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FREEDOM OF COMMERCIAL EXPRESSION IN NEW ZEALAND

LLB(HONS) RESEARCH PAPER
FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION (LAWS 520)

FACULTY OF LAW
VICTORIA UNIVERSITY OF WELLINGTON

2005

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ABSTRACT

The object of this paper is to give a broad overview of the right to freedom of commercial expression in New Zealand. The paper begins by considering the value of commercial expression and both reasons against and in support of restrictions on commercial expression. The right is largely unexplored in New Zealand. On the other hand, the courts in Canada and the United States have extensively considered freedom of commercial expression. Therefore this paper considers overseas jurisprudence in order to determine the preferred approach to be taken in New Zealand. The paper then goes on to explore the actual extent that freedom of commercial expression is recognised in New Zealand through examining case law, legislation, the vetting process required under the Bill of Rights Act (BORA), and self-regulation of the advertising industry through the Advertising Standards Authority (ASA). The paper asserts that the right to freedom of commercial expression in New Zealand is not protected adequately due to a lack of in-depth analysis as to whether restrictions on commercial expression are justified in accordance with section 5 of the BORA. Moreover, this paper asserts that the ASA and the Advertising Standards Complaint Board (ASCB) are subject to the BORA. Therefore the Codes established by the ASA and the decisions of the ASCB should be compliant with the BORA. New Zealand must strive to recognise that the right to freedom of commercial expression is a fundamental right protected under the BORA.

WORD LENGTH

The text of this paper (excluding table of contents, abstract, footnotes and bibliography) comprises 16,164 words.

SUBJECTS

Freedom of Expression
Bill of Rights Act 1990
Advertising Law

I INTRODUCTION

There is widespread recognition that freedom of expression is a fundamental right. However, should this right extend to commercial expression?[1] In other words, can commercial entities invoke their rights under the Bill of Rights Act 1990 (BORA)? It may seem artificial that commercial entities can invoke freedom of expression to protect their expression, particularly when expression is purely commercial. However, such expression is protected by section 14 of the BORA. Section 14 does not exclude information from a commercial context. Moreover, section 29 of the BORA extends rights to "legal" as well as natural persons. Thus commercial entities may legitimately appeal to freedom of expression when restrictions are placed on their ability to communicate.

This paper gives a broad overview of the concept of commercial expression and its protection under the right of freedom of expression. Freedom of commercial expression is largely unexplored in New Zealand. However, it has been dealt with extensively in other jurisdictions. Therefore this paper begins by considering United States and Canadian jurisprudence. Their courts and academics have looked into the definition of commercial expression, values served by commercial expression, both reasons against restrictions and reasons for restrictions, and approaches in justifying limitations on commercial expression. The paper will then examine the extent that New Zealand currently recognises and restricts freedom of commercial expression through case law, legislation, the vetting process and self-regulation of the advertising industry.

The focus of this paper is the expression itself being "commercial" not merely the motive. Most commonly, such expression would involve advertising for goods and services. Alternatively, expression merely motivated by a commercial motive, is outside the scope of this paper. Articles, documentaries, books, films and even art could potentially fit within expression that concerns a

[1] "Commercial expression" and "commercial speech" are used interchangeably throughout this paper and has the same meaning. The latter is generally used in the context of analysing United States jurisprudence. The former is generally used in the context of New Zealand and Canada.

commercial motive. The finding of whether expression itself is "commercial" is not an easy task, and this will be explored later. The cases and legislation in this area mainly concern commercial advertising. Therefore advertising will be the main focus of this paper.

II VALUES OF COMMERCIAL EXPRESSION

There is public interest in communication of information relating to goods and services. Legislation in United States which prohibited pharmacists from advertising prices of medicines was invalidated in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council (Virginia Pharmacy).*[2] In doing so, Blackmun J stated:[3]

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions ... be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Similarly, the Canadian Supreme Court has held:[4]

> Over and above its intrinsic value as expression, commercial expression which ... protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfilment and personal autonomy.

Commercial expression may have a role in furthering a core value of freedom of expression, that of facilitating democracy.[5] Commercial expression informs consumers and in doing so supports a free market economy. Much of our economic system depends on the free flow of commercial expression. A free

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[2] *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc (Virginia Pharmacy)* (1976) 425 US 748.
[3] *Virginia Pharmacy*, above n 2, 765 Blackmun J.
[4] *Ford v Quebec* [1988] 2 SCR 712, 767.
[5] See Wojciech Sadurski *Freedom of Speech and Its Limits* (Kluwer Academic Publishers, The Netherlands, 1999) 9, 20. Sadurski examines the core values of freedom of expression.

market economy is an aspect of a democratic society.[6] Although, it has been argued, that democracy can function without a free market economy,[7] as the free market is only one idea of how goods should be distributed in society.[8]

Another perspective is that free expression serves the value of self-government, and commercial expression supports a free market economy in which assists individuals in the governing of themselves.

