Fitzgerald v R – ***The Futility of New Zealand's Three Strikes Law***

TOMMY ZHANG*

I INTRODUCTION

On 31 May 2010, the Governor-General gave Royal Assent to the Sentencing and Parole Reform Act 2010. The new legislation amended the Sentencing Act 2002 and inserted sections 86A to 86I,[1] which formed the basis for the current three-strikes regime, popularly known as the "Three Strikes Law" in New Zealand. Eight years later, Daniel Clinton Fitzgerald found himself facing his third strike on one count of indecent assault for kissing a female victim on the cheek.[2] The indecent assault, when viewed in isolation, usually would not attract a jail term.[3] However, because it was Fitzgerald's third strike, the sentencing judge was compelled to sentence him to seven years imprisonment without parole.[4] Fitzgerald subsequently appealed to the Court of Appeal and argued that the trial judge's approach to sentencing was inconsistent with his right to be free from disproportionately severe punishment.[5] The three judges of the Court of Appeal accepted that Fitzgerald's punishment was disproportionate to the offending. Surprisingly, the judges differed on their respective interpretations of the law and came to different conclusions. This note critiques the majority and the dissent's judgments before discussing the reasons why New Zealand courts are generally reluctant to grant a

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* BSc/LLB(Hons), University of Auckland. This note is derived from a research paper submitted for a Comparative Human Rights Law course taught by Professor Paul Rishworth in December 2020. I would like to thank Professor Scott Optican for his generous feedback on earlier drafts of this note. I also gratefully acknowledge Don Lye for his thoughtful comments, as well as his patience and encouragement during the writing process. Errors remain my own.

1 Sentencing Act 2002, ss 86A–86I.

2 Section 86D(2); Crimes Act 1961, s 135.

3 *R v Fitzgerald* [2018] NZHC 1015 [*Fitzgerald (HC)*] at [21].

4 *Fitzgerald (HC)* at [17]. Although, the High Court Judge did decide that a seven year sentence without parole was manifestly unjust and ordered the sentence to be served with the possibility of parole under s 86D(3), at [19].

5 New Zealand Bill of Rights Act 1990, s 9; *Fitzgerald v R* [2020] NZCA 292, (2020) 29 CRNZ 350 [*Fitzgerald (CA)*].

declaration of inconsistency (DOI). It then comments on the implications of the Supreme Court granting the application for leave to appeal in part,[6] as well as on the Three Strikes Law in light of the decision generally.

II BACKGROUND TO THE CASE

On 3 December 2016 Fitzgerald was slightly intoxicated walking down Cuba Street, Wellington.[7] He accosted two women who were walking towards him.[8] Fitzgerald reached out to kiss one of the women on the lips.[9] She averted her face and the kiss landed on her cheek instead.[10] The second victim intervened and tried to pull Fitzgerald away by the arm.[11] Fitzgerald retaliated by dragging her by the arm until she was up against a shop window.[12] The two struggled for a brief moment before Fitzgerald desisted and walked off.[13] Fitzgerald was arrested by police shortly afterwards and was charged for indecent assault, common assault and breach of supervision order (alcohol and drug condition).[14]

In the High Court, France J sentenced Fitzgerald to seven years' imprisonment with the possibility of parole for the offence of indecent assault pursuant to s 86D(2).[15] Although his Honour considered that the nature of the offending would normally not attract a jail sentence, the judge nevertheless refused to grant Fitzgerald a s 106 discharge without conviction.[16] This was because the s 106 proviso "unless by any enactment applicable to the offence the court is required to impose a minimum sentence" applied. Section 86D(2) clearly was a minimum sentence, notwithstanding that "the quantum

6 *Fitzgerald v R* [2020] NZSC 119 [Fitzgerald (SC)].

7 *Fitzgerald (CA)*, above n 5, at [2].

8 *Fitzgerald (HC)*, above n 3, at [2].

9 At [2].

10 At [2].

11 *Fitzgerald (CA)*, above n 5, at [3].

12 *Fitzgerald (HC)*, above n 4, at [2].

