JACK DOUGLAS

HOW FETTERED IS AN UNFETTERED DISCRETION?

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Abstract

Compulsory acquisition is a process whereby the Crown, or local government, can take land for public works or other specified purposes. Section 186 of the Resource Management Act 1991 grants the Minister for Land Information the discretion to allow privately owned utilities to exercise powers of compulsory acquisition. This paper argues that the Minister for Land's discretion under s186 is not sufficiently constrained. Private property rights must be more of a fetter on the Minister's decision. This paper analyses the legal jurisprudence which informed the early takings legislation and explains its impact on judicial decisions in modern times. Despite an extensive common law history of protecting property rights stemming from our legal ancestors, early takings legislation favoured economic progression. The ability to compulsorily acquire land was a necessary tool in this sense, and this mindset still hampers the current legislation. An analysis of *Minister for Land Information v Dromgool* highlights the little fetters existing on the Minister's decision-making ability under s186 of the RMA and its perilous consequences for private property rights. Compulsory acquisition is a sensitive topic. The coercive power of the Crown to take land can result in the sale of a principal place of residence with no acknowledgment of the involuntary nature of that sale. In order to acknowledge the violation of property rights inherent in compulsory acquisition, this paper argues that changes beyond increasing monetary compensation are necessary. The legislature and judiciary alike must identify a mechanism to recognise and compensate landowners for involuntarily selling their land.

Keywords: *"Compulsory acquisition", "property rights", "fetter', 'Minister for Land Information v Dromgool'*

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I. Introduction

To fetter is to confine or restrict. Whereas the Minister for Land Information has been held to have an unfettered discretion to compulsorily acquire lands,[1] this essay argues that perhaps a consideration of the landowner's private property rights should be more of a fetter.

Protection of private property lies at the heart of our legal system on the basis that it is necessary for the security of the individual and the wealth of a nation.[2] It is admittedly too far to suggest that the landowner has the ultimate power to do with their land as they wish; some acquiescence to government intervention into private property rights is helpful. Where land is at risk from the impacts of climate change, or where a public work is necessary, it may be for the public benefit to compulsorily acquire land and disturb private property rights. However, only the Crown has the power to disturb private property rights.

Where a decision is made to acquire land compulsorily, there is always a balance to be struck between upholding private rights and acting for public benefit. The question remains whether that balance has already been struck in takings legislation, the Public Works Act 1981 (PWA) and the Resource Management Act 1991 (RMA), or whether the judiciary has struck the right balance in their interpretation of such Acts. Whenever these Acts are invoked, the salient issue is whether the current legislative framework provides sufficient protection to private rights.

The Court of Appeal's decision in *Minister for Land Information v Dromgool* provides a helpful discussion of compulsory acquisition of land under Part 2 of the PWA 1981. A key feature of the discussion centres around the ability of the Minister for Land Information (the Minister) to grant powers to private organisations to take land, as if they were an elected Government or local authority. The Court held that there are very limited fetters on the Minister's discretion. This begs the question whether there should be fetters on the Minister's discretion and why protecting private property rights was not one of them.

II. Jurisprudence: Legal thinking behind takings legislation

There are two schools of thought concerning the legality of compulsory acquisition: one favours upholding the individual's rights, and one favours the state's right to govern in the

[1] *Minister for Land Information v Dromgool* [2021] NZCA 44.
[2] Jeremy Bentham *The Theory of Legislation* (2nd ed, Trübner & Company, 1871) at 109-113.

public's interest. As such, compulsory acquisition is subject to many rights-based arguments, which can (and seemingly have) informed the legislation on the topic.

We begin our dive into property jurisprudence with an argument posed by Sir William Blackstone. Blackstone stood for the idea that private property rights are looked upon so highly that the law will not allow any violation of these rights, no matter the public benefit a violation may bring.[3] Rather, there is more public benefit in the protection of individual property rights.[4] No-one but the legislature can interfere with a person's private property right, and compel them to alienate their land.[5] Even then, this can only be done when reasonable compensation for the injury suffered is provided.[6] However, as Blackstone concedes, this inalienable right is subject to the core principle of parliamentary supremacy.[7]

Jurists from the United States of America have different conceptions of private rights. This difference may exist due to the protection of private property interests being a constitutional right; the Fifth Amendment to the United States Constitution provides: "Nor shall private property be taken for public use, without just compensation."[8]

Jeremy Bentham argued for the security of property. Secure property is essential because a society that protects its property is a wealthy society.[9] Unsurprisingly, as an English theorist from the early 1800s, Bentham viewed land as an economic resource above all else. Security of land creates wealth. If someone is secure in their land, they will be motivated to invest in it because they can reap the rewards of their labour.[10] Bentham's views reflect English conceptions of land: something that can be used to gain individual status and wealth. Such conceptions undoubtedly left a mark on the system New Zealand inherited from our legal ancestors.

In her article *Property as a Keystone Right*, Carol Rose highlights seven arguments for why property is the 'keystone right'.[11] One such argument is the priority argument: property exists before politics and is, therefore, the basis on which other rights can exist.[12] This argument

[3] William Blackstone *Commentaries on the Laws of England in Four Books, Vol. 1* (eBook ed, Liberty Fund Inc., 2011) at 103.
[4] Blackstone, above n 3, at 139.
[5] Blackstone, above n 3, at 139.
[6] Blackstone, above n 3, at 139.
[7] See Blackstone, above n 3, at 91.
[8] United States Constitution, amend V.
[9] Bentham, above n 2, at 113-114.
[10] Bentham, above n 2, at 112-114.
[11] Carol M. Rose "Property as the Keystone Right?" (1996) 3 Notre Dame L. Rev 329.
[12] Rose, above n 11, at 333.

can be attributed to John Locke's 'bottom-up' theory of property.[13] Locke's theory suggests that even the most primal societies will naturally consume, store, and trade goods around them.[14] Eventually, these societies will look to some form of government to protect the property they have earned.[15] These property rights pre-exist any form of political institution.[16] The bottom-up approach sees property as an economic tool: societies are safeguarding their property to protect their wealth.

