems lay down a restricted list of a about a dozen "real rights."[83] He detects a pervasive general rule that we are not free contractually to create more than a handful of entitlements against strangers, and everywhere the content is much the same. Generally, there are three possessory interests (in the common law, fee, life and leasehold estates); there are non-possessory non-security interests which may be described as servitudes; and there are security interests such as mortgages. All such rights can be held in co-ownership with others. Generally, legal systems prevent the imposition of affirmative burdens on a person merely because he or she has acquired a property interest.[84] All systems limit, or at least greatly restrict, the creation of other real rights: " 'fancies' are for contract, not property."[85] This characteristic of legal systems is referred to as the "numerus clausus," the closed number of property rights that are recognized. It is a characteristic that has received only incidental attention in the doctrine of most legal systems. (Some civil law systems say expressly that no real rights can be recognized other than those provided for in the Civil Code.) Similarly it has received little attention in the literature, although that is changing; an economic rationale for numerus clausus has been a particular focus.[86] Rudden's own preference is for a philosophical explanation in a combination of Kantian, Hegelian, and Hohfeldian terms.[87]

> A duty-not-to may be imposed, but a no-duty-to cannot be removed. White's and Black's will alone can add another claimant (Black) to everyone's duty-not; it cannot do so in respect of a duty-to. … Duties-not are frequently imposed on us without our consent, … or by the law of tort. Duties-to are not.

Rudden usefully emphasizes that property rights are entitlements good against people with whom we have no contract, in short, strangers. A contractual right can be enforced only against a party who is privy to the contract; in contrast, a proprietary right can be enforced against anyone who interferes with it, even though they had not previously been in a relationship with the plaintiff, such as under a contract or trust.

The numerus clausus characteristic of legal systems provides us with further useful ideas about finding property rights in statutory licences. There appear to be sound reasons for the restriction of property rights; the courts should not expand the range of property rights carelessly. There is a philosophical rationale for caution in changing the law so as to impose new positive duties on strangers. Indeed, it is a rationale based on our notion of justice. There are economic rationales as well, such as information costs. We note this while recognizing that as a matter of positive law, if the legislature decrees the existence of a new property right, then we no longer have doctrinal grounds to say otherwise under the numerus clausus characteristic or principle. We can also note at this point that numerus clausus does not prevent "workarounds" to provide some of the benefits of the property rights that would

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[83] B Rudden, "Economic Theory v Property Law: The *Numerus Clausus* Problem" in J Eekelaar and J Bell, eds, *Oxford Essays in Jurisprudence, Third Series* (Oxford: Oxford University Press, 1987) p 239. By "non-feudal" he includes Roman law, modern codified systems and modern non-codified systems.

[84] Rudden p 242, 252.

[85] Rudden, p 243, 260. By "fancy" he adopts the word used by Lord Brougham LC in *Keppell v Bailey* (1834) 2 My & K 517, 535, 39 ER 1043, 1049.

[86] Rudden op cit took the view that none of the economic reasons for the characteristic seemed particularly convincing. TW Merrill and HE Smith, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle" (2000) 110 Yale L J 1 find a an economic rationale, primarily in the information costs of persons proposing to deal with property interests. They also take the view that legislative rulemaking, rather than judicial entrepreneurship or the contractual activity of parties, must be the pathway for any legal reform of property rights.

[87] Rudden op cit p 252.

otherwise be forbidden; for example, chains of covenants binding subsequent purchasers of a property to recognize an interest that is not known by law to run with the land; or flat-owning companies that can provide split ownership in the absence of condominium legislation.[88]

A Possible Distinction between Private Ordering and the Content of a Resource Consent

We therefore find ourselves in a situation where the legislation is not very clear (although section 122 is clearer than many of its equivalents elsewhere), and where immediate legislative intervention is unlikely. Internationally, we do not find any substantial law developing on the matter; there is no well-established body of doctrine to rely on. We find cases that show that the courts are sometimes reluctant to be entirely bound by the legislature's expressions of intention. One explanation of this, of course, is the legislative track record of inadvertence and weakness of expression. Another explanation, in my view, is to be found in the basic ideas about law that we have been discussing; formalism and limits on the creation of property rights.[89] From them we can identify questions of coherence, justice between parties, and (perhaps tugging in the opposite direction) care in overextending the concept of property. I believe that they help us understand what is happening in the cases, whether or not we think that they are decided correctly. They also give us some insights into what we would wish for in the way that the law should develop.