13 At [2].

14 At [1]; Crimes Act 1961, ss 135 and 196; Parole Act 2002, s 107T.

15 At [28]–[29].

16 At [16] and [21]; Section 106 provides: "[i]f a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence."

of the sentence is the maximum penalty available"[17] and "any enactment applicable to the offence".[18] Justice France held that he had no jurisdiction to apply s 106 to grant Fitzgerald a discharge without conviction when the offence was a third strike triggering s 86D(2). However, his Honour was sympathetic to Fitzgerald's circumstances and considered that ordering him to serve the entire seven years' sentence without parole would be manifestly unjust.[19] Fitzgerald was ultimately sentenced to seven years' imprisonment with the possibility of parole for the offence of indecent assault.

III THE COURT OF APPEAL DECISION

Majority (Clifford & Goddard JJ)

On appeal, Fitzgerald argued that the Three Strikes Law is not an enactment "applicable to the offence" that requires a minimum sentence.[20] It was submitted that the correct interpretation of the s 106 proviso involves "an enactment that applies to the *offence*" Fitzgerald committed.[21] In this context, the offence committed is indecent assault. The proviso in s 106 would only apply if the substantive offence itself provided for a minimum sentence.[22] Finally, because s 86D(2) "is an enactment that applies to certain *offenders*: those who have two strikes recorded against them", it does not fall within the s 106 proviso and a discharge without conviction can be granted.[23] Accordingly, it was submitted that the High Court's approach was incorrect and, nevertheless, inconsistent with Fitzgerald's right not to be subjected to disproportionately severe punishment.[24] The Crown submitted that the High Court was correct to find that the s 106 discharge without conviction was unavailable and that his Honour's

17 At [13].

18 At [12].

19 Section 86D(3); see *Fitzgerald (HC)*, above n 3, at [27].

20 *Fitzgerald (CA)*, above n 5, at [13].

21 At [13].

22 At [123], Collins J noted that when s 106 was enacted, the only offences that prescribed minimum sentences were for treason and certain acts of piracy.

23 At [13] and [50].

24 New Zealand Bill of Rights Act 1990, s 9. For a brief review of the High Court Judge's approach, see *Fitzgerald (CA)*, above n 5, at [49].

interpretation of s 106 was the only viable reading of that provision.[25] Section 86D(2) applied to the third strike offence that Fitzgerald committed. It mandated a seven years' imprisonment, and his Honour was required to impose that minimum sentence even if it was inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA).[26]

Confronted with two viable, but competing, interpretations of s 106, the majority turned to s 5 of the Interpretation Act 1999 and the relevant NZBORA provisions for guidance. The starting point was that "[l]egislation must be interpreted having regard to its text and purpose".[27] When the text of a provision is capable of being read in more than one way, then the purpose of the provision may assist the Court to choose between competing readings of the text.[28] The purpose of the provision is "ascertained from its immediate and general legislative context and its wider social, commercial or other objectives".[29] Additionally, the NZBORA mandates the Court to prefer the interpretation of legislation that is consistent (or more consistent) with the observed rights and freedoms.[30] Section 6 of the NZBORA is qualified by s 4, which makes clear that the role of the Court is to interpret legislation, not to "rewrite the legislation by adopting "interpretations" that are in truth exercises of legislative power."[31]

The relationship between ss 4 and 6 of the NZBORA is a reflection of New Zealand's adherence to parliamentary supremacy, a bedrock of our constitutional democracy. It forbids the Court from engaging in statutory interpretation in a way that is, in effect, "under the guise of interpretation, the legislative power that our constitutional arrangements entrust to Parliament".[32] Although the principles of interpretation is clear, applying them in practice is a different story. As the majority observed "[i]dentifying the boundaries of this interpretive exercise is a conceptually difficult and practically challenging exercise that necessarily involves a substantial degree of judgement."[33] Preliminarily, the majority agreed with Fitzgerald that s