Property is also an important right because it can diffuse power.[17] Rose claimed that "as long as many people can own property and attempt to earn money, power - including political power - will necessarily remain more or less diffused."[18] If the ability to own land is spread, so is the ability to earn money. Where individuals have entrenched rights to property and to trade property, this gives them rights, and it gives them a voice. Giving individuals a voice empowers them to resist any encroachment on other rights.[19] Rose argues that if land, and thus power, is diffused, then individuals are less likely to succumb to restrictions on other rights.

There are problems with the diffusion of power argument. Where power is diffuse, individuals become entitled.[20] One such problem can be termed 'the rule of capture'.[21] Individuals with entrenched property rights may begin to think they can use their land however they wish, simply because everyone else is doing it. Without proper regulation, land may be used, for example, to pollute. If the Government wants to regulate land use and stop individuals from using their land this way, the individual expects compensation.[22] Further, diffusion of power can have the opposite effect of dissipating property rights. It is difficult to safeguard property rights when power is diffuse, and individuals have (within reason) free range to use their land as they wish.[23] Such free range contradicts Bentham's focus on security.[24]

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[13] Rose, above n 11, at 333.
[14] John Locke *Two Treatises of Government* (Cambridge University Press, 1967) at 329-330 as cited in Rose, above n 11, at 333.
[15] Locke, above n 14, at 329-330 as cited in Rose, above n 11, at 333.
[16] Rose, above n 11, at 335.
[17] Rose, above n 11, at 340.
[18] Milton Friedman *Capitalism and Freedom* (University of Chicago Press, Chicago, 1962), at 14-21 as cited in Rose, above n 11, at 340.
[19] Rose, above n 11, at 340.
[20] Rose, above n 11, at 344.
[21] Rose, above n 11, at 344.
[22] Rose, above n 11, at 344.
[23] Rose, above n 11, at 345.
[24] See text accompanying footnotes 9 and 10.

Rose also argued that because property rights are symbolic of all other rights, it is the keystone right.[25] The symbolism argument stems from James Madison, who articulated that he had property in his religious beliefs, among other rights.[26] Rose took this argument to suggest that property is a means by which people can visualise all rights.[27] Individuals must be secure in their property to understand their rights and protect their rights.[28] A flaw in this argument is that property rights are generally conceived as things that can be bought and sold.[29] Whereas land can be bought and sold, the right to education cannot. As such, comparing property to other absolute rights is not necessarily safe nor helpful.[30]

Another critique of property as the symbolic right is Curmugeon's critique.[31] Curmugeon's critique stands for the idea that if a society is too conscious of protecting rights, that society prevents itself from progression for fear of breaching these rights.[32] This critique puts the idea of progression and growth above all else. Curmugeon's critique is directly relevant to the underlying balance to be struck in compulsory acquisition: public benefits vs private rights. Where individuals feel entitled to have their private property rights protected, this can come at the expense of progress. As an example of a stymie on progress, the debate in *Minister for Land Information v Dromgool* alone has been argued in the New Zealand judicial system for over three years.

In the early 1900s, the need for social and economic progress was so intense that economic progress was, in fact, a legal theory present in the common law.[33] The emphasis on economic progress was highlighted in the 1915 case of *Hadachek v Los Angeles*, where the US Supreme Court prohibited the operation of brickyards within certain areas. The Court dismissed the claimant's loss, saying, "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."[34] It is hard to ignore the idea that economic progress must have informed the drafting of the PWA 1928. Casting

[25] Rose, above n 11, at 348.
[26] James Madison *The Papers of James Madison* (Robert A. Rutland et al ed., 1983) as cited in Rose, above n 11, at 348.
[27] Rose, above n 11, at 349.
[28] Rose, above n 11, at 349.
[29] Margaret Jane Radin "Market-Inalienability" 100 Harv.L.Rev. (1987) 1849 at 1854 as cited in Rose, above n 11, at 349.
[30] Jennifer Nedelsky *Private property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (University of Chicago Press, Chicago, 1990) at 261-62 as cited in Rose, above n 11, at 349.
[31] Rose, above n 11, at 350.
[32] Rose, above n 11, at 351.
[33] See E. F. Albertsworth "The Common Law and the Idea of Progress" (1924) 10 A.B.A.J. 459.
[34] *Hadachek v Los Angeles* 239 US 394 (1915) at 410, as cited in Albertsworth, above n 33, at 462.

back to the earlier version of the PWA, there seemed to be little regard for private interests in a statute which favoured economic progress.

Ultimately, Rose makes a convincing argument that property deserves greater recognition and protection. However, as with any right, property still requires some public acquiescence to have any real effect. No amount of safeguarding of property rights can allow the individual to do what they want with their land. Indeed, such an argument would have the opposite effect of reducing security of land if certain uses impacted others' use of their land.[35]

III. History of the Public Works Act

Undoubtedly, social views and legal jurisprudence on private property have progressed much since the 1928 enactment of the PWA. However, it is important to understand the intentions behind the drafting of the legislation that framed current takings provisions.

Section 11 of the PWA 1928 granted power to the Crown and local authorities to take land for public works with little fetter on that power.[36] There was no need for the public work to be reasonable or necessary. The Act did, however, provide a framework for objections to be made. Any stakeholder could object to the taking of the land, provided the objection was well-grounded.[37] What constituted well-grounded was not defined and appeared ambiguous on its face.[38] In any case, there was no framework for determining the consequence of a successful objection; the Act merely provided that objections could be made.[39]

The only real restriction on the Crown's power to take the land was that no personal injury could occur that could not be compensated under the Act.[40] The Act provided a right to compensation to anyone whose interest or estate in the land was taken.[41] If compensation was claimed, the amount was to be determined by the Minister of Public Works, who fixed compensation at a sum which they thought was fit.[42] If the landowners disagreed, the Courts were charged with fixing a reasonable sum.[43]

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[35] See text accompanying footnotes 23 and 24.
[36] Public Works Act 1928, s11.
[37] Public Works Act 1928, s22(c).
[38] See Public Works Act 1928, s22(d), which provided that an objection to the amount of compensation would not be well-grounded.
[39] Public Works Act 1928, s22(f).
[40] Public Works Act 1928, s23.
[41] Public Works Act 1928, s42(1).
[42] Public Works Act 1928, s46.
[43] Public Works Act 1928, s46.

