In the Supreme Court of New Zealand

I Te Kōti Mana Nui *CIV 2019-404-761*
SC 2/2020

In the matter The Declaratory Judgments Act 1908

Between **Kiwi Party of New Zealand**
Applicant

And **ATTORNEY-GENERAL**
Respondent

Submissions in support of Notice of application for leave to bring civil appeal

Ss 69:80 Senior Courts Act
Dated 14 January 2020

Presented for filing by:

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May it Please the Court

Chronology

1 April 2019, Bill amending the Arms Act, 'the Bill' introduced to Parliament.

2 April 2018, first reading of the Bill.

3 April 2019 written submissions open.

Date currently unknown Select Committee delegated review of submissions to police.

4 April 2019 written submissions close. 12,953 submissions received.

4 April 2019 Select Committee heard selected and invited submitters only.

8 April 2019 Police review of submissions provided to Select Committee.

8 April 2019 Select Committee accepted the police review of submissions in its entirety, approved the Bill and referred it back to Parliament.

9 April 2019 second Reading of the Bill.

10 April 2019 third Reading of the Bill.

11 April 2019, Royal assent given to the Bill.

Introduction

1. It is respectfully submitted that Wylie J. struck out the causes of action at issue on the basis of either a lack of justiciablity or a lack of constitutional status, expressed by the learned Judge as the claims not expressing "higher law values". Further in response to the submission that the factual matrix gave rise to novelty, the learned Judge held that this was an area of settled law.

2. This appeal raised two broad questions:
   (a) whether the process by which the Arms Act 1983 'the Act' was amended is justiciable and if so whether the amendments were unlawful;
   (b) whether the right to bear arms is a constitutional right and if so whether the Act is an unjustified limitation of that right, of no lawful effect.

3. These submissions are organised around the categories set out in paragraph 1, with reference to the paragraphs of the Learned Judge's Decision above as follows:

   lack of justiciablity: {25} - [30] [43] – [47];

   lack of constitutional status: [32] - [37] (Treaty) {38] - [42];

   Settled law: [50].

SUBMISSSIONS

Justiciablity

4. There are two broad justiciablity submissions:

   (a) That Parliament abdicated its role and acted at the direction of the Crown. The actions of the Crown are clearly justiciable.

   (b) That the process by which Parliament passed the Act was so flawed that it violated constitutional norms and so is justiciable.

5. In the UK Prorogation case[1], despite submissions by the UK PM that the issue was not justiciable, the UK Supreme Court reaffirmed the Court's inherent supervisory jurisdiction to enforce the rule of law, as follows:

> 69.This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect…

6. It is submitted that in issue here is whether the Crown determined the Legislature's actions and in fact it is a form of prerogative power that is in play here.

Justiciablity – abdication

7. In *Re Delhi Laws* the Supreme Court of India held:

> KANIA C.J.--Section 7 of the Delhi Laws Act, 1912, … ultra vires … respectively inasmuch as to that extent the Central Legislature has abdicated its functions and delegated them to the executive government.[2]
> MAHAJAN J.--The above said sections are ultra vires … inasmuch as they clothe the executive with co-extensive legislative authority in the matter of modification of laws made by legislative bodies in India.[3]

8. It is submitted that there are two related components to this issue;

   (a) Whether the party system, compounded by MMP and regulatory capture, have resulted in a situation where the Crown determined the Parliamentary outcome in regard to this Act;

   (b) Whether in this particular instance the Select Committee in fact abdicated its functions to the police, then simply signed off on the police review of submissions.

[1] R (on Application of Miller) https://www.supremecourt.uk/cases/uksc-2019-0192.html
[2] RE: THE DELHI LAWS ACT, 1912, THE AJMER-MERWARA [1951] INSC 35; AI... Page 2 of 112
[3] Ibid.

9. AV Dicey in his '*Introduction to the Study of the Law of the Constitution*'[4] published in 1914, wrote:

> Systematic party discipline violates the essential principles of Democracy, for it very much limits the control over their Government exercised by the people, and it sacrifices the public service to purely individual interests. The evil is very apparent in England and will become more so.[5]
> The rule of a party cannot be permanently identified with the authority of the nation or with the dictates of patriotism. This fact has in recent days become so patent that eminent thinkers are to be found who certainly use language which implies that the authority or the sovereignty of the nation, or even the conception of the national will, is a sort of political or metaphysical fiction which wise men will do well to discard. [6]

10. Breaking down the above quote, Dicey says that the overweening power of the party is corrosive of representative democracy. In referring to "purely individual interests" Dicey is referring to the influence of lobbyists, who provide the funds by which the party promotes itself. He who pays the piper calls the tune. In the media age this factor is more dominant than ever. He says this is "evil". He then refers to "eminent thinkers" who considered that this process has rendered the "sovereignty of the nation" a fiction.