25 At [15].

26 At [15].

27 At [26].

28 At [26].

29 At [26].

30 New Zealand Bill of Rights Act, s 6; see *Fitzgerald (CA)*, above n 5, at [28].

31 At [27] and [30].

32 At [30].

33 At [30].

86D(2) is inconsistent with s 9 of the NZBORA.[34] The substantial issue was what the inconsistency with s 9 of the NZBORA meant for the interaction between s 86D(2) and ss 106 and 107.[35] The majority reasoned that if s 106 can "plausibly" be read in a way where the s 106 proviso does not apply to the mandatory sentence imposed by s 86D(2), then s 6 of the NZBORA requires that reading.[36] However, such a reading cannot create "an exception to that provision via s 106 in circumstances where the legislature expressly chose not to include a safety valve provision in s 86D(2)".[37] Such an approach would be doing an "end run" around s 86D(2) and would effectively be the court exercising legislative power in disguise.[38]

After extensively canvassing the history of the ss 106 and 86D(2) provisions, the majority concluded that despite Fitzgerald's submissions on the correct interpretation of s 106, the "contextual indications" pointed the other way.[39] Fitzgerald's proposed interpretation of s 106 was "a very strained one" at best.[40] The majority observed that Fitzgerald's interpretation of s 106 would, in effect, create a safety valve in s 86D(2) in a way that Parliament expressly considered and rejected.[41] If the effect of adopting one of the available statutory interpretations contradicts Parliament's clear intentions, then it is a strong indication that its adoption would cross the line between permissible interpretation of the law and impermissible law-making.[42]

Furthermore, the majority reasoned that adopting Fitzgerald's interpretation would lead to "peculiar and arbitrary outcomes inconsistent with the wider scheme of the Sentencing Act".[43] If a third-strike offender like Fitzgerald is able to argue that s 86D(2) imposes a grossly disproportionate sentence, then that would clearly satisfy the threshold to grant a discharge without conviction.[44] And if

34 At [46].

35 At [47].

36 At [52].

37 At [53].

38 At [53].

39 At [72].

40 At [72] and [74].

41 At [35] and [72].

42 At [72].

43 At [73].

44 Section 107, which states that a discharge without conviction cannot be granted unless "the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence".

Fitzgerald's interpretation of ss 86D(2) and 106 is permitted, then s 6 of NZBORA would, by default, require the sentencing judge to discharge the offender without conviction in order to comply with the right enshrined in s 9 of the NZBORA.[45]

This would lead to the arbitrary result where the law would treat certain classes of third-strike offenders more favourably than second-strike offenders for committing the same crime. The successful third-strike offender would receive a discharge without conviction whereas the second-strike offender would receive their sentence without parole for the same crime. Section 86D(2) removes the sentencing discretion of the sentencing judge. A judge in this situation would have no choice but to discharge an offender like Fitzgerald without conviction rather than giving what would be an otherwise proportional term of imprisonment. A reading of the Sentencing Act that produces such a result was not a tenable reading of the statute taken as a whole.[46] The only residual discretion judges have in such a situation lies in s 86D(3).

On the other hand, the Crown argued that s 86D(2) is not inconsistent with s 9 of the NZBORA because the application of s 86D(2) does not always amount to disproportionate punishment.[47] The majority rejected the Crown argument and held: "[t]he fact that the provision will produce unobjectionable results in other scenarios does not save it."[48] Instead, the preferred approach is to consider "realistic scenarios in which the provision will require the court to impose a sentence that is grossly disproportionate and inconsistent with s 9."[49] The majority cited the Supreme Court of Canada (SCC) decision *R v Lloyd*, with approval.[50] In the context of determining whether a sentence imposed on an offender constitutes a "cruel and unusual" punishment under s 12 of the Canadian Charter of Rights and Freedoms (the Charter), the SCC held that:[51]

> A law will violate s. 12 if it imposes a grossly disproportionate sentence on the individual before the Court, or if the law's

45 *Fitzgerald (CA)*, above n 5, at [73]; contrasted with Collins J's comments at [135] where a finding of a breach of s 9 of NZBORA "does not necessarily mean they are eligible for a discharge without conviction".

46 *Fitzgerald (CA)*, above n 5, at [73].

47 At [76].

48 At [76].

49 At [76] and [78].

50 At [77]; *R v Lloyd* 2016 SCC 13, [2016] 1 SCR 130.

51 At [22] (emphasis added).

> *reasonably foreseeable applications* will impose grossly disproportionate sentences on others.