The above provisions paint a crude picture of the Crown owning the ability to take land as it wished, do with the land what it pleased, and offer compensation as it felt fit. While there were opportunities to object to both the taking and the compensation offered, the 1928 Act provided no framework or guidelines to consider these objections. Certainly, there was no real fetter on the Minister's discretion to take land in 1928.

The nature and effect of the PWA have changed significantly since 1928. Whereas the 1928 Act focused entirely on the powers of the Crown and Minister alike, the current version of the PWA restores some power to the landowner. While the Government of the day still has an unmatched power to take land for public works, the legislative changes show that private property rights have earned much greater recognition since 1928. Whether this increased recognition has extended to the common law is questionable.

It is important to note that only four years before the 1981 PWA Bill was introduced, the Government had amended s81 of the Town and Country Planning Act 1977 to grant additional powers to local governments to acquire land on top of existing powers in the PWA 1928. The reasons behind the amendment were given by the Honourable R Semple:[44]

> That amendment had been asked for by local authorities who were trying to plan areas on modern town planning lines where groups of individuals are holding an area of land within the planned scheme that was *an obstruction to the completion of the planning scheme…* People may be holding the land until the growth of the population and the hunger for land caused the prices to soar… *that holding-up is an obstruction against the modern town planning scheme.* (Emphasis added).

In sharp contrast with the above amendment, the overarching goal of the Bill – the precursor to the enactment of the current PWA - was to protect the individual and restrict the compulsory acquisition of private property to essential works.[45] As such, the main arguments on the Bill centred around the need for balance between the Crown's power to acquire land and the protection of private property rights.

One debate on the Bill was over the justification for takings by local government. Where previously, the 1928 Act had provided no need for the taking to be reasonable or necessary, the Bill placed a burden on the taking authority to justify why the land was being taken.[46]

[44] (2 September 1981) 440 NZPD 3175.
[45] (2 September 1981) 440 NZPD 3165
[46] Public Works Bill 1981 (153-3), cl 23(b).

The Minister behind the 1981 Bill claimed that by having to justify why land was being taken, local governments would find it harder to acquire land.[47] The Bill provided that the landowner had to be made aware of the purpose of the taking and why the taking was deemed 'essential'. Essential was inserted as a higher standard than 'reasonably necessary.'

The Bill proposed a framework for objections similar to the current PWA. Under the Bill, the Planning Tribunal (now Environment Court) would consider whether the taking was fair, sound, and essential for achieving the objectives of the Minister.[48] Unlike the current PWA, the Bill did not establish any requisite factors for the Planning Tribunal to consider. Despite the fact that the work had to be 'essential', the Bill proposed to grant the Governor-General the power to declare any particular work an 'essential work' without any hearing from the Planning Tribunal.[49]

Objectors to the Bill included local governments. Submissions from objectors matched the sentiment expressed in the reasoning behind the 1977 amendment to the Town and Country Planning Act.[50] Local authorities expressed concern that the Bill would hamper their ability to carry out projects for the good of society; they even classed the Bill as an unwarranted intrusion into their rights and powers.[51] Perhaps the most common submission in opposition of the Bill echoed that of the Christchurch City Council, who wondered why the PWA was being re-enacted when there was nothing wrong with the provisions in the 1928 Act.[52] Alternatively, it was argued that landowner's private rights were sufficiently safeguarded by the process by which they could object to the taking of their land.[53]

The Parliamentary debate on the Bill aptly illustrates the two schools of thought concerning compulsory acquisition and property rights. On one hand, it is imperative for social and economic progression that the Crown maintain the ability to acquire land with limited fetters. There is an inherent need for governments to have the ability to act in the public's interest. To add a fetter on any discretion exercised in compulsory acquisition is to obstruct local and national progression.[54] This discussion highlights property as an alternative source of power.

[47] (25 September 1981) 441 NZPD 3643.
[48] Public Works Bill 1981 (153-3), cl 24(9).
[49] Public Works Bill 1981 (153-3), cl 3.
[50] See text accompanying footnote 44.
[51] (2 September 1981) 440 NZPD 3169.
[52] (2 September 1981) 440 NZPD 3169. It could only be said that there were no problems with the existing provisions because they had not yet been abused.
[53] (2 September 1981) 440 NZPD 3173.
[54] See text accompanying footnote 44.

The author suggests that the opposers to the Bill wanted to ensure the Crown had political power and control over property. An obvious concern with this argument echoes the sentiment expressed by Carol Rose that if property and political power were to be centralised, this would leave "no room for alternative avenues for power."[55] On the other hand, supporters of the Bill intended to uphold the protection of the individual's rights.[56] The Bill's objective was to improve the landowner's ability to retain the rights to use their land and prevent compulsory acquisition.[57] Landowners were not painted as obstructions to progress but, instead, a necessary fetter.

Whereas opposers to the Bill did not consider private property rights should be a fetter at all, supporters of the Bill aimed to construct the balance between public and private rights in the legislation. The author suggests that the result of either argument may have rendered a discussion of private rights unnecessary in judicial decisions. The balance, or lack thereof, between private property rights and public benefit, had already been determined.

IV. Current statutory context

Section 186(1) of the RMA allows the Minister to grant the power to network utility operators to acquire or take land as if they were a local government.[58] The network utility operator's power is subject to the process set out in Part 2 of the PWA.[59] In essence, s186(1) gives the Minister the ability to grant privately owned companies the power to disrupt private property rights with the coercive force of the Crown.

The power to acquire land for a government or local work derives from s16 of the PWA.[60] Before acquiring or taking any land under Part 2 of the PWA, the Minister or local authority must:[61]

a) serve a notice of intention to acquire the land to interested parties;
b) lodge the notice of intention with the Registrar-General of Land;
c) invite the owner to sell the land. After the land is valued by a registered valuer, the Minister or local authority must advise the landowner on an estimated amount of compensation they are entitled to.

[55] Rose, above n 11, at 340. See also text accompanying footnotes 17 and 18.
[56] (2 September 1981) 440 NZPD 3171.
[57] (2 September 1981) 440 NZPD 3176.
[58] Resource Management Act 1991, s186(1).
[59] Resource Management Act 1991, s186(1).
[60] Public Works Act 1981, s16.
[61] Public Works Act 1981, s18(1) (a-d).

d) The Minister or local government must "endeavour to negotiate in good faith" to reach an agreement for the sale of the land.

