

## ***Criminal Proceeds (Recovery) Bill***

18 August 2006

Attorney-General

### LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

CRIMINAL PROCEEDS (RECOVERY) BILL - PCO 7242/3

Our Ref: ATT114/1298

1. You will recall that we provided you with advice on the consistency of the Criminal Proceeds and Instruments Bill with the New Zealand Bill of Rights Act 1990 ("the BORA") in June 2005 prior to that Bill's introduction. A copy of that advice is [appended](#) to this opinion for your ease of reference.
2. Cabinet has now agreed to the withdrawal of the Criminal Proceeds and Instruments Bill and its replacement with the Criminal Proceeds (Recovery) Bill.
3. Like the Criminal Proceeds and Instruments Bill, the Criminal Proceeds (Recovery) Bill provides for a conviction based forfeiture regime limited to instruments of crime and a civil regime to forfeit other property representing the proceeds of crime or assessed by a Court to be the value of a person's unlawfully derived income, although there are some differences of detail from the earlier Bill. The key difference is that the new Bill also includes provisions to enable international enforcement of foreign restraint and forfeiture of property issues arising in New Zealand.
4. We have considered the Criminal Proceeds (Recovery) Bill for consistency with the BORA and have concluded that it raises essentially the same issues as the earlier Criminal Proceeds and Instruments Bill. For the same reasons as detailed in our advice on the earlier Bill, we have concluded that the Criminal Proceeds (Recovery) Bill is not inconsistent with any of the rights and freedoms contained in the BORA.

Yours sincerely

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## ***Criminal Proceeds and Instruments Bill***

10 June 2005

Attorney-General

### LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:  
CRIMINAL PROCEEDS AND INSTRUMENTS BILL - PCO6396/7

Our Ref: ATT114/1298

1. We have vetted this Bill for consistency with the New Zealand Bill of Rights Act 1990 ("the BORA"). We consider that the Bill is consistent with the rights and freedoms contained in the BORA.
2. The Bill is intended to replace the current Proceeds of Crime Act 1991. The regime contemplated by the Bill differs in a number of respects from the current scheme, but most notably in ability to seek forfeiture orders in relation to criminal proceeds without a conviction being obtained.
3. While we consider the Bill to be consistent with the BORA, we did consider a group of issues in relation to ss 9, 14, 21, 23, 25, and 27 of the BORA. These are drawn to your attention below.

### **Criminal proceeds and instruments forfeiture regime**

#### *The regime*

4. Part 2 of the Bill sets out the criminal proceeds and instruments forfeiture regime. The regime provides for conviction-based forfeiture of instruments of crime and non-conviction-based forfeiture of other property representing the proceeds of crime or assessed to be the value of a person's unlawfully derived income. Accordingly, there is provision in Part 2 for the making of the following types of orders:

4.1 Restraining orders (clauses 24 to 26), which have the effect of restraining the person subject to the order from dealing with the property other than provided for in the order, and permitting the Official Assignee to take control and custody of the property. Restraining orders are temporary and are intended to preserve the property pending determination of an application for forfeiture.

4.2 Assets forfeiture orders (clause 47). These may be made by a Court where it is satisfied on the balance of probabilities that the property is "tainted assets". "Tainted property" means any property that has in whole or in part been;

4.2.1 acquired as a result of significant criminal activity; or

4.2.2 directly or indirectly derived from significant criminal activity.

4.3 Profit forfeiture orders (clause 55). These may be made by a Court where it is satisfied on the balance of probabilities that the beneficiary has unlawfully benefited from significant criminal activity within the relevant period of criminal activity and has interests in property.

4.4 Instrument forfeiture orders (new section 142M of the Sentencing Act 2002), which may be made where a Court is satisfied that the property in question was used to commit or to facilitate the commission of a qualifying forfeiture offence, being an offence punishable by a maximum term of imprisonment of 5 years or more.