The reasonable hypothetical test was not applied as Fitzgerald's sentence before the Court is grossly disproportionate to the offence.[52]

The majority's approach to statutory interpretation is unsurprising. What is perhaps more surprising was the unequivocal acceptance of the reasonable hypothetical doctrine as imported from Canadian case law.

There are conceptual and practical issues with adopting the reasonable hypothetical doctrine in New Zealand. First, the Canadian constitutional framework operates in a fundamentally different way to New Zealand's. If a court finds that a provision imposing a mandatory minimum is cruel and unusual contrary to ss 1 and 12 of the Charter, a court is obliged under s 52(1) of the Constitution Act 1982 to declare that the law has "no force and effect" to the extent of the inconsistency.[53] The SCC has the power to "strik[e] down" the offending provision,[54] a constitutional power unavailable to New Zealand courts in the NZBORA. The purpose of the reasonable hypothetical is to allow a court to identify whether a sentencing provision is overinclusive in its general application.[55] Therefore, once a reasonable hypothetical results in a cruel and unusual punishment and is inconsistent with s 12 of the Charter, it follows that the effective remedy is to strike down the legislation.

Such a remedy is available in Canada because the Canadian Constitution is supreme law. However, s 4 of the NZBORA prohibits courts from striking down legislation that is inconsistent with NZBORA. The next best alternative is to grant a DOI. However, a declaration does not resolve the issue, which "would be to leave 'the legislation in its pristine over-inclusive form outstanding on the books'".[56] Conceptually, it could also create the anomaly whereby a future third-strike offender could point to *Fitzgerald* or a reasonable hypothetical,[57] and be granted a declaration of inconsistency in a situation where s 86D(2) produces a rights-consistent punishment. It is puzzling why the majority elected to import foreign jurisprudence. There was a clear opportunity for the majority to begin developing a

52 *Fitzgerald (CA)*, above n 5, at [78].

53 *R v Ferguson* [2008] 1 SCR 96 at [36].

54 At [35].

55 At [44].

56 At [44].

57 *Fitzgerald (CA)*, above n 5, at [78] said that such "[e]xamples could readily be multiplied."

proportionality jurisprudence on a case-by-case basis that is more consistent with our own legal culture and constitutional framework. It is lamentable that this has not occurred.

Dissent (Collins J)

In His Honour's dissent, Collins J read s 106 in the way explicitly rejected by the majority. After surveying the legislative history, His Honour concluded that only a malevolent Parliament would have intended for s 82D(2) to apply in a harsh and indiscriminate way to impose a sentence onto Fitzgerald for the offence he committed.[58] The wording "'any enactment applicable to the offence' could only have referred to the specific sentence provisions relating to [the substantial] offence", which were treason and piracy at the time s 106 was enacted.[59] If Parliament wished to restrict the Court's powers to discharge without conviction, then they clearly would have done so when s 86D(2) was enacted.[60] According to His Honour, this was unsurprising because s 86D(2) was not intended to apply to the likes of Fitzgerald, who would normally be eligible for a discharge without conviction, but to offenders who repeatedly commit "very serious offences".[61]

Therefore, after concluding that s 106 was applicable to Fitzgerald, Collins J reviewed the case law surrounding s 106 and concluded that the approach was "well established".[62] The "three-step process" of s 106 was:[63]

> (a) identifying the gravity of the offence;
>
> (b) identifying the direct and indirect consequences of a conviction for the defendant; and
>
> (c) determining whether the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending.