On this basis, I consider that we should encourage the development of the law in directions that allow a wide range of principles of private law to apply to transactional disputes *inter partes*, where there is no significant policy point in issue, and where the primary consideration should be a just outcome. In these cases, the commercial context and expectations within an industry can reasonably be considered, although the fundamental question should be fairness or justice between claimants. It may be that we should inject a focus on that question into discussion that is sometimes excessively dominated by policy matters.

The cases will keep coming. Many of them will find no answer under section 122. For example, does a declaration of trust over property affect resource consents? Does the doctrine of waste apply to life interests or leasehold estates in them? Are they choses in action (things) for the purposes of assignments in equity and under the Property Law Act 2007? Are resource consents caught by the Receiverships Act 1993? Does the doctrine of relief against forfeiture apply to the cancellation of a resource consent? The same questions can arise in relation to minerals, water, fisheries, and other natural resources, and to emissions units of different kinds.

It seems realistic, therefore, to distinguish the policy questions from these transactional questions. "How much water can we allocate?" and "Is the water right exclusive?" versus "Can the holder of a water permit grant a right carved out of it that will be binding on a later holder of the permit?" The policy questions are at the heart of the RMA system for sustainable management of resources, and the enabling of councils and others to make decisions for the purposes of sustainable management of resources, taking into account the

[88] Rudden p 260. New Zealand's special contribution to this kind of legal creativity was the cross lease.

[89] For the sake of completeness, a third explanation should be noted as available in some countries, the constitutional character of cases where legislation can be struck down for breach of a constitutional guarantee of property rights.

matters that have been decreed. I make no claim that this distinction will explain all cases in a satisfactory manner, but it seems to have power to organize our thinking about how we want the law to develop.

Armstrong v Public Trust and *Clarkson v Wishart* both found ways to make this distinction. They dealt with a private law dispute by the application of property law, even though it required them to ascertain Parliament's intention in a way that gave less emphasis that one might at first sight expect to one section of the legislation. They both proceeded on the basis that the public resource management issues could be distinguished. We should not be surprised that *Armstrong v Public Trust* applied property law principles. In my view it was correctly decided. To be sure, the decision did need to work around section 122, but it is not difficult to agree that Parliament was concerned more with relations between the permit holder and the public authorities, and had not excluded private ordering. *Clarkson v Wishart* supports that reading. Absolute fidelity to the words of the statute may not be useful where Parliament has not seriously engaged with the matter in issue. As for the recent decisions on claims to water permits, such as *Hampton v Hampton*, my view is that they have not yet come to grips with the private law aspects of the disputes that they entail.

The second broad category of cases is where property law ideas are used to construe the extent of the rights granted to the holder of a resource consent. Mostly our cases in this category have concerned non-derogation from a grant, securing the consent against the claims of other resource users, particularly *Aoraki Water Trust v Meridian Energy Ltd* and *Southern Alps Air Ltd v Queenstown Lakes District Council*. In these cases the policy element is substantial, and the legal justification seems slender. The non-derogation principle is not stated in the Act, and it is vulnerable to attack as a proposition that cannot stand in face of the actual words of the legislation. It could go the way of other principles and doctrines that the courts sometimes err in developing without sound statutory footing. Property law language, however attractive it seems, is not necessary. The cases could have been decided by means of statutory interpretation and administrative law to ascertain the rights granted, and to ascertain that a discretion to issue a subsequent permit should not be exercised in a way that would undermine the rights previously granted. The result would probably have been the same. My concern is with the use of property rights ideas to expand the rights granted by the legislature, or for that matter to confine them. Extensions of non-derogation, or importation of other property doctrines, could lead to some very unsatisfactory results. In my respectful view, *Hampton v Hampton* erred in having too little regard for the private law and property aspects of the dispute before it, and *Aoraki Water Trust v Meridian Energy Ltd* erred in having too much.