5. The Bill also contains various "safeguards" and ameliorating provisions that apply in relation to the orders provided for in Part 2. For example, clause 61 allows a court to grant relief from a civil forfeiture order on the basis of a valid interest in the property or hardship. Relief may also be granted under the Sentencing Act in relation to instrument forfeiture orders.
6. The types of orders provided for in Part 2 raise a number of potential issues under the BORA. We note also that similar regimes for the forfeiture of proceeds of criminal activity in comparable jurisdictions have been subject to challenge on a range of human rights-related grounds. We have therefore considered the full range of potential issues in light of relevant New Zealand jurisprudence and that from comparable jurisdictions.

#### *Section 9 - cruel, degrading, or disproportionately severe treatment or punishment*

7. Section 9 of the BORA provides for the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.
8. Section 9 appears in the subpart of the BORA entitled "Life and security of the person".<sup>[1]</sup> The focus of ss 8 to 11 of the BORA appears to be on interferences with bodily integrity. If that is so, then questions arise as to the proper scope of the terms "treatment" and "punishment" in s 9. For example, do these apply to economic or other non-liberty affecting penalties such as forfeiture of property?
9. This matter has not been the subject of detailed judicial consideration in New Zealand, although in *Lyall v Solicitor-General*<sup>[2]</sup> the Court of Appeal appears to have proceeded on the assumption that s 9 was applicable to a determination of whether tainted property should be forfeited to the Crown under the Proceeds of Crime Act 1991.
10. In the United States it has been held that forfeiture statutes (and individual decisions under them) can be challenged for inconsistency with the Eighth Amendment prohibition on cruel and unusual punishments.<sup>[3]</sup>
11. Similarly, in challenges to regimes for the forfeiture of proceeds of crime (including the instruments of crime) under the Canadian Charter of Rights and Freedoms, the Courts have proceeded on the basis that forfeiture can be considered "punishment".
12. In *Turner v Manitoba*<sup>[4]</sup> the Court was asked to consider a Charter challenge to the provisions of the Wildlife Act that provided for the mandatory forfeiture of items used in the commission of offences under that Act. In concluding that forfeiture was not cruel and unusual punishment under s 12 of the Charter, the Court cited with approval the conclusions

reached in *R v Porter*.<sup>[5]</sup> In that case the Court held that while forfeiture could be considered punishment, it was not cruel and unusual. The Court did observe that the thrust of cruel and unusual was directed to physical and emotional constraints of the person and not the individual's financial or property loss.

13. While the application of s 9 of the BORA to "treatment" or "punishment" which does not impact on bodily integrity has not been considered in detail in New Zealand, courts in the United States and Canada have been proceeded on the basis that forfeiture does constitute punishment and is accordingly subject to scrutiny against constitutional protections. In any event, we consider that even if forfeiture orders were to be considered "treatment" or "punishment" that is subject to s 9 of the BORA, the impact of such orders is not such as to constitute "disproportionately severe" treatment or punishment.
14. In *Puli'uvea v Removal Review Authority*<sup>[6]</sup> the Court of Appeal acknowledged that the appellant's removal from the country would cause "considerable distress, sadness and difficulties". However, it did not consider that it attained "the high threshold" required before the prohibition on disproportionately severe treatment was breached. In that regard, the Court referred approvingly to the view that treatment had to be "so excessive as to outrage standards of decency" to amount to disproportionately severe.<sup>[7]</sup>
15. We do not consider that the making of a forfeiture order in relation to property that has been obtained directly or indirectly through criminal activity or which has been used to facilitate the commission of an offence, would be considered "so excessive as to outrage standards of decency".