Departing from the majority's view, Collins J held that a finding of a breach of s 9 of the NZBORA does not automatically entitle the

58 At [116].

59 At [127].

60 At [128].

61 At [128].

62 At [134].

63 At [134].

criminal defendant to a discharge without conviction.[64] This point is illustrated by the hypothetical example of a defendant who is convicted of rape as their third strike. Without the three-strikes regime, the criminal defendant hypothetically would be sentenced to eight years' imprisonment. Under the three-strikes regime, he would be sentenced to 20 years' imprisonment without parole, the maximum sentence for rape. The defendant may argue the difference of 12 years engages their rights under s 9 of the NZBORA, but the gravity of the offence would "pose a considerable challenge if [they] tried to argue that [they] should be discharged without conviction".[65] Collins J asserted that such approach to s 106 and s 86D(2) would only apply if a defendant is sentenced to a determinate year of imprisonment "in circumstances where his offending would not normally attract a custodial sentence" and can show some types of *unique vulnerabilities*.[66] Fitzgerald's unique vulnerabilities, which forms the basis for the finding of manifest injustice and disproportionality by the majority, were:[67]

> (a) The fact that the offending would normally not attract a prison sentence;
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> (b) Fitzgerald has long-standing mental health conditions which severely impairs his ability to regulate his behaviour. This bears directly on his culpability, which would usually be a mitigating factor under s 9(2)(e);
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> (c) Fitzgerald's lack of appreciation and response to the warnings given by the Court undermines the deterrence rationale underpinning the Three-Strikes Law;
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> (d) A consultant psychiatrist had testified to the detrimental effect that a long-standing prison sentence would have on Fitzgerald, which would usually be a mitigating factor under s 8(h);
>
> (e) Fitzgerald's risk of reoffending was not at a level that would justify a lengthy prison sentence.

Collins J's approach is, at best, optimistic. His Honour took a strained reading of s 106 in order to give effect to Fitzgerald's rights under s 9 of the NZBORA. Such an approach is similar to the concept of a

64 At [135].

65 At [136].

66 At [140].

67 At [34], which Collins J agreed with at [140].

"constitutional exemption" in Canada.[68] Taking such a narrow, and even strained, reading of s 106 amounts to an 'exception' to s 86D(2) in a way that Parliament had not intended. As Peter Hogg observed, constitutional exemptions would allow the Court to create an exception to the legislation in small cases of applications that would offend the Charter where the defendant's lack of moral culpability would make the sentence cruel and unusual.[69] However, the concept of a constitutional exemption was unanimously rejected by the SCC in *Ferguson*.[70] It was held that the only remedy where a sentencing provision violated s 12 was to strike it down in its entirety.[71] Writing for the Court, McLachlin J reasoned that a constitutional exemption would have the effect of "read[ing] in a discretion to a provision where Parliament clearly intended to exclude discretion".[72] Instead, the appropriate course of action was to strike down the legislation and throw "the ball ... back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects".[73]

Just like how the Supreme Court of Canada refused to adopt constitutional exemptions in cases of cruel and unusual sentencing provisions, Collins J's approach to s 9 in relation to the Three Strikes Law also ought to be rejected. His Honour's approach would be what the majority warned as doing an "end run" around s 86D(2).[74] It has the effect of creating an exception and reading in judicial discretion in circumstances where Parliament expressly chose not to provide a safety valve under s 86D(2).[75]

Although Collins J's approach is admirable in his attempt to reconcile Fitzgerald's right under s 9 of the NZBORA with s 86D(2), His Honour's approach is based on shaky reasoning. His Honour used parliamentary records on the Three Strikes legislation and focused on the lack of discussion of s 106 to evidence Parliament's intention to exclude s 86D(2) from the s 106 proviso.[76] However, would it not be equally plausible that Parliament refrained from such discussion because they felt that the clear exclusion of judicial discretion in

68 See generally Ferguson, above n 53.

69 Peter W Hogg *Constitutional Law of Canada* (5th ed, Thomson Reuters, Ontario, 2017) at ch 40.1.

70 Although the discussion in *Ferguson* around this point is strictly obiter dicta.

71 *Ferguson*, above n 53, at [74].

72 At [56].

73 At [65].

74 *Fitzgerald (CA)*, above n 5, at [53].

75 At [35], [53] and [72].

76 At [128].

sentencing meant that judges could not invoke s 106 to save a sentence under s 86D(2)? Such a speculative exercise has no place in statutory interpretation when the plain and ordinary meaning of the provision is clear. Even if s 6 of the NZBORA requires judges to entertain alternative interpretations consistent with s 9 of the NZBORA, s 4 makes clear that courts cannot overstep their boundaries as interpreters of law into creators of law. Arguably, it was what Collins J had done here.