The notice of intention to take land must be prepared per s23.[62] The notice must include a general description of the land to be taken, a description of the purpose for which the land will be used, reasons why the taking of the land is reasonably necessary, and the process for which objections can be made.[63]

Objections to takings of land are dealt with by the Environment Court, subject to s24.[64] Section 24(7) lists several factors the Environment Court must consider when dealing with an objection. Most importantly, the Environment Court must:[65]

a) ascertain the objectives of the Minister or local authority;
b) enquire into the adequacy of consideration given to alternative options to meet those objectives;
c) …
d) decide whether it would be fair, sound and reasonably necessary for achieving the objectives of the Minister or local authority for the land to be taken.

If the Minister or local authority cannot agree with the landowner for the sale of the land after three months, they have the power to take the land.[66] Taking land is different from acquiring land, as the landowner is not automatically entitled to any compensation if their land is taken.[67]

V. Comparing theory to reality

This section will explain the judiciary's approach to interpreting the aforementioned statutory context when determining the extent of the Minister's decision-making power under s186(1) of the RMA.

Section 186(1) of the RMA, prima facie, does not provide for the Minister to consider any particular factors. The section states:[68]

[62] Public Works Act 1981, s23.
[63] Public Works Act 1981, s23(b)(i-iv).
[64] Public Works Act 1981, s24.
[65] Public Works Act 1981, s24(7) (a-f).
[66] Public Works Act 1981, s18(2).
[67] See Public Works Act 1981, s70.
[68] Resource Management Act 1991, s186(1).

> A network utility operator that is a requiring authority may apply to the Minister of Lands to have land required for a project or work acquired or taken under Part 2 of the Public Works Act 1981 as if the project or work were a government work within the meaning of that Act and, if the Minister of Lands agrees, that land may be taken or acquired.

Section 186(1) frames the Minister's powers broadly. There is no statutory fetter on the Minister's discretion to grant network utility providers the coercive powers of the Crown.[69]

Despite this broad framing, "there is no such thing as an unfettered discretion."[70] Any statutory power, even if given in unqualified terms, is always subject to limits:[71]

> [53] Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole… A power granted for a particular purpose must be used for that purpose, but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.

Accordingly, the Courts have read into s186(1) several fetters, limiting the Minister's decision-making power. Where the statutory purpose is a fetter on the Minister's discretion, the relevant issue then becomes determining the purpose of the RMA, and s186(1) in particular.

The purpose of the RMA is to promote the sustainable management of natural and physical resources.[72] The purpose of the RMA has not been an active fetter for the Courts when interpreting the Minister's powers under s186(1), despite judicial reliance on it in cases discussing the interrelationship between other sections in the RMA and private property rights.[73]

The purpose of s186, in particular, was considered by William Young J in *Seaton v Minister for Land Information (Seaton).* His discussion alludes to a government sentiment focusing on

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[69] But see Resource Management Act 1991, s8; which provides that when any power is exercised under the RMA, the principles of Te Tiriti o Waitangi must be considered.
[70] *Minister for Land Information v Dromgool,* above n 1, at [70].
[71] *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74 at [53]. Citations omitted.
[72] Resource Management Act 1991, s5(1).
[73] Compare *Falkner v Gisborne District* Council [1995] 3 NZLR 622 at 631-632; *Hastings v Manukau Harbour Protection Society* Environment Court A068/2001. These cases discuss s85 of the Resource Management Act 1991.

the need for compulsory acquisition in the interests of public benefit above safeguarding private rights. William Young J held that s186 was enacted to broaden the scope of compulsory acquisition, which had previously been restricted once many government operated utilities became privately owned.[74]

The Minister's decision is also to be exercised following Part 2 of the RMA.[75] Part 2 sets out the purposes and matters of national importance that anyone exercising any power under the RMA must consider. These purposes are in line with the overarching purpose of the RMA: the sustainable management of natural resources. Each factor identified in s6 of the RMA is a justified fetter on the Minister's decision.

While all of these fetters have been deemed relevant, the Courts have held that it is up to the Minister themselves to decide what is relevant to their decision.[76] Despite the above fetters, this seems to give the Minister a reasonably unrestricted discretion in lending the coercive force of the Crown to a privately owned organisation. Perhaps to address this concern, the Supreme Court in *Schmuck v Opua* qualified this by saying that the Minister could decide what was relevant subject to challenge on the grounds of unreasonableness.[77] The author suggests this qualification, similar to the process of objection to compulsory acquisition, is akin to an ambulance at the bottom of a cliff. Although it will be a rare occasion for the Minister to make an unreasonable decision, it seems as though the only limits to the Minister's power are through an objection, as opposed to statutory principles which guide the decision-making process itself. In the case of compulsory acquisition, it seems like a fragile protection, if that, of private property rights.

VI. Minister for Land Information v Dromgool

Minister for Land Information v Dromgool (Dromgool) interprets the Minister's role under s186(1) of the RMA and sets out what fetters should restrict the Minister's discretion.

The dispute arose in response to an Environment Court decision which held that the Minister's response to an objection under s24(7) of the PWA was discretionary.[78] The

[74] *Seaton v Minister for Land Information* [2013] NZSC 42 at [76].
[75] *Minister for Land Information v Dromgool*, above n 1, at [119].
[76] *Schmuck v Opua Coastal Preservation Inc.* [2019] NZSC 118 at [132]; *Minister for Land Information v Dromgool*, above n 1, at [93].
[77] *Schmuck v Opua,* above n 76, at [132].
[78] *Dromgool v Minister for Land Information* [2018] NZEnvC108 [Environment Court report].

Minister did not have to consider the matters that the Environment Court themselves would be dealing with.

The Minister was held to have a near unfettered discretion. Nevertheless, the Courts have read in several limits on this discretion.[79] This begs the question: how fettered is an unfettered discretion?

A. Facts

Top Energy Ltd. (TEL) planned to build an electricity transmission line from Kaikohe to Kaitaia. TEL made a request to the Minister under s186(1) of the RMA seeking easements over the plaintiff's land, among others, to construct this line, and the Minister gave their agreement.