### *Section 21 – unreasonable search and seizure*

16. Section 21 of the BORA provides for the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
17. We have considered whether the provisions in the Bill that authorise the making of restraining orders and forfeiture orders (both non-conviction and conviction based) give rise to an issue of consistency with s 21 of the BORA.
18. On a straightforward reading, s 21 appears to be engaged as it guarantees protection against "unreasonable ... seizure ... of property." An interference with a person's possessory interest in property falls relatively easily within that plain language. However, we note that the Court of Appeal has referred to the "touchstone" in s 21 BORA being "the protection of reasonable expectations of privacy."<sup>[8]</sup>
19. However, the New Zealand jurisprudence has been somewhat inconsistent in the application of this concept to particular fact situations. In the early case of *Alwen Industries v Comptroller of Customs*<sup>[9]</sup> Blanchard J had to consider the interpretation of s 284 of the Customs Act 1966. He took the view that s 21 was relevant to the interpretation of the provision in circumstances involving what might be described as a simple interference with property, devoid of any liberty or privacy concerns.
20. The High Court in *Wilson v New Zealand Customs Service*<sup>[10]</sup> (involving a seizure of an innocent third party purchaser's motor vehicle as part of a customs investigation) held that on the facts it could not be said that s 21 was being invoked "purely for property protection purposes." In the Court's view there were privacy issues for the first plaintiff inextricably

bound up in the seizure and continued deprivation of her car: "deprivation of a person's right to use their property or the reduction of their property rights to a right to apply for its return, might amount to a detrimental effect on the owner's privacy interest in that property". Williams J regarded the Canadian cases as unhelpful to the proper interpretation of s 21 BORA because s 8 of the Charter does not contain a specific reference to "property", unlike our s 21.

21. In *McGlone v Ministry of Fisheries*[\[11\]](#) Wild J held that there was no "seizure" for the purposes of s 21 BORA when, by operation of provisions in the Fisheries Act, a commercial fisher who had failed to make returns required by that Act was liable to have his fishing vessel forfeited upon conviction.
22. In *Westco Lagan Limited v Attorney-General*, McGechan J considered the content of ss 21 to 25 of the BORA and observed that, "it would be distinctly odd if the legislature had plonked a provision intended to deal in a general way with seizure of property without compensation into such a matrix", and concluded "there is a very strong likelihood the legislature did not so intend." Moreover, McGechan J noted that stand-alone property-protection guarantees are well enough known in constitutional instruments; the absence of such a direct provision, in line with a similar absence in the Canadian Charter, "points to a decision to omit such rights altogether."
23. Canadian decisions under s 8 of the Charter (the equivalent provision of s 21 of the BORA) have consistently held that forfeiture of property is not a "seizure" within the meaning of s 8.[\[12\]](#)
24. In *Quebec (Attorney-General) v Laroche*[\[13\]](#), the Supreme Court of Canada held that a restraint order, made in conjunction with a special seizure warrant, did involve a seizure to which s 8 applied, notwithstanding the fact that a restraint order under the Criminal Code of Canada does not involve the removal of the property in question from the custody of the person subject to the order (rather, such an order simply "restrains" that person from alienating the property while the order is in force). However, the Court viewed the restraint order as "intended to supplement seizures that are taking place contemporaneously, and that they place property under the control of the justice system ... whether for the purpose of a criminal investigation or for the punishment of crimes that fall within Part XI of the Criminal Code". Further, the finding that a restraint order was a "seizure" was not determinative; the case was decided on the basis that the evidence did not support the making of a restraint order.
25. Despite finding that a restraint order made in such circumstances was a "seizure" the Court in *Laroche* did say that:

"The prohibition against unreasonable search and seizure is designed to promote privacy interests and not property rights.... Specifically, where property is taken by governmental action for reasons other than administrative or criminal investigation a "seizure" under the Charter has not occurred.... A detention of property, in itself, does not amount to a seizure for the Charter purposes - there must be a superadded impact upon privacy rights occurring in the context of administrative or criminal investigation."

26. Given the unsettled state of New Zealand law in this area, we have placed considerable reliance on the Canadian position. Certainly, the emphasis of the Canadian courts on privacy

as lying at the heart of the protection against unreasonable search and seizure is consistent with the New Zealand Court of Appeal's view of what s 21 of the BORA seeks to protect.