IV A DECLARATION OF INCONSISTENCY IN CRIMINAL APPEAL?

Upon concluding that s 86D(2) was inconsistent with Fitzgerald's right to be free from disproportionate punishment under s 9 of the NZBORA, the Court of Appeal majority then flirted with the idea of granting a DOI to remedy the s 9 right.[77] They noted that "a declaration provides important vindication of an appellant's rights [and that] vindication is arguably more, not less, important where s 4 of the NZBORA" requires a rights infringing result.[78] On the other hand, however, jurisdictional and practical issues ultimately proved too difficult to surmount. Despite the Supreme Court's confirmation in *Attorney-General v Taylor* of the High Court's jurisdiction to issue a DOI in a civil case,[79] there is uncertainty as to whether "a declaration of inconsistency can be sought in the context of an appeal under pt 6 of the CPA".[80]

Claudia Geiringer, a leading Bill of Rights commentator, summarised the four key reasons why courts have decided that a DOI should not be available in criminal proceedings:[81]

> (1) Criminal proceedings are not appropriate for assessing "civil relief";

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77 At [81]–[91].

78 At [87].

79 *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213.

80 *Fitzgerald (CA)*, above n 5, at [84] and [88].

81 Claudia Geiringer "On a road to nowhere: implied declarations of inconsistency and the New Zealand Bill of Rights Act" (2009) 40 Victoria U Wellington L Rev 613 at 626. These points are summarised from the judgment of *Belcher v Chief Executive of the Department of Corrections* [2007] NZCA 174 at [13]–[14].

(2) There is a risk of the criminal process being diverted into collateral issues;

(3) The District Court Act 1947 does not give District Court judges jurisdiction to make such declarations in civil proceedings, so there is no principled basis for them to have jurisdiction in criminal cases; and

(4) If District Court judges do not have the jurisdiction in criminal cases, it would be anomalous for High Court judges to do so.

Despite the inertia against issuing a DOI in a criminal proceeding, Geiringer observed that the majority of NZBORA issues are raised in the context of criminal proceedings.[82] In such cases, the stakes are high, legal aid is more freely available and there are huge incentives for criminal defendants to test the limits of the legal system.[83] Furthermore, there is an "ever present risk of zealous legislative majorities seeking to push or indeed ignore the boundaries set by the contemporary human rights framework" in the area of criminal justice.[84]

One would think Geiringer's observations would make an appellate court more sympathetic to the likes of Fitzgerald and issue a DOI. Indeed, the majority queried whether any "practical purpose [was] served by requiring the appellant to commence separate civil proceedings in order to obtain a formal declaration of inconsistency".[85] However, the majority considered that such an important issue needs to be raised squarely on appeal to be considered by a full court,[86] and that it was "generally undesirable for this Court to engage in determining significant public law issues without the benefit of a judgment from the High Court".[87] They also saw no real or tangible benefit that Fitzgerald could derive from the issuing of a DOI.[88] Further comments were made about how Fitzgerald did not initially seek a DOI and the issue only arose after the appeal was heard, in response to an inquiry from the Court.[89] This suggests that

82 Geiringer, above n 81, at 627.

83 At 627.

84 At 627.

85 *Fitzgerald (CA)*, above n 5, at [87].

86 At [88].

87 At [86].

88 At [90].

89 At [89].

the justices were implicitly concerned about the risk of Fitzgerald's criminal process being diverted into collateral issues, as noted above by Geiringer.

The *Fitzgerald* appeal highlights the complex jurisprudential and practical issues of issuing a DOI in a criminal appeal. Previous case law touching upon this issue have been inconsistent. In *Belcher*, four judges in the Court of Appeal held decisively that a DOI is a civil remedy and cannot be granted in a criminal proceeding.[90] Whereas the Supreme Court, in dismissing the subsequent *Belcher* appeal, "assum[ed], without deciding" that a DOI is available in a criminal proceeding.[91] Supreme Court guidance is desperately needed on this issue. However, as discussed below, it seems unlikely that such guidance will be provided as the Supreme Court's leave for appeal was only partially granted to consider the relationship between s 86D(2) and 106.[92] In the absence of clear Supreme Court guidance, it may be preferable to look towards the legislature to resolve this dilemma. The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill was introduced on 18 March 2020 and passed its First Reading on 27 May 2020. The aim of the Bill is to:[93]

> [P]rovide a mechanism for the Executive and the House of Representatives to consider, and, if they think fit, respond to, a declaration of inconsistency made under the New Zealand Bill of Rights Act 1990 (the Bill of Rights) or the Human Rights Act 1993.

