



Report of the

ATTORNEY-GENERAL

on the Trade in Endangered Species
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: THE TRADE IN ENDANGERED SPECIES AMENDMENT BILL

Background

- 1 The Trade in Endangered Species Amendment Bill, a Member's Bill introduced in the House of Representatives on 24 April 1997, by Eric Roy MP, has been vetted for consistency with the New Zealand Bill of Rights Act 1990. I have concluded that, for the reasons set out below, clause 2 of the Bill, in so far as it extends the current definition of "trade" for the purposes of the Trade in Endangered Species Act 1989, is inconsistent with section 14 of the New Zealand Bill of Rights Act (relating to freedom of expression). The inconsistency arises in relation to the "offers for sale" and "display to the public" elements of the new definition of trade which, in the context of the Bill and the principal Act as a whole, amount to a restriction on the right to freedom of expression contained in the Bill of Rights Act. Because the restriction does not impair as little as possible the right to freedom of expression it cannot be treated as a reasonable limit in terms of section 5.
- 2 The objective of the Bill is to close a perceived loophole in the existing law, which allows specimens of endangered, threatened and exploited species (hereafter collectively referred to as endangered specimens) to be traded in New Zealand, as the principal Act relates, in essence, only to export and import.
- 3 The Bill extends the present definition of "trade", contained in section 3 of the Trade in Endangered Species Act 1989, to include, inter alia, "display to the public (either generally or in part)" and "offers for sale" "specimens for commercial reasons in New Zealand, except as expressly allowed under any other Act".
- 4 It should be noted that sections 44 (and section 45, dealing with possession) are limited in application to endangered specimens. The extended definition of "trade" in clause 2 of the Bill is not so limited and relates to all specimens, defined in section 3 of the principal Act as:
" "Specimen" means—
 - (a) Any animal or plant, whether alive or dead; or
 - (b) Any recognisable part or derivative thereof:"
- 5 Whilst this extended definition of "trade", relating to all specimens and not just endangered specimens, would appear to widen the application of the principal Act in a quite inappropriate manner, closer scrutiny of the Trade in Endangered Species Act confirms that this is not the case. The

new definition of "trade" does not per se create any unlawful activity. The relevant offence provisions are, as mentioned, sections 44 and 45. As these provisions are themselves limited to endangered specimens, in practical terms the proposed definition of trade can only apply to such specimens.

Freedom of expression under the Canadian Charter

- 6 The "display" and "offers for sale" paragraphs in clause 2 of the Bill raise issues concerning section 14 of the Bill of Rights Act, dealing with freedom of expression. The Canadian Charter case law has adopted a wide meaning as to what activity amounts to "expression". Perhaps the leading judgment on this issue is *Irwin Toy Ltd v Quebec (A-G)* (1989) 58 DLR (4th) 577. The Supreme Court of Canada noted that:

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content"

The Court also noted, at page, 607:

"We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or the meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."

Commercial expression is clearly covered by the protection. (*Ford v Quebec (A-G)* (1988) 54 DLR (4th) 577 at 618.

Offers for sale

- 7 Having regard to the relevant Canadian case law it is considered, on balance, that clause 2(d) ("offers for sale") involves a *prima facie* infringement of the right to freedom of expression conferred in section 14 of the Bill of Rights Act. The provision in question would have the effect of making unlawful any advertisements or other communications which offer for sale a specimen. In concluding that the Bill places a limit on the freedom of expression the *Irwin Toy* test as to (i) whether the activity falls within the sphere of conduct protected by freedom of expression and (ii) whether the purpose or effect of the legislation to restrict freedom of expression has been followed.
- 8 The view has been expressed and endorsed in the Courts in Canada that if Government's (legislation's) *purpose* is not to restrict free expression a valid claim can still be made that the *effect* of the Government action is to restrict expression. The Ontario Divisional Court in *Ontario Adult Entertainment Bar Association v Metro. Toronto* 129 DLR (4th) 81 recently canvassed some of the tests adopted by the Canadian Courts in determining whether the effects (rather than the purpose) of

Government action amounts to a breach of a constitutionally protected right or freedom and concluded, at page 103:

"We are of the opinion, that the freedom of expression sought by the interveners is trivial and insubstantial in relation to the "pursuit of truth, participation in the community and individual self-fulfillment and human flourishing". In the words of Dickson C.J.C., the prohibition cannot "lie at, or even near, the core of the guarantee of freedom of expression"."

