

Janet November  
Law Commission

13 December 2004

### **Customs Act Forfeiture and Seizure Powers**

1. You invited a submission on this topic, and I write in my capacity as the President of the New Zealand Council of Civil Liberties.
2. The provisions allowing for the seizure and forfeiture in the Customs Act are in breach of many fundamental constitutional statutes, and this will be tested shortly in **Mihos v Attorney-General** Civ 2004-485-1339. That case is a judicial review currently before the High Court<sup>1</sup>.
3. The statutes relevant to this “fundamental human right’ include:

Magna Carta: and

The Bill of Rights Act 1688(Imp), (and see the Petition of Right 1627 and the Ship Money Act):  
and

The New Zealand Bill of Rights Act 1990

4. I am confident that the issue of whether seizures and forfeitures by Customs are reasonable and lawful under the New Zealand Bill of Rights Act (“NZBORA”), will receive considerable attention from others, the application of the NZBORA as you well know has developed from prima facie exclusion, to a balancing test. I will concentrate on the common law heritage, and internationally recognised right to property free of arbitrary interference. (This can of course then be applied to lawfulness and reasonableness, in the NZBORA debate).
5. Historically, the interrelationship between the Crown and Citizens has been of significant importance culminating in the English Civil Wars of the 1640’s, and the reaffirmation of certain fundamental rights in the Bill of Rights 1688(Imp).

### **Starting Point: An Ancient Common Law Right Internationally Recognised**

6. The right to own property and not to be arbitrarily deprived of it has traditionally been regarded as a ‘**fundamental right**’, answering ‘a demand of human nature’<sup>2</sup>.

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<sup>1</sup> Unlikely to be heard before April or May 2005.

<sup>2</sup> **Davis v Mills** (1904) 194 US 451, per Holmes J.

7. This is recognised by Magna Carta<sup>3</sup>.

8. The Universal Declaration of Human Rights Article 17 provides:

(1) Everyone has the right to own property alone as well as in association with others

(2) No one shall be arbitrarily deprived of his property.

9. The US Constitution Fifth Amendment embodies the principle:

No person shall... be deprived of... property, without due process of law; nor shall private property be taken for public use, without just compensation

10. As does the First Protocol to the European Convention on Human Rights which states:

Article 1:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

11. Our modern New Zealand Bill of Rights states:

**Section 21 Unreasonable search and seizure—**

Everyone has the reasonable search or seizure, whether of the person, property, or correspondence or otherwise.

Reflecting Article 17 of the International Covenant on Civil and Political Rights.

12. Both common law, and Statute provide protection for property owners. The due process statute the Magna Carta, is assisted by both the Bill of Rights Act 1688(Imp), and the Petition of Rights 1627, which are still in force in New Zealand. [Imperial laws Application Act 1988, Sch 1]

13. The Bill of Rights Act 1688, has an important and somewhat overlooked provision of major importance in this debate it reads:

**GRANTS OF FORFEITURES—**

That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void:

14. The Petition of Right 1627 provided:

8 The Petition

<sup>3</sup> Clause 39 provides that: 'No man shall be ... disseised of any tenement. . . except by the lawtul judgment of his peers or by the law of the land'.

THEY DO THEREFORE HUMBLY PRAY Your Most Excellent Majesty that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament; AND that none be called to make answer, or take such oath, or to give attendance or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof...

15. Justice Keith writing in the Court of Appeal Report for 2001 refers to the Ship Money Act 1641 (and the Petition of Right). He comments:

1641 and 2001 On 4 July 1641 Charles I assented to “An Act for declaring unlawful and void the late Proceedings touching Ship-Money, and for the vacating of all Records and Process concerning the same”. According to G M Trevelyan that Act and others including the Habeas Corpus Act were

“Passed without debate by the Houses and signed without thought by the King. The means of unparliamentary revenue—Ship Money, Forests, Knighthood, Tonnage and Poundage—were made illegal beyond further dispute...”

(England Under the Stuarts (1904, revised 1946, Folio Society edition ‘1996) ch VII pi 92).

