



Report of the

ATTORNEY-GENERAL

on the Casino Control (Moratorium)
Amendment Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 260 (2) of the Standing Orders of the
House of Representatives*

**VETTING FOR CONSISTENCY WITH THE
NEW ZEALAND BILL OF RIGHTS ACT 1990:
CASINO CONTROL (MORATORIUM)
AMENDMENT BILL**

- 1 I have considered whether this Bill, which imposes a 3 year moratorium on further applications for casino premises licences, effective from the date of introduction, complies with the New Zealand Bill of Rights Act 1990. I have concluded that clause 2 of the Bill limits the right conferred by section 27 (3) of the New Zealand Bill of Rights Act and cannot, on the information available, be treated as a justified limit under section 5 of the Act.

Scope of the Section 27 (3) Right

- 2 Section 27 (3) of the New Zealand Bill of Rights Act provides as follows:

“Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals”.

Clause 2 of this Bill provides a special regime for applications for casino premises licences received by the Casino Control Authority during the three year period commencing on 16 October 1997 and ending with the close of 15 October 2000.

In respect of these applications the Authority is required not to consider any application or grant a licence in respect of the application, but must return the application, and any fee accompanying it to the applicant, as soon as practicable.

The Authority is authorised to consider applications received outside the moratorium period in accordance with the provisions of the Casino Control Act 1990. Of particular relevance is proposed new section 27A (4) of the Casino Control Act 1990, (inserted by clause 2 of the Bill), which provides as follows:

“(4) The Crown is not liable to pay costs, compensation, or damages to any person—

“(a) Who makes an application; or

“(b) Who, but for this section, would have made an application—

for a casino premises licence to the Authority during the period commencing on 16 October 1997 and ending with the close of 15 October 2000.”

- 3 In previous consideration of section 27 (2) and (3) of the New Zealand Bill of Rights Act the view has been adopted that in general these provisions do not preclude alterations to the substantive law, which may affect the prospects of success for any proceeding provided that the proceedings themselves or the procedures applying to the conduct of those proceedings remain unaffected. This approach seems consistent with the indication given as to the scope of these respective provisions by the Court of Appeal in ***Knight v CIR*** [1991] NZLR 30 at p37 and ***Gazely v Attorney-General*** 16/7/96 CA 52/94. In examining the draft cabinet papers dealing with the proposal I have noted statements indicating that the Crown Law Office considers that if the Bill were to apply retrospectively only to those applications lodged after the date of introduction, there would be no requirement for compensation because those applicants would have been aware of the Government's intentions at the time of lodging their applications; and that accordingly the option (now set out in proposed new section 27A (2) of the Casino Control Act) would expose the Crown to little if any fiscal risk. I take this explanation to be a statement of the likely legal position in the absence of a clause such as proposed new section 27A (4) which is intended, it would appear, to eliminate the possibility of any fiscal risk to the Crown from the imposition of the moratorium.
- 4 In considering whether proposed new section 27A (4) constitutes a limit on the right conferred by section 27 (3) of the New Zealand Bill of Rights Act, I have noted that the clause does not preclude applicants to whom the moratorium applies from bringing proceedings against the Crown. However, by precluding the possibility of "costs, compensation and damages", proposed section 27A (4) limits the remedies available to any litigant in any proceedings. This in turn must affect the pleadings and the overall conduct of the litigation. In other words the clause will affect the procedures to be adopted in the conduct of any proceedings and not solely the substantive law. While an applicant may bring proceedings against the Crown it cannot be said in the light of proposed new section 27A (4), that the proceedings can be brought and heard "*in the same way as civil proceedings between individuals*". For these reasons I conclude that proposed new section 27A (4) constitutes a limit on the right conferred by section 27 (3) of the New Zealand Bill of Rights Act.

Section 5 of the New Zealand Bill of Rights Act

5 Section 5 of Bill of Rights Act provides:

"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

6 In applying section 5 I rely on decisions of the Canadian Supreme Court on their equivalent provision (known as the "Oakes test", **R v Oakes (1986)** 26 DLR (4th) 200 Supreme Court of Canada). I also apply Richardson J's formulation of the test in **MOT v Noort** [1992] 3 NZLR 260 at page 283 which involves balancing the following factors:

- (a) The significance in the particular case of the values underlying the Bill of Rights Act;
- (b) The importance in the public interest of intrusion on the particular right protected by the Bill of Rights;
- (c) The limits sought to be placed in the application of the Act's provision in the particular case; and
- (d) The effectiveness of the intrusion in protecting the interests put forward to justify those limits.

7 Regardless of which approach is adopted, the view which has been adopted is that two essential components must be satisfied. First, the limit must be substantively justified. This has been taken to mean that the limitation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom (i.e. it must relate to concerns which are pressing and substantial in a free and democratic society). Second, it must be shown that the means used to achieve the objective are reasonable and demonstrably justified. Essentially this involves a test of "proportionality" which consists of three components:

- (a) the measures adopted must be carefully designed to achieve the objective in question, not arbitrary, unfair or based on irrational considerations; that is they must be rationally connected to the objective;
- (b) the measures should impair as little as possible the right or freedom in question; and
- (c) there must be proportionality between the law limiting the right and the objective of the limitation i.e. the limitation must not be so deleterious of a right as to outweigh the substantive justification for the limitation.

The onus of justifying the limitation on the right or freedom rests on the party seeking to impose that limit (in this case the

Crown). **Solicitor-General v Radio New Zealand** [1994] 1 NZLR 48 refers.