In the present context it is considered that the freedom to advertise a specimen which may, in certain circumstances, be lawfully possessed is not trivial or insubstantial.

Justified Limitation

- 9 It is considered that the identified breach of freedom of expression cannot be regarded as a justified limitation under section 5 of the New Zealand Bill of Rights Act. The reasons for reaching this conclusion are based on the decision of the Supreme Court of Canada in *R v Oakes* [1986] 1 S.C.R. 103.
- 10 Professor Peter Hogg notes in "Constitutional Law in Canada" (3rd ed, 1992 at page 867) that, in summary, the *Oakes* case laid down four criteria that must be satisfied for a law to qualify as a reasonable limit that can be demonstrably justified in a free and democratic society—
 - (i) Sufficiently important objective: The law must pursue an objective that is sufficiently important to justify limiting a Charter right.
 - (ii) Rational connection: The law must be rationally connected to the objective.
 - (iii) Least drastic means: The law must impair the right no more than is necessary to accomplish the objective.
 - (iv) Proportionate effect: The law must not have a disproportionately severe effect on the persons to whom it applies.
- 11 The *Oakes* test has been considered and applied in the New Zealand context in a number of decisions including *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) and *Solicitor-General v Radio NZ* [1994] 1 NZLR 48.
- 12 It is in respect of the last two *Oakes* criteria, referred to above, that it is considered the Bill presents difficulties. The existing prohibitions and penalties in respect of trade in endangered species are not absolute. A permit or certificate may be obtained to export, import, re-export, or introduce from the sea endangered specimens. The permit/certificate regime is tied to the current activities constituting trade under the Trade in

Endangered Species Act 1989. However, the effect of the extended meaning given to trade in the Bill is to preclude absolutely the activities listed in paragraphs (a) to (e) of clause 2. This is because there is no provision made in the Bill for a person to apply for a permit or certificate to undertake such activities. Section 44 makes *all* trade in endangered specimens unlawful, except with the necessary permit or certificate.

- 13 It is considered that the limitation on the right to freedom of expression identified previously in this report may be so deleterious as to outweigh any substantive justification that may exist to warrant over-riding that freedom. If a person, who wished to offer for sale an endangered specimen, was able to apply for a permit or certificate to do so then this may, depending on the criteria for issuing such permit or certificate, be a proportionate response to the objective sought to be achieved by the Bill.
- 14 Concerns, however, do exist that even in the event that a certificate or permit regime for trade in New Zealand was incorporated into the Bill that the right to freedom of expression may not be impaired to the least drastic means available. This is because, as presently drafted, the same schedules of endangered species apply to those species endangered by import and export and those species endangered by an offer to sell locally or by display for commercial purposes. It is possible that the class of species that is endangered by offers for sale locally or by display is smaller than the class of species endangered by import and export. More information would be needed to determine whether this is in fact the case. In view of the previous finding that the Bill is, in any case, inconsistent with s 14 of the Bill of Rights Act, in a manner which cannot be considered as a justified limitation under section 5 of that Act, it is unnecessary for a final determination to be made on this point in this report.
- 15 It is considered that the effect of the proposed law impairs the right to freedom of expression, which is inherent in the prohibition on an individual's right to offer for sale an endangered specimen, to a greater extent than is necessary to accomplish the objective.
- 16 As Professor Peter Hogg has noted in "Constitutional Law in Canada" (3rd ed, 1992 at page 878) that the requirement of least drastic means has turned out to be at the "heart and soul" of a section 1 Canadian Charter justification. That provision equates to section 5 of the New Zealand Bill of Rights Act. Professor Hogg quotes a number of decisions where laws have failed the requirement of least drastic means and in respect of which the Supreme Court of Canada has determined that less

restrictive laws were available to the legislature which would still accomplish the desired objective but would impair the relevant Charter right less than the law that was enacted.

- 17 If a conditional prohibition is appropriate for certain types of trade (import, export etc) involving endangered species then an absolute prohibition on other types of trade (such as offering for sale) would appear to be disproportionate in effect. It would seem that the objective of the Bill, to prevent trading in endangered specimens in New Zealand, could be met by having a certificate or permit regime (i.e., a conditional prohibition only) as exists in respect of trading under the current Act, rather than an absolute prohibition as would be the result of the Bill.