Individual self-fulfilment is another core value of freedom of expression.[9] Commercial expression can indirectly serve individual self-fulfilment. Commercial expression performs an important social and educational role as informed choice enables consumers to purchase according to their needs and wants. Self-fulfilment ensues due to the purchase of the desired goods and services. Moreover, interest in commercial speech may be "as keen, if not keener" than "interest in the day's most urgent political debate".[10]

It may also directly serve individual self-fulfilment, merely through the expression itself. For example, advertising (one form of commercial expression) may sometimes be seen as extremely creative pieces of work. Therefore the mere expression of such advertising leads to individual self-fulfilment.

Finally, commercial expression may contribute to the "marketplace of ideas"[11], through putting information concerning goods and services out into the marketplace.

It is worth mentioning that it has been questioned whether advertising does in fact inform consumers as modern advertising campaigns are designed to be

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[6] *Re Klein and Law Society of Upper Canada* (1985) 50 OR (2d) 118, 134 Henry J (dissent): "[I]n a free market economy (which is an attribute of a democratic society), freedom of communication in economic affairs is no less important to the proper functioning of society than freedom of political communication".

[7] Andrew Wilson "Advertising and the Charter: Just Do It?" (2000) 9 Dalhousie Journal of Legal Studies 302, 312.

[8] *Re Klein,* above n 6, 164 Callaghan J (majority).

[9] See *Whitney v California* (1927) 274 US 357, 375 Brandeis J. See also Sadurski, above n 5, 20.

[10] *Virginia Pharmacy,* above n 2, 763.

[11] *Abrams v United States* (1919) 250 US 616, 630.

anti-rational. Critics have examined the psychological effects of advertising and argue that many advertisements do not inform as to product quality or price.[12] However, analysing the psychological aspects and methods of advertising is outside the scope of this paper. For our purposes, we proceed on the presumption that advertising informs potential consumers.

III REASONS AGAINST RESTRICTIONS

This part of the paper summarises the arguments against restricting commercial expression. Evidently, there is an overlap between "values of commercial expression" and "reasons against restrictions", as the former provides for the latter. Therefore the following are additional reasons against restrictions.

General advertising bans on vices such as alcohol, gambling, and tobacco are considered paternalistic. Viewing people as needing protection from promotion of such vices presumes that people are unable to make rational decisions. This type of paternalism is "incompatible with the faith places in public judgment in a democracy".[13]

Further such goods and services are legal to provide therefore should be legal to promote. That is not to say free reign is given to advertisers to advertise however they wish to. Advertisements should be reasonably restricted if they mislead, promote unlawful activities, or are socially irresponsible.[14] The point is that arbitrary comprehensive bans will be hard to justify as reasonable, compared with a partial ban.[15]

The proponents of bans are usually motivated by genuine social concerns. They believe that a problem in society can be resolved, amongst other things, by an advertising ban.[16] However this is argued as nonsense as advertising bans

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[12] See Wilson, above n 7, for an interesting perspective on the effects of advertising.
[13] Selene Mize "The Word Dog Never Bit Anyone: the Tobacco Advertising Ban and Freedom of Expression" (1995) 8 Otago Law Review 3, 430.
[14] Glen Wiggs "The Right to Advertise" (Unpublished, Wellington, 1994) 1 ["The Right to Advertise"].
[15] *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199, 344 McLachlin J.
[16] "The Right to Advertise", above n 14, 2.

cannot remove the social problems. For example, with respect to a ban on liquor advertising, it is not the product that is objected to but the misuse of the product. The answer is more education and hence more expression.[17] Advertisers should ensure that advertisements do not encourage misuse.

Commercial expression in the form of paid advertising serves freedom of expression in that it provides funding for the press. Both broadcasters and the print media rely on advertisements to produce revenue.[18] Commercial expression aids the provision of non-commercial expression in broadcasts and print articles. Any comprehensive restrictions on advertising may have the effect of decreasing such valuable non-commercial expression, particularly if a slippery slope begins and more product bans are advocated on products such as fast food, cellular phones, women's sanitary products and so forth. The potential for advertising bans may be endless and the potential for fewer media organisations would ensue.

IV REASONS FOR RESTRICTIONS

This part of the paper summarises the arguments for restricting commercial expression.