27. Accordingly, we take the view that it is arguable that restraining orders and forfeiture under the proposed regime do not engage s 21 as there is no element of privacy involved in the "freezing" and taking of the property.
28. Even if s 21 does apply, however, in our view it is reasonable to freeze and forfeit the assets of those seeking to benefit from criminal activity. In reaching this view, we note the observations of the European Court of Human Rights in *Welch v United Kingdom* (1995) 20 EHRR 35 and in *Phillips v United Kingdom* (41087/98) [2001] ECHR 433 (5 July 2001) in relation to the objectives underlying legislation providing for the forfeiture of proceeds of crime in the United Kingdom. In *Phillips* the Court noted that confiscation orders were "conferred on the courts as a weapon in the fight against the scourge of drug trafficking, and also to deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade." After taking into account the importance of the aim pursued, the Court concluded that the interference suffered by the applicant was not disproportionate.
29. Similarly, in *Gilligan v Criminal Assets Bureau*<sup>[14]</sup> the Irish High Court held that the State has a legitimate interest in the forfeiture of the proceeds of crime and concluded that the Irish Proceeds of Crime Act 1996 was a proportionate response to the problem of the accumulation and use of assets which are directly or indirectly derived from crime.
30. In our view, to the extent that s 21 is engaged by the making of restraining orders and forfeiture orders under the Bill (and we consider that the better view is that it is not), any seizure is "reasonable" in terms of s 21 bearing in mind the objectives pursued by the Bill and the various protections included in the Bill (for example, provision for protection of third party interests, relief on hardship grounds).

#### *Application of s 25 ( minimum standards of criminal procedure) to civil forfeiture*

31. Section 25 of the BORA provides that every person charged with an offence has, in relation to the determination of the charge, the certain minimum procedural rights. These include the right to a fair trial and the right to be presumed innocent until proven guilty according to law.
32. It has been argued in Canada that a restraining order in relation to possible proceeds of crime impacted upon a defendant's right to a fair trial as it might be seen to imply an involvement in crime. However, the Court in *R v Trang*<sup>[15]</sup> held that the essence of a restraint order was to impose a temporary restraint on property while issues were determined. Further, an application for a restraint order was not part of the criminal trial against the defendant. As such it did not impact on any finding of innocence or guilt in a criminal trial.
33. Similarly, challenges to the consistency of proceeds of crime confiscation regimes in the United Kingdom, Ireland, and Northern Ireland have been brought on the basis of its consistency with similar criminal procedure guarantees to those in s 25 of the BORA, including those in the European Convention. In a series of decisions, courts have consistently held that those protections do not apply to civil proceedings to determine an application for forfeiture.

## *Retrospectivity*

34. The Bill will apply retrospectively (see clause 9). Accordingly, we have considered the application of s 25(g) of the BORA. Section 25(g) provides that a person who has been charged with an offence has in relation to the determination of the charge "[t]he right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing to the benefit of the lesser penalty."
35. As noted above, we have concluded that s 25 of the BORA does not apply to civil proceedings. However, as the instrument forfeiture regime is to operate as part of the sentencing process we have considered the consistency of the regime with s 25(g). We have concluded that, as the regime is no harsher in its impact than the current regime, no issue of consistency with s 25(g) arises.

## *Section 26(2) - double jeopardy*

36. Section 26(2) of the BORA provides that a person who has been finally acquitted or convicted of, or pardoned for, an offence shall not be tried or punished for it again. As noted above, courts in Canada and the United States have held that forfeiture constitutes "punishment". Accordingly, there is a question whether the forfeiture of proceeds constitutes a "second punishment" in circumstances where a person has been convicted and sentenced of an offence.[\[16\]](#)
37. The United States Supreme Court in *United States v Ursery*[\[17\]](#) held that *in rem* civil forfeitures are neither "punishment" nor criminal proceedings for the purposes of double jeopardy.
38. We note also the judgment of the Court of Appeal in *Daniels v Thompson*[\[18\]](#) held that:

"In our view it would be erroneous to treat the word "punished" in section 26(2) as embracing punishment outside the ambit of the criminal process and its associated enforcement of the public law."

39. In view of the Court's narrow view of the ambit of s 26(2) in *Daniels* and the United States case law on the point, we have concluded that s 26(2) is not engaged by applications for orders under the Bill and no issue of double jeopardy arises.