Mr and Mrs Dromgool (the Dromgools) filed an objection to the acquisition of their land to the Environment Court under s24(7) of the PWA.[80]

TEL provided much evidence to suggest that constructing a new transmission line was a reasonable project. The existing line was almost 60 years old and was susceptible to outages. These outages could prove very costly to Northland's economy, with estimates suggesting that nine outages in the previous four years caused an economic loss of over $13 million.[81] The Dromgools disputed the chosen route for the line, arguing that their property should not have been chosen for it.

B. The Environment Court Report

The Environment Court upheld the Minister's decision, finding that the Minister's decision under s186(1) was fully discretionary.[82] The RMA provided no explicit requirement for the Minister to consider any particular matter, not even alternative routes.[83]

The Court relied on *Seaton* for the proposition that the Minister is not obliged to ensure that an acquisition of land will comply with s24(7) of the PWA.[84]

[79] See text under heading V.
[80] Public Works Act 1981, s24(7).
[81] *Minister for Land Information v Dromgool,* above n 1, at [9].
[82] Environment Court report, above n 78, at [40].
[83] Environment Court report, above n 78, at [37].
[84] Environment Court report, above n 78, at [53].

Because TEL had extensively considered alternative routes, the Court held that alternative options had reasonably been considered, which was sufficient for s24(7) of the PWA.[85] The Minister themself did not have to consider the alternative options.

C. High Court decision

The High Court overturned the Environment Court's decision. The High Court held that the Minister's discretion was not unfettered.[86] Rather, the Minister alone was obliged to consider any relevant factors. In particular, it was "implicit and obvious from s24(7)(b) that the Minister is required to consider alternative routes and methods."[87]

The High Court also held that it was incorrect for the Environment Court to find that there had been adequate consideration of alternative options because the Minister themself had not considered these alternatives.[88] TEL's consideration of the alternative options was irrelevant. The Minister appealed the High Court's decision to the present case.

D. Issues

There were two main issues in the Court of Appeal. First, determining the role and obligation of the Minister under s186 of the RMA.[89] Secondly, whether the inquiry into the adequacy of consideration of alternatives contemplated by s24(7) of the PWA an inquiry into such consideration by the requiring authority, the Minister, or both.[90]

E. Decision

The Court of Appeal overturned the High Court decision, favouring the reasoning of the Environment Court.

It was determined that the Minister's role, in a s186(1) application, is merely to be satisfied that the project would be capable of passing an Environment Court report according to s24(7).[91] It was the network utility operators job to ensure that the factors set out in s24(7) had been satisfied. As such, it is good practice for the Environment Court to focus their

[85] Environment Court report, above n 78, at [126]-[127].
[86] *Minister for Land Information v Dromgool*, above n 1, at [20].
[87] *Dromgool v Minister for Land Information* [2019] NZHC 1563 [High Court judgment] at [48].
[88] High Court judgment, above n 87, at [65].
[89] *Minister for Land Information v Dromgool,* above n 1, at [7].
[90] *Minister for Land Information v Dromgool,* above n 1, at [7].
[91] *Minister for Land Information v Dromgool*, above n 1, at [8].

inquiry on whether the network utility provider has adequately considered alternative options, not whether the Minister has.[92]

The Court looked to the statutory context to determine the nature of the Minister's power.[93] After limited discussion on that context itself, the Court held that the statutory context of s186(1), the RMA, and the PWA, meant that the Minister's power has to be exercised on the basis that the Environment Court will determine any objection to their decision.[94] As such, the Minister, in exercising their discretion, must be satisfied that the taking or acquisition of land could pass the statutory test set out in s24(7) of the PWA.[95]

Despite the notion contended above that the Court of Appeal's decision gave the Minister an unfettered discretion, the Court did discuss the role of policy. Policy considerations relevant to the Minister's decision include government and legislative policy and considerations of Te Tiriti o Waitangi.[96] However, the Court framed these fetters not as guiding principles but rather as boundary markers that the Minister's decision could not exceed.[97]

The Court relied on *Seaton* to support their conclusion that it is only the network utility operator who must consider the alternative options, as per s24(7) of the PWA.[98] The discussion in *Seaton* compared the processes for land acquisition under s16 of the PWA and s186 of the RMA. The Court agreed with William Young J's approach, which held that where land is taken under s186(1) of the RMA, the references to 'Minister' in subss (a) and (d) of s24(7) in the PWA must really be references to the network utility operator.[99] It was also stated in *Seaton* that the focus for the Environment Court is the network utility operator's need for the acquisition of land compared to other alternative options.[100]

The Court refuted the idea that the Minister must personally assess any relevant factors under s24(7) for practical reasons.[101] The Minister will not have the knowledge and expertise of the network utility operator. Where there is an objection to the taking, the issue of consideration of alternative options is deliberately left to the Environment Court.[102] Further, there have

[92] *Minister for Land Information v Dromgool*, above n 1, at [8].
[93] *Minister for Land Information v Dromgool*, above n 1, at [71].
[94] *Minister for Land Information v Dromgool*, above n 1, at [71].
[95] *Minister for Land Information v Dromgool,* above n 1, at [72]; see also Public Works Act 1981, s24(7).
[96] *Minister for Land Information v Dromgool*, above n 1, at [73].
[97] *Minister for Land Information v Dromgool*, above n 1, at [73].
[98] *Minister for Land Information v Dromgool,* above n 1, at [81].
[99] *Seaton v Minister for Land Information,* above n 74, at [83].
[100] *Seaton v Minister for Land* Information, above n 74, at [66], per Glazebrook J.
[101] *Minister for Land Information v Dromgool*, above n 1, at [86].
[102] *Minister for Land Information v Dromgool*, above n 1, at [84].

been no objections at the time the Minister's decision has been made. As such, any decision of the Minister would be made without any public input – a vital feature of the objection process.[103] However, it must be noted that in this case, the Minister did have information of objections which could have informed their decision.[104]

Despite determining that the Minister is not required to assess the merits of alternative means of achieving the network utility operator's objective, the Court denied the contention that the Minister's role is merely a rubber stamping exercise.[105] The Court rejected the reasoning in *Schmuck* - which held that 'supervisory' was an apt word to describe the Minister's role - because the Minister is facilitating the project, as opposed to "approving an action which the network utility operator itself is able to carry out."[106]

Not particularly relevant to the critical issues, the Court upheld the reasoning of the Environment Court that in the case of a project affecting nearly 100 properties, there was no need for the objectives identified in the notice of intention to take land to relate to each property.[107]

F. Analysis

Compulsory acquisition is one of the few times the Crown has the power to overrule private property rights. As counsel for the respondents put it, compulsory acquisition "results in the trammelling of private property rights."[108] As such, perhaps it would not be too burdensome on the Minister to assess the merits of the alternative options.