11. It is submitted that sovereignty inheres in society at large. Parliament is only sovereign insofar as it represents society. This is why properly speaking the English Parliament comprises of the Crown together with the combined Houses of Parliament[7]. This division maps onto the broad classes which comprise English society, the Commoners, the Barons and the Crown, the latter being the representative of executive power, that is the military and the executive agencies. The party system has resulted in the bulk of society, the Commoners, not actually being represented in Parliament. As Parliament no longer represents society it is no longer sovereign.

12. It is submitted that over the last 100 years the "evil" which Dicey identified has become entrenched, particularly because 'safe seats' means that in most electorates, pre-selection rather than election, determines who will find a place in Parliament. Further, MMP

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[4] https://oll.libertyfund.org/titles/dicey-introduction-to-the-study-of-the-law-of-the-constitution-lf

[5] Ibid xv.
[6] Ibid lx.
[7] Ibid 322.

provides a successful political party with absolute discretion as to a set of parliamentary places. This set of factors leads to practical disenfranchisement, as has been observed in a US study which argued that the public had a near zero effect on public policy[8].

13. It is submitted that the above process has resulted in a binary political system whereby the vast bulk of prospective parliamentarians are beholding to a small cabal, which decides who will be selected to stand for a particular electorate and who could expect a place by virtue of MMP. This completely unequal power dynamic is exacerbated by the concern of the cabal for replacement, which leads them to choose candidates whose primary and often sole talent, is one of loyalty to the cabal. The resulting dearth of ability in Parliament throws the great bulk of the workload onto the cabal, who may be persons of ability but they are few. This leads to divestment of decision-making to the executive agencies. This in turn leads to regulatory capture. The current Minister of Police is an ex-policeman and the National Party Shadow Minister of Police is an ex policeman. The two vie as to who can offer the most to their former colleagues. There is no longer a Minister of Police but rather a Minister **for** Police. In this, Cabinet structure more represents a set of fiefdoms than a representative government.

14. It is submitted that the capture of the Legislature by the Crown has resulted in a collapse of the separation of powers. In reality the passage of the Act was accomplished by the Crown, utilising a power in the nature of the prerogative powers, of which the UK Supreme Court had this to say:

> 41.Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of Parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the Government, must comply. However, the effect which the courts have given to Parliamentary sovereignty is not confined to recognising the status of the legislation enacted by the Crown in Parliament as our highest form of law. Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.

[8] doi:10.1017/S1537592714001595 American Political Science Association 2014 p 575.

15. Among the 17th Century cases referred to above, the UK Supreme Court specifically refers to *Entick v Carrington*[9]. As discussed in the US Supreme Court case of *US v Boyd*[10] at issue in the cases surrounding *Entick v Carrington* was the suppression of critics of the English Administration of the time, particularly John Wilkes and his associates. John Wilkes was writing about the Administration's use of taxation of the American colonies to bribe members of Parliament, with the result that Parliament was in the thrall of the Crown[11].

16. It is submitted that the rationale of judicial deference is that the Court should not overrule the will of the people. However, the will of the people is not in issue where the Crown utilises the appearance of democracy to grasp at absolute power. It is submitted that the current political process, dominated as it is by the party machine, lobbyists and regulatory capture, is a fraud on the people. No differently than the multitude of other frauds the Court is called upon to unwind, this fraud vitiates all that it obtains.

17. In *Re Delhi Laws* it was held:

> Fazl Ali J.--(i) The legislature must formally discharge its primary legislative function itself and not through others. … (iii) It cannot, however abdicate its legislative functions and therefore, while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature. (iv) As the courts of India are not committed to the doctrine of separation of powers and the judicial interpretation it has received in America, there are only two main checks in this country on the power of the legislature to delegate, these being its good sense and the principle that it should not cross the line beyond which delegation amounts to (750) 'abdication and self-effacement.'[12]

18. The Parliamentary record shows that the Select Committee delegated consideration of the written submissions to it, to NZ police and then adopted the police review, without question, immediately upon receiving it. It is submitted that as the NZ police are conflicted on this issue, having long sought themselves to be armed at all times and the population disarmed, this amounted to "abdication and self-effacement". Further it is submitted that the evidence of Mr Heckenberg, filed in support of these proceedings,