## **Investigative powers I**

40. Subpart 7 of Part 2 of the Bill contains a range of investigative powers that are intended to enable enforcement officers to carry out their functions and duties under the Bill. These include:

40.1 Warrants to search for and seize property issued by a Judge on the application of the Police (clause 100);

40.2 Warrants to search for and seize property issued by a Judge on the application of the Director of Criminal Proceeds Confiscation ("the Director") (clause 102);

40.3 The Director's power to require production of documents (warrantless) (clause 104);



40.4 Court order requiring production of documents made on the application of the Director (clause 106);

40.5 The Director's power to require attendance before the Director and/or the answering of questions and/or the supply of information and/or the production of documents (warrantless) (clause 107);

40.6 Search warrants issued by a Judge on the application of the Director in the event of non-compliance with clauses 104, 106, or 107 (clause 108); and

40.7 Warrants to search for and seize property issued by a Judge on the application of the Official Assignee (clause 109).

41. We have considered the consistency of these various powers with ss 14 (right to freedom of expression which includes the right not to be compelled to impart information) and 21 (unreasonable search and seizure) of the BORA.

*"Reasonable" search and seizures?*

42. "Reasonable" in the context of section 21 essentially means that the power to search or seize is substantively justified in the context of balancing legitimate state interests against the expectations of privacy. In considering the search regime established by the Bill, we have borne in mind the objectives of the Bill, namely, preventing individuals involved in criminal activity from benefiting directly or indirectly from that criminal activity, and ensuring and the proceeds of crime are not available to such persons.
43. We note that the searches authorised by clauses 100, 102, 106, 108, and 109 all require prior authorisation by a judicial officer who must be satisfied that a sufficiently objective standard has been proven before issuing a warrant. The powers are confined to search for and seizure of evidence relevant to proceedings under the Bill and property that is or may be subject to an order under the Bill. Further, clause 115 sets out the form and content of warrants and requires that certain matters must be stated in the warrant in reasonable detail. Clause 117 specifies the powers that are conferred by a search warrant and includes a requirement for searches to be carried out at a time that is "reasonable in the circumstances".
44. With respect to the searches authorised by clauses 104 and 107, we note that these are warrantless powers. However, while case law in New Zealand and Canada has held such powers to demand the production of documents to be "searches" that are subject to the BORA and the Charter respectively, [\[19\]](#) courts have recognised that the impact on privacy interests involved in a demand for documents is far less than in a physical search of property or persons. [\[20\]](#) Further, clause 122 prescribes the content and form of notices issued by the Director and requires that a notice which requires attendance before the Director must state that the person has the right to be accompanied by a lawyer. These powers are also quite limited in their application - clause 104 may only be exercised against a person whose property is subject to a restraining order or a officer of a financial institution that the Director believes has information about property subject to a restraining order and clause 107 may only be used against a person whose property is subject to a restraining order made on the application of the Director.

45. The Bill also provides for the Official Assignee to hold seized property and for its return where it is not subject to a restraining or forfeiture order (clause 111). It also requires those executing warrants to produce evidence of their authority to search and seize (clause 1219). There are also restrictions on the extent that self-incriminating information obtained from a person can be used against that person in a criminal prosecution (see paragraphs 47 to 49 below).
46. Finally, we have also taken into account the objectives served by the investigative powers in subpart 7, namely, the securing of property and the gathering of evidence required to support applications for forfeiture of property derived from criminal activity. Bearing in mind these objectives and the various safeguards around the powers, we have concluded that the investigative powers contained in subpart 7 are "reasonable" search and seizures within the meaning of s 21 of the BORA.

### *Forced expression*

47. We have considered whether the requirements in the investigative regime requiring the provision of information and answering of questions raise an issue in relation to s 14 of the BORA.
48. We consider that these requirements are not inconsistent with the right to freedom of expression. We acknowledge that the right to freedom of expression, as protected by section 14, includes the right to say nothing or the right not to say certain things. However, for the same reasons that we have concluded that the investigative regime is "reasonable" in terms of s 21 of the BORA, we consider that to the extent that this regime limits the right to freedom of expression it constitutes a justified limitation on that right in terms of s 5 of the BORA.