Part of the Court's reasoning for rejecting the idea that the Minister had to review the alternative options personally was that it would be impractical.[109] The Minister's lack of knowledge and relevant expertise would prevent them from making an informed decision.[110] This reasoning is weak. When the Minister is deciding whether to grant a private organisation the coercive powers of the Crown, it would seem reasonable that they are provided with all the necessary information to make an informed decision, as would the Environment Court. The decision is serious and should be treated as such. The Environment Court alike does not

[103] *Minister for Land Information v Dromgool,* above n 1, at [86].
[104] *Minister for Land Information v Dromgool*, above n 1, at [84].
[105] *Minister for Land Information v Dromgool,* above n 1, at [93]-[95].
[106] *Minister for Land Information v Dromgool,* above n 1, at [95].
[107] *Minister for Land Information v Dromgool*, above n 1, at [125].
[108] *Minister for Land Information v Dromgool*, above n 1, at [63].
[109] *Minister for Land Information v Dromgool*, above n 1, at [86].
[110] *Minister for Land Information v Dromgool*, above n 1, at [84].

usually have the technical expertise itself but comes to a decision based on a significant amount of expert evidence in front of them.[111] Admittedly, requiring the Minister to be aware of such information would make the compulsory acquisition process more expensive and time-consuming. However, this seems reasonable when considering the task at hand, including overriding private property rights.

A salient point of the Court's reasoning was its reliance on William Young J's judgment in *Seaton*. In that case, William Young J stated that s186 of the RMA was enacted to address the void that resulted from the privatisation of utilities that were initially government owned.[112] This privatisation severely limited the scope of compulsory acquisition, and s186 was enacted to grant those powers back to the respective utilities.[113] The author's concern with this approach is that while it is logical that government-operated utilities have the power to compulsorily acquire land, granting those powers to utilities when they are privately owned is not, or should not, be so straightforward. It should alarm most New Zealanders to discover that their land could be acquired by someone other than the Crown.

Nonetheless, William Young J's argument was relied on to read into s24(7)(b) of the PWA a requirement that the Environment Court alone must enquire into the adequacy of the consideration of alternative options by the network utility provider.[114] As a matter of legal interpretation, this argument is questionable. Whereas s24(7)(a) and (d) both explicitly mention consideration of the objectives of the Minister or local authority, s24(7)(b) does not mention anyone at all.[115] Section 24(7)(b) is stated in very broad terms. The author agrees that it would be illogical if the Minister alone reviewed the alternative options, but s24(7)(b) certainly does not exclude the Minister from doing so and nor should the common law. A literal interpretation of s24(7) would suggest the Minister must personally assess any relevant factors to the project in question.

In contrast to their discussion on William Young J's judgment above, the Court proceeded to state the purpose of s186(1) differently. In holding that the Minister's discretion was subject to the statutory context, the Court stated the purpose of s186(1) was:[116]

[111] Public Works Act 1981, s24.
[112] *Seaton v Minister for Land Information*, above n 74, at [76].
[113] *Seaton v Minister for Land Information*, above n 74, at [76].
[114] *Minister for Land Information v Dromgool*, above n 1, at [78].
[115] See text accompanying footnote 65.
[116] *Minister for Land Information v Dromgool*, above n 1, at [71].

> …to authorise a network utility operator to apply for the Minister's agreement to the proposed taking or acquisition of land required for a proposed project or work, and to give the Minister the power to decide whether or not to agree to the taking of the land.

That is not the purpose of s186(1). The Court has simply paraphrased s186(1). This statement is somewhat circular in that it leaves open the question why the network utility operators are granted the ability to apply for compulsory acquisition powers. In reality, the purpose of s186(1) is to grant powers of compulsory acquisition back to network utility operators that were once government-owned.[117]

Seemingly reliant on their misconception of the purpose of s186(1), the Court did not feel it accurate to describe the Minister's role under s186(1) as a decision to exercise the powers of compulsory acquisition.[118] Rather, "If the affected landowners agree, there will be no compulsory acquisition, and no use of the Crown's coercive power."[119] The author feels as though the Court has misunderstood the nature of compulsory acquisition. It seems naïve to say that the Crown has not exercised any coercive power where a landowner has acquiesced to a notice of intention to acquire their land. Rather than a voluntary sale of the landowner's own volition, the landowner is generally selling their land because they have no other option.[120] The point of this discussion is that the Court's distinction between takings where the landowner has agreed or objected is irrelevant and not true. The coercive force of the Crown is in action regardless of the landowner's stance. As such, the distinction made by the Court is no reason to dismiss the idea that the Minister should have some responsibility to enquire into the alternative options available.

Despite mentioning that government policy can be a fetter on the Minister's discretion, the Court failed to give this fetter any meaningful effect.[121] One aspect of government policy that the Court felt relevant was the Government's policies on climate change, which garnered one entire sentence of discussion.[122] Climate change is not a matter of national importance under

[117] See text accompanying footnotes 112 and 113.
[118] *Minister for Land Information v Dromgool*, above n 1, at [90].
[119] *Minister of Land Information v Dromgool,* above n 1, at [90].
[120] Natalie Akoorie "Covid 19 coronavirus: Hamilton council takes private land for Peacockes subdivision project without paying" *The New Zealand Herald* (online ed, Hamilton, 9 May 2020).
[121] *Minister for Land Information v Dromgool,* above n 1, at [73].
[122] *Minister for Land Information v Dromgool,* above n 1, at [74].

s6 of the RMA. However, it has been suggested to amend s6 to make climate change a mandatory consideration when exercising any power under the RMA.[123]

The Court refused to describe the Minister's role as supervisory, despite stating that the Minister is not required to assess the merits of alternative means of achieving the network utility operator's objective. *Schmuck v Opua* indeed held that 'supervisory' was an apt word to describe the Minister's role.[124] The Minister is not required to undergo the same process that the network utility operator has already done, yet still has the power to refuse consent.[125] The author suggests, however, that where the Minister's role is simply to ensure that the network utility operator has considered alternative options, it is hard to avoid describing the role as 'supervisory.'