Edwin Baker argues that "limiting people's opportunity to use legislative power to regulate commercial actors, including the actor's speech, out of some view that the regulation is not really in the people's interest"[19] is paternalistic. This is the idea of judicial paternalism, in that the Court would be paternalistic if it protects commercial speech and invalidates rationally designed legislative choices.[20] For instance, when there is widespread popular support for bans on tobacco advertising, it is paternalistic for the Court to invalidate such regulation on the basis that it is not really in the people's interest.

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[17] "The Right to Advertise", above n 14, 8.
[18] Colin Munro "The Value of Commercial Speech" (2003) Cambridge Law Jnl 62(1) 134, 156.
[19] C Edwin Baker "Paternalism, Politics, and Citizen Freedom: the Commercial Speech Quandary in Nike" (2004) 54 Case W Res 1161, 1178.
[20] Baker, above n 19, 1178.

This argument is an interesting twist on the "paternalism" concept, as usually "paternalism" is put forward as a reason to support not having comprehensive bans on advertising. The key point in response would be that people are able to use the legislature to regulate commercial expression, but if they do, they must provide evidence to justify such action.

Furthermore, it is argued that commercial expression is not chilled as easily. First, due to the profit motive, commercial expression is seen to be more durable.[21] However, it is noteworthy that commercial expression is only as: [22]

> [H]ardy as the law empowers it to be, and ... if certain advertising practices are prohibited ... and the sanctions sufficiently enforceable, no degree of perceived hardiness will enable speech to persevere.

Secondly, businesses have easier access to the truth regarding their factual statements about products and the organisation. In contrast, typical speakers on public affairs do not have similar methods to verify their speech.[23] The chilling effect is more likely to arise in the latter context.

One concern is protection of a vulnerable group, such as children or consumers in general. Restrictions on commercial expression would be reasonable in order to protect children or consumers against unscrupulous advertisers, in particular because consumers do not have adequate resources to check that information is correct. Therefore advertisements should not be false or misleading. Further, advertisers commonly spend large amounts of funds on sophisticated advertising campaigns which employ psychological tools so that advertisements have the desired persuasive effects. Consumers should be protected to an extent due to this imbalance of power that advertisers have. Advertisers should have a due sense of social responsibility. However, it does not follow that arbitrary wide-reaching bans are reasonable.

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[21] Baker, above n 19, 1178.
[22] Rodney Smolla "Free the Fortune 500! The debate over corporate speech and the First Amendment" (2004) 54 Case W Res 1277, 1290.
[23] Baker, above n 19, 1169.

Some argue that the principal purpose of freedom of expression is to advance human autonomy and dignity. Thus as commercial entities are non-human there is a lack of human dignity to protect.[24] This is argument seems persuasive in the first instance as when one thinks of breaches of "fundamental rights", the right of a tobacco company to advertise cigarettes does not jump to the fore-front of one's mind. Moreover, breach of a tobacco company's right to advertise, hardly pulls at the heart strings as other breaches of fundamental rights tend to do.

Yet this argument largely ignores the fact that section 29 of the BORA expressly provides that rights extend to legal persons as well as natural persons. Therefore it is irrelevant that such entities are non-human.

It has been suggested that due to some positive protection of commercial expression, such as through company law, partnership law, and intellectual property law, then the negative effect of advertising restrictions "may be thought to redress the balance somewhat".[25] However, this perspective is illogical. An analogy in the political sphere may demonstrate the absurdity. For example, in allowing citizens the right to vote for a government, it does not follow that it is justified to restrict the right to protest about the government. The giving of positive protection for some commercial expression should not provide the justification for restricting other commercial expression. Any justification must relate to the advertising itself.

Perhaps if freedom of commercial expression is indeed an artificial appeal to freedom of expression by commercial entities, then it may serve to water down the right. It may have the effect of lessening the authority for the fundamental right to freedom of expression.

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[24] Baker, above n 19, 1163.
[25] Munro, above n 18, 145.

V DEFINING COMMERCIAL EXPRESSION

The First Amendment[26] guarantees freedom of expression in the United States. The United States Constitution lacks an express provision to justify limiting the rights and freedoms guaranteed in the Constitution. Instead, the courts have established categories of speech and afford each category different levels of protection. It has developed its commercial speech doctrine, which gives the category of "commercial speech" an intermediate level of protection[27] under the First Amendment. Therefore it is essential to define what commercial speech is. However, the United States jurisprudence has shown that it is difficult to define precisely what constitutes "commercial speech". It has offered various definitions that commentators have argued are unworkable and unpredictable.[28]

In comparison, Canada does not categorise speech as such. Freedom of expression is protected under section 2(b) of the Canadian Charter of Rights and Freedoms 1982 (Charter). In *Irwin Toy Ltd v Quebec (Attorney-General)*,[29] the Supreme Court held that "if the activity conveys or attempts to convey meaning, it has expressive content and prima facie falls within the scope of the guarantee". The only exception was that violence was not a form of expression. This is a very broad definition of "expression", thus all expression including commercial expression is protected under this definition.