### **Self-incrimination**

49. Section 23(4) of the BORA provides that every person who is detained under any enactment has the right to refrain from making any statement. However, clause 136 provides that no person is excused from answering any question, providing any information, producing any document, or providing any explanation on the ground that to do so would or might incriminate or tend to incriminate that person. Accordingly, in circumstances where there is a detention (such as arguably exist when a person is required to attend before the Director under clause 107) an issue of consistency with s 23(4) of the BORA arises.
50. However, it is noted that there is a limitation on the use that may be made of self-incriminating statements obtained in such circumstances under the Bill. Clause 138 provides that a self-incriminating statement may only be used in a prosecution for an offence where the person gives evidence inconsistent with that statement. A refusal to answer questions or provide information, or the provision of misleading information, may only be used in a prosecution under clause 125 (failure to comply with notices, orders and search warrants).
51. The limitation on the availability of self-incrimination as a basis for refusing to answer questions or provide information is intended to ensure that the objectives underlying the Bill are not defeated by a lack of necessary information. In view of this, we consider that the limitations on the use that may be made of self-incriminating statements in prosecutions contained in clause 138 is a sufficient safeguard to ensure that the limitation on s 23(4) is justified under s 5 of the BORA.

## Right to be presumed innocent

52. Section 25(c) of the New Zealand Bill of Rights Act provides for the right to be presumed innocent until proven guilty.
53. In *R v Wholesale Travel Group*, the Supreme Court of Canada held that the right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt and that the state must bear the burden of proof.[\[21\]](#)
54. Clause 125 provides that it is an offence for a person against whom an examination notice, a production notice, or production order has been made to fail, without reasonable excuse, to comply with that notice or order. Clause 128 provides that every person who, without reasonable excuse intentionally obstructs any person exercising a power or carrying out a function under the Act commits an offence.
55. These clauses appear to bring into play s 67(8) of the Summary Proceedings Act 1957 which provides that:

"Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of an offence in the enactment creating the offence, may be proved by the defendant, but, ...need not be so negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant."

56. The effect of this that a defendant who is able to raise doubt as to his or her fault but is not able to prove absence of fault on the balance of probabilities would be convicted. This is contrary to the presumption of innocence because the defendant is convicted even though reasonable doubt exists as to his or her fault.
57. Whilst the penalties are at the high end for a reverse onus provision (up to 6 months imprisonment or a fine of up to \$5000 or both in the case of clause 125 and up to 3 months imprisonment or a fine of up to \$5000 or both in the case of clause 128, we consider that these provisions constitute justified limitations on s 25(c) of the BORA. We have reached this conclusion after taking the following factors into account:

57.1 The matters which the defendant is required to prove are matters that can be said to be peculiarly within the knowledge of the defendant;

57.2 The importance of ensuring necessary information is available to enforcement officers so that the objectives underlying the Bill are not undermined;

57.3 The availability of a defence operates to the benefit of a defendant.

## Natural justice

58. Section 27(1) of the BORA provides that every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

59. Clause 22 of the Bill permits applications for restraining orders to be made without notice to persons having an interest in the property. Such an *ex parte* order may only be made where the Court is "satisfied that there is a risk of the proposed restrained property being destroyed, disposed of, altered, or concealed." Clause 22 overrides clause 23 (which provides for the rights of persons having an interest in the proposed restrained property to be heard at and adduce evidence in relation to an application for a restraining order).
60. *Ex parte* processes involve an abrogation of the right to natural justice and will only be justified in circumstances of particular urgency.[\[22\]](#)
61. However, we consider that the limitation on s 27(1) of the BORA imposed by clause 22 of the Bill is justified in view of the fact that an *ex parte* order may only be made in circumstances where there is a risk to the property concerned.
62. Further, we note also the judgment in *Martin v Ryan* where the Court held that the discretion to make an *ex parte* order was a discretion that should be used only in circumstances justifying overriding natural justice. Accordingly, the Courts will, in interpreting clause 22, be required to exercise their discretion as consistently with s 27 of the BORA as possible.