16. Against such a rich heritage of prohibition of forfeiture, and a fundamentally recognised international human right it is surprising that we have paid so little attention to the extensive powers of the state in this area.

### **Applying Common Law and International Principle Locally**

17. How then in the face of a valid statute the Bill of Rights 1688 can Customs still exercise seizure and forfeiture powers? Probably because the 1688 statutory provision has been overlooked. Indeed your own terms of reference fail to draw attention to the Bill of Rights 1688. Discussion of reform in this area is incomplete without it. **Fitzgerald v Muldoon** is a useful reminder of the importance of fundamental constitutional principle; applied here it means—A conviction is a clear necessity prior to forfeiture.
18. The Customs Department clearly recognise this common law and international pedigree:

#### **New Zealand Customs Service**

##### **GM PRO 03**

##### **SEIZURE, WAIVER OF FORFEITURE AND DISPOSAL PROCEDURE**

Issue Date: 01 July 02

Review Date: 01 August 03

Owner: National Manager Goods Management

#### **1.0 Purpose**

- 1.1.1. The forfeiture of goods is recognised as one of the most severe penalties in Customs law. Historically forfeiture was designed to have a deterrent effect on offending and is still considered necessary to encourage compliance with, and allow for the effective enforcement of, Customs law.

19. In my submission the forfeiture and seizure of goods by customs without trial, and as a *deterrent* is simply a modern form of state theft—a new form of ‘ship money’. The Bill of Rights 1688 prohibits this form of forfeiture short of conviction. Additionally, the Courts not the Executive are responsible for deterrence.

### **Proceeds of Crime analogy and Reversal of Presumption of Innocence**

20. The seizure and forfeiture of goods by Customs is a form of *Proceeds of Crime* seizure and forfeiture, **without** any of the same protections, and on a presumption of guilt, rather than the presumption of innocence. This is constitutionally offensive.
21. The Customs Act seizure and forfeiture powers as currently administered cannot be reconciled with the ancient and modern Bill of Rights, and are unlawfully applied.
22. Whilst the administrative power of waiver of penalty by the Chief Executive is wide, if it were subject to proper controls it might be acceptable (i.e. a power to impose a lesser penalty and review by an independent tribunal). But as it is frankly whilst applauding the sentiment, I find its breath tantamount to some effective arbitrary regal power of pardon:

Section 130 of the Customs Act 1996 provides:

130 No penalty in certain cases

A person is not liable to the imposition of a penalty under section 128 of this Act, if—

- (a) That person has voluntarily disclosed the error or omission to the Customs before the Customs has notified the person that—
- (i) The goods to which the entry relates have been selected for examination by the Customs;
- (ii) Documentation is required to be presented to the Customs in relation to that entry;
- (iii) The Customs intends to conduct an audit or investigation in relation to a selection of entries that includes that entry, or in relation to entries made over a period of time that includes the time the entry was made; or
- (b) That person satisfies the Chief Executive that the person formed a view as to the relevant facts pertaining to the entry which, while incorrect, was reasonable having regard to the information available to that person when the entry was prepared; or
- (c) That person satisfies the Chief Executive that he or she acted in good faith on information provided by the importer or supplier of the goods to which the entry relates, and reliance on the accuracy or completeness of the information so provided was reasonable in the circumstances; or
- (d) The total correct value for duty of the goods to which the error on the entry relates is less than \$1,000; or
- (e) An information for an offence against this Act has been laid in relation to the error or omission; or
- (f) The period between the date of lodgement of the entry of the goods and the date on which the error or omission was first identified exceeds 4 years; or
- (g) The provisions of section 127 of this Act apply.
- Status Compendium.

### Forfeiture for Negligent Form Filing

23. In the **Mihos** case cited above the recommendation to the Minister read:
22. Even if it were to be accepted for the purposes of deciding this application for waiver of forfeiture that Mr Mihos did not intentionally make an erroneous import entry or produce erroneous invoices, Mr Mihos was at the very least negligent when he produced the invoices and entered his goods. Mr Langford in fact, states in the submissions, “Mr Mihos submits that he was careless when he presented the erroneous documents and made the erroneous declaration...”. This conduct in itself would preclude the Customs Service from supporting his application for waiver of forfeiture.”
24. This is draconian and seriously alarming, what is being said is that Customs can consider even the **negligent** completion of forms a valid reason for forfeiting goods, and the Chief Executive clearly accepts this. There is little point in granting a Chief Executive such a penalty waiver power, if it is not correctly used.
25. For any such powers to be valid they must not only be proportional, but have a sound constitutional basis. The current practice of the Customs Department breaches both requirements.