Display to the Public

- 18 The other aspect of the proposed definition of "Trade" which raises freedom of expression issues is the fact that "display to the public (either generally or in part)" is now expressly covered by the definition. Whether "display", in itself, amounts to "expression" is unclear. However, in the *Irwin Toy* case (supra) at page 607) the Supreme Court of Canada noted that parking a car in certain circumstances and if with an expressive content could amount to "expression". Interestingly, in a decision that has been brought to my attention on a similar point (dealing with circus animal performances), the Court held that there was "no evidence of the content of any ideas associated with the entertainment". The case in question, *Stadium Corporation of Ontario v Toronto (City)* 10 O.R.(3d) 203 was subsequently overruled by the Court of Appeal for Ontario, but on an unrelated vires issue. In the *Stadium* decision the Ontario Court (General Division) noted that the applicant's evidence was "unsupported by any objective evidence or systematic body of knowledge tending to show that exotic animal shows are a form of artistic expression or symbolic speech that expresses, in fact, some kind of meaning or message." In other words the necessary expressive content was not found to exist in that case.
- 19 Unlike displays of, for example, either live animals in zoos or specimens in museums, circus animals are directly under the control of humans. To this extent circus performances are more likely to be "expressive" than in the former case where the activity may largely be out of the control of the human "displayer". Against this, however, displays in museums or zoos serve an important educative function and the message frequently conveyed is the necessity or desirability to preserve these species. The relevant human activity involved is the caging, containment or other display of the specimen and the

labelling or educational information provided on the cage or enclosure. While the issue is not without doubt, it is possible that display of a specimen may, in some circumstances, convey a meaning which is expressive and thus come within the scope of section 14 of the New Zealand Bill of Rights Act.

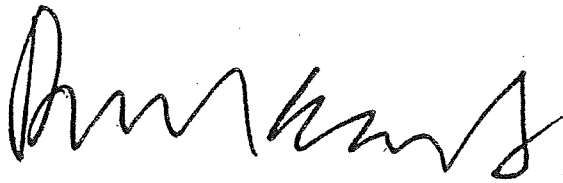
- 20 It appears unlikely that museum or zoo "displays" are intended to be covered by this Bill, but the drafting of the Bill does give rise to that possibility as, in some circumstances, such display could be considered to be "for commercial reasons" by virtue of the charge of an admission fee.
- 21 The conclusion with regard to the absolute prohibition of a person's ability to display for commercial purposes an endangered specimen is the same as indicated above with regard to offer for sale. That conclusion is that the limitation on the right to freedom of expression which results from the new definition of "trade" is overly restrictive. The measures which could have been adopted to achieve the objectives of the Bill, namely a conditional prohibition rather than an absolute prohibition, would have impaired less the right to freedom of expression.

Conclusion

- 22 It is considered that paragraph (d) of the proposed definition of trade restricts the freedom of expression under section 14 of the Bill of Rights Act and that paragraph (a) may also have that effect. Given that the Bill, as drafted, makes no provision for any person to apply for or be issued with a certificate or permit for such activities the Bill, as worthy as its objectives may be, does not impair the right to freedom of expression by the least drastic means available to give effect to those objectives. An absolute prohibition on trade in New Zealand, as defined in the Bill, would not appear to be necessary when a conditional prohibition is considered appropriate with respect to importation or export, the existing types of trade dealt with in the Act.
- 23 Due to the absolute nature of the prohibition on trade of endangered specimens in New Zealand, which results from the application the new definition of trade, it cannot be concluded that the breach of the freedom of expression identified is a justified limitation under section 5 of the Bill of Rights Act 1990. Assuming that the objective of the legislation is of sufficient importance to warrant overriding a constitutionally protected right or freedom, it is considered that the proposed restriction on trade in New Zealand, by way of offering for sale or displaying specimens, cannot be treated as a justified limitation to the right to freedom of expression contained in section 14 of

the Bill of Rights Act. This conclusion is reached by applying the following criteria (recognised under Canadian and New Zealand case law): (1) The measure does not impair as little as possible on the right or freedom in question; and/or (2) The limitation is so deleterious to outweigh the substantive justification for the limitation.

Dated this 14th day of May 1997.

A handwritten signature in black ink, appearing to be 'D. M. Stewart', written in a cursive style.

Attorney-General