The Bill is currently silent on the jurisdictional issue of the Court issuing a DOI in a criminal proceeding. Whether the Bill will be amended to include a resolution to the issue is yet to be seen. Still, it is possible as the Select Committee is currently preparing a report on the Bill proposing changes to the House of Representatives for a Second Reading.

90 *Belcher*, above n 81.

91 *Belcher v Chief Executive of the Department of Corrections* [2007] NZSC 54 at [6].

92 *Fitzgerald (SC)*, above n 6.

93 New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2020 (230-1) (explanatory note).

V APPEAL TO THE SUPREME COURT

On 3 November 2020, the Supreme Court granted partial leave to appeal to consider the question of whether the Court of Appeal was correct to find that s 106 of the Sentencing Act 2002 does not apply to Fitzgerald.[94] The note predicts that the Supreme Court will reject Fitzgerald's arguments that s 106 can operate to discharge him without conviction, notwithstanding s 86D(2). The Court of Appeal's majority judgment is likely to be upheld. It is also desirable for the Supreme Court, in this instance, to establish s 9 of the NZBORA proportionality jurisprudence in relation to the three-strikes regime or for mandatory minimum sentencing. Supreme Court guidance on this point is needed so that judges are not inclined to give judgments based on their own idiosyncratic notions of what is fair, just and proportional in future cases.

Fitzgerald also sought leave to appeal the Court of Appeal's refusal to grant a DOI in respect of s 86D(2) of the Sentencing Act. [95] The Supreme Court declined the appeal and agreed with the Court of Appeal generally that this was not "a suitable case to consider whether there is jurisdiction to make a declaration of inconsistency in the context of criminal appeals".[96] However, it is unclear when a suitable case will ever arise. As the Court of Appeal majority noted, it is impractical and unrealistic to expect criminal defendants to commence a separate civil proceeding in order to obtain a formal DOI when it does not provide any real or tangible benefits.[97] Despite this, we are likely to see, or at least the author hopes, the Supreme Court signalling to Parliament and the public (falling short of issuing a DOI) that the legislation has created an injustice to Fitzgerald.

VI CONCLUSION

Despite critique from experts, it appears the Three Strikes Law is here to stay for the foreseeable future. The Labour Government has

94 *Fitzgerald (SC)*, above n 6.

95 At [1].

96 At [3].

97 *Fitzgerald (CA)*, above n 5, at [87] and [90].

indicated its desire to repeal the regime,[98] but doing so could come at the political cost of appearing to be "soft on crime". The dilemma is captured perfectly by the saying: "like wars, forest fires and bad marriages, really stupid laws are much easier to begin than they are to end".[99]

The *Fitzgerald* appeal represents the potential consequences of when the legislature overreaches and removes the discretion of judges in the sentencing process. Judges sitting on the bench are often best placed to decide what an appropriate sentence is for the offender in front of them. Parliamentarians, juxtaposed, often consider such matters in the abstract and are detached from the potential context and nuances that each unique individual offender brings to a sentencing trial. When sentencing discretion is removed from judges, the courts are forced to apply laws created from parliamentarians view of the sentencing process as black and white. This will inevitably lead to individuals like Fitzgerald who slip through the crack, suffering injustices that cannot be adequately remedied.

98 Edward Gay "Labour set to repeal three strikes law, which sees repeat offenders get max sentence" The Southland Times (online ed, New Zealand, 26 October 2020).

99 Matt Taibbi "Cruel and Unusual Punishment: The Shame of Three Strikes Laws" RollingStone (online ed, New York, 27 March 2013).