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[9] (1765) 19 State Tr 1029; 95 ER 807: 809.
[10] 116 U.S. 616 (1886).
[11] Wardroper J, *Kings, Lords and Wicked Libellers (*1973)
[12] Re Delhi Laws p3.

suggests that the police review diminished the magnitude of dissent, as the review lumped those who objected to the process by with the Bill was being progressed into a secondary category and never engaged with the reasons put forth in opposing submissions. It was simply a head count, which inexplicably did not include about 10% of submissions.

Justiciability - process

19. The Crown cynically rushed this Act through immediately after the Christchurch shootings. It is submitted that the use of this tragedy to advance a political agenda was a disgusting example of political opportunism.

20. The process, from introduction of the Bill to its Royal assent was 10 days. The time given for written submissions was 48 hours. Oral submissions were restricted to those selected by the Select Committee.

21. The Chair of the Select Committee predetermined the outcome, stating publicly on 3 April 2019 that: "I think the public of New Zealand has demanded Parliament take action on this issue".

22. The Chairman of the Select Committee also made a mistake of fact in that he stated on 3 April 2019:[13]

> "Across the 250,000 or so licensed firearm owners the vast majority will not actually be impacted. The ban specifically deals with military-style assault weapons and that is a much smaller subset."

23. In fact the Act prohibited all semi-automatic firearms, over .22 calibre, barring pistols, catching about 30% of registered firearms owners according to the affidavit evidence of filed and provided that any type of ammunition could be prohibited by Order in Council.

24. As discussed above the Select Committee delegated the review of submissions to police, a conflicted party, then adopted that review, demonstrably without consideration as it did so within hours of its presentation.

25. It is submitted that the process by which the Act was passed fell so far short of the process that controversial issues require, that it was unlawful.

[13] https://www.radionz.co.nz/news/political/386192/gun-owners-shocked-at-short-submission-time-on-firearms-law-change

Justiciability - comity

26. At paragraph [30] Wylie J adopted the Crown submission that comity forbade the Court from questioning the legislature. In the Prorogation case a similar submission was advanced on behalf of the UK PM, as follows;

> 28. … They conclude that the courts should not enter the political arena but should respect the separation of powers.

27. In response the UK Supreme Court held:

> 34. Fourthly, if the issue before the court is justiciable, deciding it will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.

28. the UK Supreme Court also held:

> 66. … That case clearly establishes: (1) that it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the "exclusive cognisance of Parliament"; (2) that the principal matter to which article 9 is directed is "freedom of speech and debate in the Houses of Parliament and in parliamentary committees.

29. It is submitted that the separation of powers requires the Court to consider whether the Crown is using 'prerogative powers' to suborn Parliament.

Constitutional right

30. In the UK Prorogation case[14], the UK Supreme Court Held:

> 39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. 40.The legal principles of the constitution are not confined to statutory rules, but include constitutional principles developed by the common law.

Constitution Magna Carta

31. It is submitted that Magna Carta sets out a number of constitutional conventions that are part of the constitution of NZ. It is submitted that art. 61 incorporates within it a right to resist arbitrary power with armed force, which is the right to bear arms. In *US v*

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Heller[15] Justice Scalia noted that the Second Amendment to the US Bill of Rights did not create the right to bear arms, but only stated that it shall not be infringed.

Constitution Treaty of Waitangi

32. The learned Judge relied upon *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*[16], at paragraph [34] of his decision, in holding that the Treaty does not on its "own confer enforceable legal rights". It is submitted that *Te Heuheu Tukino* was decided during a period when the separation of powers between the Crown and Court had largely collapsed, the nadir of these times being exemplified by *Liversadge v Anderson*[17], by which time the Court had gone down the rabbit-hole, to paraphrase Lord Atkin. It is submitted that this process has reversed since *Anisminic*[18] and that constitutional cases during this period are not necessarily to be relied upon.

33. It is submitted that the Treaty is a part of the Constitution of NZ and as such cannot be altered by Acts of Parliament. It is submitted the Court may make declarations as to any inconsistencies between actions by the Crown and the terms of the Treaty.