In this second category of cases, there are significant policy implications quite apart from the question of the legal foundation. An argument about non-derogation from a grant tends to strengthen the rights of the holder of the consent. This strengthening has some benefits, in increasing certainty, security of tenure, and the viability of economic instruments depending on market transactions in rights. But it is not cost-free. One can identify four possible effects of increasing the rights of the existing consent holder. Above all, it may reduce the flexibility of the regulator responsible for the resource overall. A regional council, for example, may need to consider reductions in water takes through reviews of consents, renewals, or in making new policies and plans. It is easy to imagine it being told, "I paid for these permits, I was a purchaser in good faith, it is an invasion of my property rights to cut them back." In my view property law should not lend legitimacy to such claims (whether made as assertions of law or as political rhetoric) beyond the terms of the statute and the protections of

administrative law. It is essential to safeguard the flexibility of the regulators of the future. Secondly, non-derogation and its like may inject a characteristic of exclusivity in the use of a resource where none had been intended by Parliament or the regional council or other regulator. Exclusivity is not essential for the protection of priorities in all fact situations. Exclusivity discourages sharing and co-operative solutions. Thirdly, property claims may reduce the options of subsequent applicants for rights to the resource. Fourthly, more general rights, values and amenity may be reduced; if the rights to take water are strengthened by judicial interpretation, there is less in-stream flow, less water available for amenity and habitat. In a competition between "hard rights" and "soft rights," the former generally prevail.

As a matter of the relevant law, the point is one that Binnie J warned about in *Saulnier v Royal Bank of Canada*: "The statute defines the nature of the holder's interest, and this interest is not expanded by our decision that a fishing licence qualifies for inclusion as "property" for certain statutory purposes."[90] As a matter of policy, the issues that we face here are much the same as those explained by Professor Joseph Sax: the real question is how to recognize private interests without undermining public entitlements. An effective system must be supple and adaptive. Public rights must sometimes trump private rights, but don't abolish them.[91] I respectfully agree with both observers.

These questions are all the more significant in circumstances like the present where there is already a strengthening of resource consent rights from the first-in-first-served principle of *Fleetwing Farms Ltd*, from the recognition of activities under granted resource consents as part of the environment for which adverse effects must be avoided, remedied, or mitigated (*Queenstown Lakes District Council v Hawthorn Estate Ltd*[92]), and from the addition of section 104(2A) which safeguards the investment of the existing consent user on renewal.

Conclusion

Property rights concepts have a great attraction. They ease legal thinking about resource consents. But they have a dangerous strength that this attraction must not conceal. My conclusion is that it is possible to make a distinction, at least on a preliminary basis, between uses of them that appear to have some logic and legitimacy from those where they do not. The courts must be careful not to muddy the waters of statutory interpretation with importations that stray from Parliamentary intent in the province of environmental policymaking. Equally, policymakers must engage with property law in a systematic way, because it is relevant to what they are trying to accomplish. They must develop some familiarity with property as a legal phenomenon, not merely as filtered through the understanding of other disciplines such as economics. The legislation must provide a platform for the development of the private law affecting resource consents. The general courts will have a role here in shaping the law that

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[90] *Saulnier v Royal Bank of Canada* (2008) 298 DLR (4th) 193 (SCC), para 48. The New Zealand Court of Appeal issues precisely the same warning in *NZ Fishing Industry Association v Minister of Fisheries*, unreported, Court of Appeal CA82/97, 22 July 1997, p 16: "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 of 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 appellants' expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned."

[91] J Sax, "Our Precious Water Resources: Learning from the Past, Securing the Future" [2009] RM Theory & Practice 30.

[92] [2006] NZRMA 424 (CA). *Unison Networks Ltd v Hawkes Bay Wind Farms Ltd* [2007] NZRMA 340 (HC) demonstrates how *Hawthorn Estate Ltd* protects the position of the prior resource consent holder.

they do not have in other aspects of environmental law; they can be expected to show less deference. The legislation should do more to enable the courts to play an effective role.

One further point should be caught before closing, and that is the diversity of situations where the courts may have to develop this law. Are rights to take resources, such as water or geothermal fluid, different in respect of property law ideas from rights like land use consents, which do not? And what about rights to occupy space, such as coastal permits? It is desirable that the law evolve in a way that minimizes complexity – the same approach for all kinds of resource consent; but the difference between the two insolvency cases *Saulnier* and *Celtic Extraction Ltd* suggests that this may not be easy. There is also the situation where the value of a resource consent is in the conditions, such as will occur in the Lake Taupo catchment under Environment Waikato's cap-and-trade system for the control of nitrogen emissions. Every farmer has a resource consent (a land use consent actually); what will be in trade is the nitrogen entitlement stated in the conditions. Is that entitlement a form of property separate from the consent itself? Finally, can RMA law be developed consistently with that under the Crown Minerals Act, the Fisheries Act and Climate Change Response Act? The more coherence we can obtain in the law, the better.