### Proportionality Test

26. In **Lindsay v Customs and Excise Commissioners**, [2002] 1 WLR 1766 The Court of Appeal held that it ‘would not have been prepared to condemn’ the policy had it been one that applied to those who were using their cars for commercial smuggling, but held that proportionality required cases of non-commercial smuggling to be considered on their particular facts, including the scale of importation, whether it is a ‘first offence’, whether there was an attempt at concealment or dissimulation, the value of the vehicle and the degree of hardship that will be caused by forfeiture<sup>4</sup>.
27. This ought to be the case in NZ. Entire sets of goods imported are forfeit, not some lesser penalty applied. A court faced with a speeding motorist does not forfeit the car on a first offence, a fine is payable.
28. The proposition however, of “fines” being levied by the Executive is of course fraught with difficulty. This is why seizure and forfeiture like criminality, and proceeds of crime action, are best left where they belong, outside of the Executive, and in the hands of the Court. Forfeiture is nothing more than the ability to impose large “fines” and this power should be the reserve of the Courts.
29. Whilst, it may be seen by some as administratively convenient, potentially quicker and less costly for ministerial review to be retained,

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<sup>4</sup> Clayton and Tomlinson, *The Law of Human Rights*, OUP, 2000, Chapter 18 —Right to Enjoyment of Possessions, 2nd Annual Update paragraph 18.109B

such review outside the Courts is best conducted by a statutory body, independent of the Department, to avoid department capture such as the “negligent forms” policy. In this way the review would be conducted according to principle. Given the fundamental importance of the right an independent tribunal would be preferable.

## European Approach

30. I make brief mention of the European Approach, which is also be of some considerable assistance. That of course is governed by Article 1 of the First Optional Protocol to the European Convention, set out again for ease of reference (Cf Article 17 of the ICCPR, and s21 NZBORA). See **Clayton and Tomlinson**, at 18.26<sup>5</sup>

Article 1 of the First Protocol to the Convention provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Over the past two decades, the Court has repeatedly held that the Article in fact comprises ‘three distinct rules’. These are contained in the first sentence of the first paragraph, the second sentence of the first paragraph and in the third paragraph respectively: fn 72 (This formulation derives *from Sporrang and Lonroth v Sweden* (1982) 5 EHRR 35 para 61.)

- the principle of the peaceful enjoyment of property (‘the first rule’);
- the principle that the deprivation of possession of property must be in the public interest and subject to the conditions provided for by law and by the general principles of international law (‘the second rule’);
- the principle that states are entitled to control the use of property in accordance with the general interest and to secure the payment of taxes or other contributions or penalties (‘the third rule’).

31. We should measure our laws against such principles. Both the extensive powers of seizure and forfeiture by NZ Customs are constitutionally abhorrent, and also misapplied as a matter of practice. The exercise of such powers as deterrence, and in a disproportionate manner, mean that both the empowering statute, and practice are long overdue for reform.

32. Such reform should reflect the rich common law heritage, and international practices, and should provide the protection necessary for this fundamental right.

## In Summary:

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The Law of Human Rights, OUP, 2000, Chapter 18 —Right to enjoyment of Possessions

- No forfeiture prior to conviction should be permitted (or indeed is by law), and a range of sanctions less than forfeiture should be able to imposed by the Courts;
- Inadequate safeguards are provided by departmental administration of the law;
- A ministerial review should be replaced by a review before an independent statutory tribunal chaired by a lawyer of 7 years standing,

Yours faithfully

**TONY ELLIS**  
**PRESIDENT NEW ZEALAND COUNCIL FOR CIVIL LIBERTIES**