It is alarming that the Court, in a case of compulsory acquisition affecting nearly 100 properties, saw no need for the notice of intention to relate to each property.[126] In a case where so many individuals are subject to the coercive force of the Crown, there should be a greater need to provide information specific to each parcel of land. Perhaps more importantly, the number of people affected by a project should not change the duty owed to the landowner. Compulsory acquisition is a sensitive topic. Anyone whose interest in land is affected by government action should receive full notice as to why their land is reasonably necessary for that action.

Ultimately, the author argues that the decision in *Dromgool* grants the Minister a great deal of centralised power with very few fetters. Of course, the Minister's decision is subject to an Environment Court hearing, but only if their decision is objected to. To object to the decision and proceed through the judicial system is not particularly accessible to all New Zealanders.[127] This begs the question of why the Minister's first instance decision is made without all relevant information, including any objections. The Court stated that public input is a crucial feature of the Environment Court report – yet it is only at the last stage of the acquisition process that public input becomes relevant.[128] Perhaps, the landowners should be given a chance to submit written objections to the Minister, which the Minister can consider

[123] Resource Management Review Panel *New Directions for Resource Management in New Zealand* (June 2020) at 155.
[124] *Schmuck v Opua Coastal Preservation Inc.*, above n 76, at [130].
[125] *Minister for Land Information v Dromgool*, above n 1, at [8].
[126] *Minister for Land Information v Dromgool*, above n 1, at [125].
[127] Akoorie "Covid 19 coronavirus: Hamilton council takes private land for Peacockes subdivision project without paying", above n 120.
[128] *Minister for Land Information v Dromgool*, above n 1, at [86].

when making their decision under s186(1). This would legitimise the Minister's decision and provide the landowner with an accessible opportunity to object to the taking of their land.

G. Underlying issue

The factual issue in *Dromgool* concerned the Minister's role and power in determining alternative routes to achieve TEL's objective.

However, the author suggests that determining the role of the Minister in cases of compulsory acquisition may not be as simple as the Courts in *Dromgool* suggests it is. At its core, a key issue in any case where a landowner is deprived of security to their land is finding a balance between protecting private property rights and acting for the public benefit.

Ultimately, dealing with any objection to a taking of land should be a simple matter of statutory interpretation. In *Dromgool*, the Courts had to interpret the Minister's decision in light of Part 2 of the PWA and the RMA. However, additional fetters to any decision made under the RMA lie within existing common law precedents and principles, statutory purposes, and even Treaty of Waitangi principles.[129] So what should be a simple task becomes complex. The varying decisions of *Dromgool* as the case has progressed through the NZ judicial system are evidence of this. At every Court, there was a different method of interpreting the statute. What is most concerning is that in none of the cases were fundamental principles of the common law relating to private property or even sanctity of one's home mentioned, let alone discussed. In the sensitive case of compulsory acquisition, requiring interpretation of an apparently ambiguous statute, the Courts must have regard to some statutory principles of law to guide their decision making. Unfortunately, little mention of any such principles is forthcoming in any judicial decision. Despite Hammond J's promising statement that powers of compulsory acquisition must be strictly construed to the extent that they are in direct interference with individual property rights,[130] it is difficult to find a judgment embracing this notion.[131]

The author suggests that the extensive common law history of the protection of private property deserved consideration by the Courts as a means of interpreting the relevant statutes.[132] The Courts should have chosen the meaning that best upholds this fundamental

[129] See discussion under heading V.
[130] *Deane v Attorney-General* [1997] 2 NZLR 180 at 191.
[131] Contrast David Grinlinton "Property rights, expropriation, and public works" (2013) 10 BRMB 40 at 43.
[132] See also Grinlinton, above n 131, at 43.

principle of the common law. While it is clear that the purposes of the PWA and the RMA may conflict with such common law protections, they must at least be identified and weighed up against each other as to which is clearer and more appropriate for the issue of interpretation before the Court.

Perhaps the fundamental principle is not discussed because the Courts feel the balance has already been struck in Part 2 of the PWA. Indeed, this was the opinion of Dr Kenneth Palmer, who claimed:[133]

> …a landowner who receives a notice to acquire land compulsorily from a local authority or the Crown, or an authorised public utility provider, has an additional right to object under the PWA 1981, and refer the matter to the Environment Court for a determination as to whether the taking is fair, sound and reasonably necessary to achieve the objectives of the authority. This process provides an appropriate balance between the powers of compulsory acquisition and the interests of private property owners.

VII. Acknowledged problem: Compensation

The legislature has acknowledged a problem with the PWA's current compensation provisions. The Public Works (Increased Compensation) Amendment Bill is evidence of that.[134]

The Bill proposes to provide additional compensation to landowners whose land is compulsorily acquired.[135] This compensation includes an extra payment of 20% of the market value of the land.[136] Further, landowners will be entitled to an additional $50,000 if the land acquired is their principal place of residence.[137]

The driving policy behind the Bill appears to be to encourage quicker negotiation times.[138] Further, increased compensation is intended to encourage more efficient planning. Faced with increased costs, the taking authority must carefully consider whether certain land is necessary for their project.

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[133] Kenneth Palmer *Legal Issues in the New Zealand Planning System* (New Zealand Productivity Commission, Working Paper, 2017) at 44. Citations omitted.
[134] Tim van de Molen "Public Works (Increased Compensation) Amendment Bill" (10 March 2021) New Zealand Parliament <www.parliament.nz>.
[135] Tim van de Molen "Public Works (Increased Compensation) Amendment Bill", above n 134.
[136] Tim van De Molen "Public Works (Increased Compensation) Amendment Bill", above n 134.
[137] Tim van de Molen "Public Works (Increased Compensation) Amendment Bill", above n 134.
[138] Tim van de Molen "Public Works (Increased Compensation) Amendment Bill", above n 134.