### **Judicial Review**

63. Section 27(2) of the BORA provides that every person whose rights, obligations, or interests have been affected by a determination of any tribunal or other public authority has the right to apply for judicial review of that determination.
64. Clause 87 provides that decisions to take proceedings under the Act by the Director are not reviewable.
65. However, in our view this limitation on s 27(2) is a justified limitation on that right under s 5 of the BORA. We note that this limitation reflects a common law reluctance to interfere with prosecutorial decisions. This is generally justified on the basis that matters, which might, in other contexts, give rise to grounds for judicial review, are open to challenge at trial. In this context, it is open to a person affected by an application under the Bill to raise any issues of law, fact or opinion that he or she disputes in front of the Court hearing the application. The limitation on judicial review in relation to this category of decisions simply reflects the policy objective of avoiding collateral proceedings that operates in relation to criminal proceedings.

### **Conclusion**

66. While the Bill raises a number of potential issues of consistency with the BORA, we have concluded that overall it is not inconsistent with any of the rights and freedoms contained in the BORA.

Yours sincerely

Val Sim  
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## Footnotes

1 The other provisions of this subpart of the BORA deal with the right not to be deprived of life; the right not to be subjected to medical or scientific experimentation; and the right to refuse to undergo medical treatment.

2 (1997) 15 CRNZ 1, 6-7 and 9 (CA).

3 See for example *United States v Busher* 817 F 2d 1409 (1987) (9th Circ).

4 (2000) MBQB 94; see also *Spence v R* [2004] NLSCTD 113 involving a similar challenge to the Wildlife Act of Newfoundland and Labrador where the Supreme Court of Newfoundland and Labrador held that the forfeiture of a seaplane used in the commission of poaching offences was not cruel and unusual punishment.

5 (1989) 26 FTR 69

6 (1996) 2 NRNZ 510 9 (CA).

7 *Ibid* at 512.

8 *R v Fraser* [1997] 2 NZLR 442, 449; (1997) 3 HRNZ 731, 739 (CA). See also *R v Grayson & Taylor* [1997] 1 NZLR 399, 407; (1996) 3 HRNZ 250, 260 (CA).

9 (1993) 1 HRNZ 574 (HC).

10 (1999) 5 HRNZ 134 (HC).

11 HC, Wellington CP 62/98 16 December 1998, Wild J.

12 See for example, *Ford Credit Canada Ltd v Canada (Deputy Minister of National Revenue)* (1995) 100 BCLR (2d) 162 where the Supreme Court of British Columbia held "Section 8 is designed primarily to protect the privacy rights of individuals and affords protection to property only where that is required to uphold the protection of privacy."

13 [2002] 3 SCR 708

14 [1997] 1 EHC 106; [1998] 3 IR 185

15 (2002) 161 CCC (3d) 210

16 We note that Bill would amend the Sentencing Act 2002 to make instrument forfeiture orders part of the sentencing regime provided for by that Act. Accordingly, as such orders will form part of a person's sentence we have not considered the issue of double punishment in relation to such orders. Similarly, an issue about "double punishment" will

obviously not arise in relation to an application for an asset forfeiture order or a profit forfeiture order where no criminal proceedings have been taken.

17 518 U.S. 267 (1996)

18 [1998] 3 NZLR 22

19 See for example, *New Zealand Stock Exchange v Commissioner for Inland Revenue* [1992] 3 NZLR 1; *R v Mills* [1999] 3 SCR 668.

20 See for example, *British Columbia Securities Commission v Branch* [1995] 2 SCR 3 and *R v McKinlay Transport* [1990] 1 SCR 627.

21 *R v Wholesale Travel Group* 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

22 See *Y v X* (2003) 22 FRNZ 965; [2003] 3 NZLR 261; [2003] NZFLR 1126 and *Martin v Ryan* [1990] 2 NZLR 209 which involved *ex parte* applications for protection orders under domestic violence legislation.

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