34. The Treaty was a constitutional settlement by which Maori surrendered sovereignty in exchange for citizenship. This agreement guaranteed them all the "rights and privileges of an English subject". It is submitted that in this bargain Maori obtained such rights and privileges as pertained **at the time,** including the right to bear arms. It is submitted that the diminution of these rights by the Crown, as purported obtained by the Act in issue, is a unilateral variation of the Treaty and so is unlawful.

35. As discussed in *Ngati Apa*[19], in 1847 the law as to native title had been correctly set out in *R v Symonds*[20]. It took from *Wi Parata*,[21] decided in 1877, until *Ngati Apa*, decided in 2003, for this to be settled law in NZ. That's about 125 years. It is submitted that this is cause for reflection. It is submitted that the reason learned jurists got it so wrong, for

[15] *District of Columbia v. Heller*, 554 U.S. 570 (2008) [8] [9]
[16] 3 April 1941.
[17] [1941]UKHL 1.
[18] [1969] 2 AC 147.
[19] [2003] NZCA 117.
[20] NZPCC 387.
[21] (1877) 3 NZ Jur (NS) SC 72.

so long, was because the collapse of the separation of powers had resulted in the Court seeing its function as one of rationalising the actions of the Crown.

Constitution Bill of Rights

36. While the UK Supreme Court in the Prorogation case characterised the Bill of Rights as an Act of Parliament, there was no discussion on this point. It is submitted that the Bill of Rights is not called an Act as it was not an Act of Parliament but rather was a constitutional settlement concomitant on the Glorious Revolution. The Parliamentary franchise in 1688 represented little more than the Barony. It is estimated that in 1780 only 3% of the people of England and Wales had the vote. In its preamble the Bill of Rights says: "Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm…". The terminology of the preamble invokes concensus across society, rather than the authority of Parliament. It must not be forgotten that in its origins English society was governed by a direct democracy of the heads of households assembled at the Folkmoot[22]. The Folkmoot assembled in large open spaces, such as Runnymede, which had a similar function to the Marae, in that it held a multitude. Parliament, in its origin and thereafter to varying degrees, was the vehicle by which the Barony supplanted the democratic goverenance of society, to further their own interests.

37. The exclusion of Catholics from the right to bear arms, was an exclusion of the partisans of absolutism, in a time of civil war where English liberty was ranged against the divine right of kings. The proviso that such arms be "as allowed by law" related to the extant prohibitions such as on highwaymen[23].

Error of fact

38. The learned Judge, at paragraph [50] of his decision held that "in my view the waters are relatively well chartered." It is submitted that the only evidence as to the novelty of the situation was that of Rodney Hide, who in his affidavit filed in support of this proceeding stated of the passage of the Bill, "I have never seen anything like it".

[22] *Primitive Folk-Moots* Gomme London 1880.
[23] Statute of Northampton (1328).

Conclusion

39. Broadly the learned Judge held that the cause of actions were not justiciable as Parliament was "supreme"[24]. It is noted that Dicey characterised Parliament's power as "sovereign", as did the UKSC in the Prorogation case. Dicey balanced the sovereignty of Parliament with the supremacy of the law of the land. It is submitted that sovereignty is not dogma but is a matter of fact and that as Parliament is in the thrall of the Crown it is not sovereign.

40. Constitutional law does not rely on good intentions but sets interest against interest. To prevent the Crown from using state power to become absolutist the armed force of the state is fettered by the people's right to bear arms, as provided by the common law, Magna Carta and the Bill of Rights. At a time when the state is becoming all-powerful, the Act bans firearms which are capable of counter-balancing those held by state actors and provides that by Order in Council any and all ammunition may be banned. This limitation of the right in fact extinguishes the right, as it removes any practical means of resistance to absolutism. At Waco, Texas, police murdered 76 men, women and children. At Bundy's Ranch a similar group of heroes were met by a body of men armed with semi-automatic firearms. Nobody died.

41. Justice Thomas of the US Supreme Court has observed that the right to bear arms is the right least loved by the Court. It is submitted that this is because the Court is generally composed of cerebral types whose forte is not violent action. Armed violence is anathema to such personalities. However, it is submitted that the ugly truth is that at bottom, power dynamics underlie societies. It is further respectfully acknowledged that the basis of these submissions, that the state is tending towards absolutism, will not sit well with the august members of the Supreme Court, as this submission is as far from your reality as are the sands of Mars. However, absolutism does not first impact on the most privileged members of society but rather first afflicts those at the other end of the social spectrum, the members of the "torturable class", to use Graham Greene's expression. But then it eats its way up.

[24] Decision of Wylie J [39]