The existence of the Bill begs the question of whether providing landowners increased compensation really strikes a balance between protecting private rights and public benefit. Perhaps, to a degree, increased compensation could be relevant in striking this balance. Simply providing market value in a case of compulsory acquisition does not address the fact that a landowner may be selling their land, or even their primary residence, involuntarily. Monetary compensation above and beyond market value may act to address the violation of private property rights inherent in compulsory acquisition. However, an intention to address the violation of private property rights was not addressed anywhere in the Bill. Further, the PWA already provides compensation beyond market value in certain circumstances.[139]

The author wonders whether the power imbalance between the taking authority and the landowner can be mitigated without some procedural changes to compulsory acquisition. That the Bill asserts to restore that balance by offering more compensation sets a concerning precedent that the Crown is not willing to protect property rights, so far as they are willing to pay a higher price in exchange for violating them. Nonetheless, some mode of addressing the violation of private property rights must be identified.

VIII. Conclusion

Compulsory acquisition, or any taking of land, is a sensitive topic. As such, the process by which compulsory acquisition occurs must strike a fair balance between protecting the landowner's rights to use their land as they wish against the benefit of the public. This is especially so considering compulsory acquisition is one of the few cases where the Crown has the coercive force to override private rights.[140]

Just as a fish does not question the water it swims in; perhaps the landowner does not question the Crown's power to take their land. It may be that the power granted to Ministers, local authorities, and in some cases, private companies is so entrenched in New Zealand common and statute law that the balance between private rights and public benefit is not questioned.

The author admits that it is logical that the landowner and the Crown are not on equal footing. It is even beneficial that an elected government can act on behalf of the general public. However, property rights are foundational for our system of government and are perhaps

[139] See Public Works Act 1981, Part 5.
[140] See Brent O'Callahan "Public Works Acquisition: Can the Crown do the bidding of utility companies?" (2013) NZLJ 183 at 183.

deserving of greater protection.[141] Indeed, Blackstone argues that the true public benefit lies in the protection of private rights.[142]

Early takings legislation was informed by legal jurisprudence on the need for progress. As such, the 1928 enactment of the PWA granted almost unbridled power to the Crown to take land as they wished. This power was unbridled in the sense that there was little to no room for objection.[143] Unfortunately, this meant that when the PWA 1981 was enacted, the general belief was that the legislation was taking significant steps to enforce private property rights.[144] Introducing a requirement to justify why land was being taken was seen as a radical step forward for the protection of private property rights.[145] Indeed, the theory was that the Act would protect landowners and reduce the ability of the Crown to take land arbitrarily.[146] The reality is that the provisions do not go far enough. A justification for any exercise of compulsory acquisition is the least the landowner could expect, and the Crown could provide. This appeared to the author as a superficial protection of property rights. Rather than put the landowner on equal footing, the regime created under Part 2 of the PWA allows the Crown to strong-arm landowners into acquiescing to the taking of their land. Indeed, it has been described as something "like a totalitarian state" by one landowner.[147] Such a statement highlights property rights as symbolic of all other rights.[148] Although the landowner can object, the reality that has played out in the legal system is that it is only on a minor technicality that the landowner prevails.[149] Even then, this does not prevent the land in question from being taken.[150] The perceived unfairness of compulsory acquisition is reflected in *Dromgool*.

Dromgool, a case surrounding the legality of a particular compulsory acquisition, is of extreme public importance. However, there is an alarming lack of candid discussion about private rights. In fact, the Court went so far as to say that the Minister has an almost unfettered discretion when deciding to grant private companies the coercive powers of the

[141] Rose, above n 11, at 333.
[142] Blackstone, above n 3, at 139.
[143] See Public Works Act 1928, s22.
[144] See text accompanying footnote 47.
[145] See text accompanying footnotes 56 and 57.
[146] (25 September 1981) 441 NZPD 3643.
[147] Akoorie "Covid 19 coronavirus: Hamilton council takes private land for Peacockes subdivision project without paying", above n 120.
[148] See text accompanying footnotes 25-27.
[149] See *Seaton v Minister for Land Information*, above n 74.
[150] Mrs Seaton's land was able to be compulsorily acquired under s186 of the Resource Management Act 1991.

Crown.[151] In granting these powers, it is not for the Minister to check whether the taking of land would be fair and reasonable at first instance.[152] Rather, only when the taking is objected to will the Environment Court investigate whether the taking of land is reasonably necessary and alternative options have been adequately considered, among other things.[153] The author wonders why it is only when a landowner objects, that they are entitled to a fuller investigation into the validity of the taking. In a case as sensitive as compulsory acquisition, where people's land and their homes are at stake, surely it is in the public benefit to require the Minister to consider whether the taking is reasonably necessary in light of private property rights. This is especially so when it is a private company, not an elected government, exercising powers of compulsory acquisition.

In granting the Minister a nearly unfettered discretion, *Dromgool* centralises political power and power over property in the Crown. Protecting private property rights is essential to diffuse this power and grant landowners security in their property.[154] Such security empowers landowners to resist any encroachments on other rights.[155] If Rose's diffusion of power argument were accepted, the Court of Appeal in *Dromgool* would likely have required the Minister to review the merit of any alternative options personally.[156]

Despite the notion contended above that perhaps the judiciary avoid discussing private property rights because the balance between property rights and public benefit has already been struck in the legislation, the author argues that the balance has not been struck. The Increased Compensation Bill is evidence of that.[157] Unfortunately, rather than any substantive procedural changes to compulsory acquisition, the Bill looks to address the gap between private rights and public benefit by way of monetary compensation. The Bill's content sets a disappointing precedent that the judiciary and legislature alike are not concerned with introducing private property rights as a fetter on any decision to take land but are willing to provide greater monetary compensation in return for a monopoly on property rights. Rather than bringing balance, this approach only increases the power imbalance between the landowner and the taking authority.

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[151] *Minister for Land Information v Dromgool,* above n 1.
[152] *Minister for Land Information v Dromgool*, above n 1, at [8].
[153] *Minister for Land Information v Dromgool*, above n 1, at [8].
[154] Rose, above n 11, at 340.
[155] Rose, above n 11, at 340.
[156] See text accompanying footnotes 17-19.
[157] Tim van de Molen "Public Works (Increased Compensation) Amendment Bill", above n 134.

To truly address the power imbalance, there is a need to return to the role of the judiciary in the age of statutes: to consider fundamental principles of the common law when deciding how to interpret ambiguous legislation. The judiciary should at least consider the fundamental common law principle of protection of private property when interpreting takings legislation. If not, the Courts should err on the side of upholding it.

Word Count

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