

KAHAWAI LEGAL CHALLENGE

June 2008

BACKGROUND

- ⇒ The Minister of Fisheries made allocation decisions for kahawai in 2004 and 2005 on its introduction to the quota management system (QMS).
- ⇒ Recreational fishing organisations disappointed that New Zealanders' non-commercial fishing rights were not being properly allowed for under the Fisheries Act 1996 challenged those decisions in the High Court, in the case commonly known as the Kahawai Legal Challenge.
- ⇒ The High Court hearing was held over four days in November and December 2006.
- ⇒ In March 2007 the High Court confirmed the following principles:
 - Sustainability of fisheries is the bottom line and must be the Minister's ultimate objective;
 - All New Zealanders have a well-settled common law right to fish;
 - This right is a factor the Minister must take into account in decision-making processes. Fisheries must be managed to enable people to provide for their social, economic and cultural wellbeing.
- ⇒ In April 2007 Sanford Ltd, Sealord Group Limited and Pelagic & Tuna New Zealand Limited appealed the High Court decision.
- ⇒ In May 2007 the New Zealand Big Game Fishing Council and New Zealand Recreational Fishing Council lodged a cross-appeal on a narrow point relating to the requirements of the Hauraki Gulf Marine Park Act 2000 on fisheries management in the Hauraki Gulf.
- ⇒ The Court of Appeal hearing was held in Wellington on 26th and 27th February 2008.
- ⇒ The Minister and Ministry of Fisheries were first and second defendants respectively, of the Appeal.

The Objective

The Kahawai Legal Challenge sought to clarify how the Minister of Fisheries should make decisions in **all fisheries**, not just kahawai. The primary goal being to achieve 'more fish in the water' and in particular a rapid rebuild of kahawai stocks.

Why Was This Is A Landmark Case?

This was the first time recreational fishing organisations joined together to take legal action to protect the public's non-commercial fishing rights.

The New Zealand Big Game Fishing Council (NZBGFC) and the New Zealand Recreational Fishing Council (NZRFC), supported by lobby group option4 and Te Runanga A Iwi O Ngapuhi, asked the High Court to rule on the nature and extent of non-commercial fishing interests and how those interests must be allowed for when the total allowable commercial catch (TACC) in a particular fishery is set.

Who Was Representing The Case?

Stuart Ryan, partner with Hesketh Henry Lawyers, and barrister, Alan Galbraith QC represented the recreational fishers. Lyn L Stevens QC was involved in the early stages before being appointed a High Court judge.

How Did This Happen?

Kahawai were not included in the QMS when first introduced in 1986. Industrial-scale targeting of kahawai schools by the purse seine fleet assisted by spotter planes took place as the fishing industry raced to catch as much kahawai as possible so that kahawai quotas would be set at the maximum tonnage possible.

Despite a small reduction in purse seining, whole schools of kahawai were still being taken every set. It is estimated over forty million kahawai have been scooped out of the water.

What Was Wrong With The Minister's 2004 and 2005 Kahawai Decisions?

In a very short time the kahawai fishery has gone from being an abundant "people's fish" to being exported for crayfish bait, fish meal and other low value products. As a result kahawai are now smaller and less available to traditional, customary and recreational fishers for food.

NZBGFC and NZRFC who challenged the way the Minister allowed for non-commercial interests in setting the TACC for kahawai said the Minister failed to adequately consider the impacts of this bulk harvesting on recreational catch, and that those who caused the depletion needed to take the cuts to rebuild the fishery.

Commercial fishers lodged a counterclaim that sought to reduce the recreational allowance and increase the commercial take. The counterclaim was heard in conjunction with the recreational's kahawai challenge.

What About Other Species?

Although kahawai is the fish species in respect of which these issues have been argued in Court, the Court of Appeal's decision will have a bearing on the way all key fisheries including snapper, tarakihi, crayfish, paua, blue cod, kingfish, shellfish, gurnard, john dory and hapuku are administered under the Fisheries Act.

A Public Good Case

The High Court's confirmation of the Fisheries Act purpose that 'sustainability is the bottom line without which there will be will be no utilisation' (or fish to catch) is a win for the our fisheries, marine environment and the people's non-commercial right to catch fish for the table. Abundant fisheries contribute to the social, economic and cultural wellbeing of all New Zealanders.

How Much Has It Cost?

Even allowing for discounted rates and significant pro bono contribution by the Queens Counsel and legal team, associated costs have exceeded half a million dollars to date. The true cost of the combined legal and public awareness campaign is difficult to quantify as hundreds of people have donated time and resources at little or no expense to the challenge team.

The NZBGFC and key option4 supporters have made sizeable donations. The public has donated and helped distribute information as have a number of commercial and professional organisations and individuals. Website www.kahawai.co.nz

TIMELINE

2004

- January:** Ministry of Fisheries issue proposals for the introduction of kahawai into the Quota Management System.
- April:** Submission from non-commercial fishers (NZBGFC, option4 and the NZ Angling and Casting Association) filed with Ministry of Fisheries regarding the Ministry's proposals for the introduction of kahawai into the Quota Management System.
- August:** Minister issues his decision regarding the catch limits for kahawai.
- Sept:** Non-commercial fishers seek legal advice on Ministers decision.

2005

- July:** Ministry of Fisheries release further proposals for the allocation of kahawai.
- August:** Submission filed with Ministry of Fisheries regarding their 2005 proposals.
- Sept:** Minister makes a second management decision for kahawai.
- Judicial review proceedings filed in the High Court by the NZBGFC and NZRFC, challenging the Minister's kahawai decisions.
- Dec:** Commercial fishers file counterclaim challenging the Minister's 2005 kahawai decisions.

2006

- May:** Adjournment of hearing reluctantly requested by recreational fishers due to both a lack of evidence from the commercial fishers and the Ministry, and time to respond to the affidavits of the commercial fishers and the Ministry.
- June:** New hearing date confirmed for November 6th in Auckland High Court.
- Nov:** Auckland High Court hearing of the Kahawai Legal Challenge over three days.
- Dec:** Last day of the Kahawai Legal Challenge hearing in the Auckland High Court.

2007

- March:** Landmark decision from the High Court delivered on 21st March.
- April:** Sanford Limited, Sealord Group Limited and Pelagic & Tuna Limited file an appeal against the High Court decision.

May: Recreational fishers file a cross-appeal against a narrow point relating to the requirements of the Hauraki Gulf Marine Park Act 2000 on fisheries management in the Hauraki Gulf.

The Minister and MFish apply for a stay on the High Court's directions to make new management decisions until after the Appeal is heard.

June: Commercial fishers also apply for a stay on the High Court's directions until after the Appeal is heard.

Court of Appeal hearing is set down for 26th and 27th February 2008.

July: High Court hears the application from both commercial fishers and the Minister/Ministry to stay the March 2007 decision.

July 11th the High Court granted a stay and the status quo remains until the 2008 Appeal Court hearing.

2008

February: Wellington Appeal Court hearing of the KLC on 26th and 27th.

June: Appeal Court delivers its judgment on June 10th.