- 8 In achieving the specific objective of the limiting legislation, although the particular right should be impaired no more than is necessary to meet the objective, it is recognised that there is a margin of error within which reasonable legislators could disagree (see **Attorney-General of Hong Kong v Lee Kwong-kut** [1993] 3 All ER 939, at 954 (PC)).

The Question of Cost

- 9 The issue of whether making savings (or avoiding fiscal risk) is a possible justification on the limitation of a Canadian Charter right has been considered in a number of cases. In **Singh v Minister of Employment and Immigration (1984)** [1985] 1 SCR 177, although the issue of whether making savings is a possible justification on the limitation of a Canadian Charter right was directly addressed by only 3 of the 6 judges, the Court was unanimous in holding that a full hearing right was to be afforded to every person who arrived at Canada's borders claiming refugee status thereby rejecting the argument that such a procedure would impose an "unreasonable burden" on the resources of Government. In **Re BC Motor Vehicle Act** [1985] 2 SCR 486, 518 Lamer J stated that "administrative expediency" would be relevant under section 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like". In **R v Schwartz** [1988] 2 SCR 443, 472 Dickson CJ noted that "administrative convenience . . . is rarely if ever an objective of sufficient importance" to override rights set out in the Canadian Charter. In New Zealand Richardson J has indicated that "in principle an abridging inquiry under s 5 will properly involve consideration of all economic, administrative and social implications." **MOT v Noort** [1992] 3 NZLR 260 at page 283 refers.

- 10 The Canadian cases do not go so far as to indicate that cost considerations and related administrative issues can never justify the limitation of a Charter right. They do, however, seem to indicate that, in the absence of exceptional circumstances (e.g. war or natural disaster) cost cutting, the limitation of fiscal risk or other administrative expediency is unlikely to justify a limit on a Bill of Rights protected freedom. The real issue would seem to be in what circumstances considerations of cost become so weighty that they would justify infringement or encroachments on a Charter right (in Canada), or a right protected by the New Zealand Bill of Rights.

- 11 Officials from the Department of Internal Affairs have been canvassed as to the possible justifications for proposed new section 27A (4) of the Casino Control Act 1990. Officials stated:
- (a) That because of the low fiscal risk to the Crown of the proposal, the proposed new provision could be regarded as one inserted primarily for the avoidance of doubt.
 - (b) That although the primary justification for the provision was the avoidance of any liability to the Crown, the proposed provision was both fair and reasonable because:
 - (i) The likelihood of success in any proceedings against the Crown was low;
 - (ii) No applicant would suffer loss of application fees, because the B requires their return;
 - (iii) In respect of any other costs incurred by any prospective applicant who fails to lodge an application prior to 16 October 1997, those costs will not necessarily constitute wasted expenditure as under the provisions of the Bill, the applicant will be able to progress an application once the moratorium expires (in other words the results of the applicant's preparation will not be lost);
 - (iv) Persons who have not applied as at 16 October will have been given due notice through the introduction of the Bill of the Government's intentions and accordingly do not suffer any unfairness if an application is subsequently lodged.
- 12 When questioned as to the likely number of prospective applicants who had already incurred costs in preparing applications which would not be submitted before 16 October, officials indicated that there were likely to be a few persons or groups (probably between 5 and 7) in this category. I have noted, in relation to the issue of the costs incurred by prospective applicants in preparing applications a statement in one of the papers prepared for Cabinet indicating that the costs to each applicant for a casino premises licence includes application fees of \$450,000, plus preparation costs of between \$1 million and \$2 million for social impact studies, resource management applications, architects fees, legal fees, publicity and other costs. It would appear accordingly that the costs incurred by prospective applicants who have not filed applications prior to 16 October may be very significant to those applicants.

Conclusion

13 On the information available I am not satisfied that the limit imposed on the right conferred by section 27 (3) by proposed section 27A (4) can be substantively justified.

The purpose of the clause is to avoid liability. The likely costs to the Crown, in the absence of such a provision, appear relatively limited, given the indications from officials as to the small number of prospective applicants affected, *and their low prospect of success in any proceedings*. Officials' preliminary estimate, on a worst case scenario, is that the maximum amount of liability would range from \$5 to \$14 million. If the fiscal risks to the Crown are low, in the absence of proposed section 27A (4), it is difficult to argue that the concerns giving rise to the limitation of the right in question are "pressing and substantial". While there will undoubtedly be variations in view as to when cost considerations do become sufficiently weighty to constitute a substantive justification for limiting a right, the present situation does not seem to involve such a case.

14 I also note that the expenditure incurred by prospective applicants who have not filed applications prior to 16 October may be significant to those applicants and that the (refundable) fees may only form a small part of the overall expenditure involved in preparing an application. There also appear to be some difficulties with the contention that expenditure incurred prior to 16 October is not wasted because it can be utilised in pursuing an application after 15 October 2000. The period of the moratorium is significant, there is some prospect of further policy changes which may affect to some extent the criteria under which applications are processed, and the resultant delay and uncertainty suggest that prospective applicants who have incurred expenditure but have not filed their applications by 16 October are highly likely to abandon the process, or be required to redo at least part of the work earlier undertaken in the light of changed circumstances and/or criteria. In summary, I am not satisfied on the information available that there is overall proportionality between the law limiting the right and the overall objective of the limitation.

Dated this 15th day of October 1997.



Attorney-General