There is less need for categorisation as the Charter provides an express limitation in section 1. Rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This limitation allows the Canadian Courts to balance guaranteed rights

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[26] US Constitution, amendment I.

[27] See *Central Hudson Gas & Electric Corp v Public Service Commission of New York* (1980) 447 US 557. Commercial speech is subject to intermediate scrutiny, compared with non-commercial speech which is usually subject to strict scrutiny. See also Sadurski, above n 5, 37-43, for a summary of levels of scrutiny.

[28] See Deborah La Fetra "Kick it up a Notch: First Amendment Protection for Commercial Speech" (2004) 54 Case W Res 1205. See also Elliot Dozier "The Effect of the Commercial Speech Classification on Corporate Statements" (2004) 33 Stetson L Rev 1035.

[29] *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927.

against other interests without restricting the substantive scope of the Charter provisions.[30]

The Canadian Supreme Court noted that although certain speech could be appropriately described as "commercial expression", the term had no particular meaning or significance under the Charter.[31] Thus what can be termed commercial speech is protected from the outset under section 2(b)[32] of the Charter and avoids the definitional problems that affect United States case law.

A United States Definitions

1 Not all paid advertising is commercial speech

Commercial speech lacks a reliable definition ever since it was first recognised as falling within First Amendment protection in 1976.[33] What is reasonably certain is the outcome of easy cases.[34]

At one end, not all paid advertising is properly classified as "commercial speech". The Supreme Court held in *New York Times v Sullivan*[35] that an advertisement which protested against handling of civil rights demonstrations, was one that:[36]

> [C]ommunicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of those whose existence and objectives are matters of the highest public interest and concern.

Therefore it was not treated as commercial speech.

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[30] See Christopher Manfredi "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40 AM J COMP J 213.
[31] *Ford v Quebec*, above n 4, 755.
[32] Section 2(b) provides: "Everyone has the following freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".
[33] *Virginia Pharmacy*, above n 2.
[34] Robert O'Neil "Nike v Kasky – What Might Have Been" (2004) 54 Case W Res 1259, 1262.
[35] *New York Times v Sullivan* (1964) 376 US 254.
[36] *New York Times v Sullivan*, above n 35, 266.

2 *Speech that does no more than propose a commercial transaction*

At the other end, in *Virginia Pharmacy,* a publication which "does no more than propose a commercial transaction"[37] seeking solely to promote a sale of a good or service, is commercial speech. For instance such speech would involve the traditional advertising of an offer to sell antibiotics at a set price.

However, with the sophistication and innovation of marketing methods that exist today, it is difficult to determine whether such expression would be doing "no more" than proposing a commercial transaction. Brown J in the California Supreme Court dissented in *Kasky v Nike*[38]. She argued contemporary marketing involves speech that is very much intermingled: [39]

> [W]ith the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and non-commercial is rapidly shrinking.

As it is difficult to articulate a clear dividing line delineating such innovative methods, any attempt to characterise may be arbitrary and inconsistent.

3 *Expression related solely to economic interests of speaker and audience*

Central Hudson Gas & Electric Corp v Public Service Commission of New York (Central Hudson)[40] defined commercial speech as "expression related solely to the economic interests of the speaker and its audience".[41] However, the Supreme Court has recognised that speech can serve dual functions.[42] There is potential that speech that is in some sense "commercial" may also be part of a matter of public interest. For instance, in *Kasky v Nike,* Nike published corporate

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[37] *Virginia Pharmacy,* above n 2, 762.
[38] *Kasky v Nike Inc* (2002) 45 P 3d 243.
[39] *Kasky v Nike,* above n 38, 326-7 (Brown J). See also Deborah La Fetra, "Kick it up a Notch: First Amendment Protection for Commercial Speech" (2004) 54 Case W Res 1205, 1231-1236. She suggests that a wide variety of marketing methods that differ from traditional advertising including product placements, sponsorships, testimonials, music videos, virtual advertising, guerrilla marketing and providing helpful advice.
[40] *Central Hudson v New York,* above n 27.
[41] *Central Hudson v New York*, above n 27, 561.
[42] See *Cohen v California* (1971) 403 US 15, 26.

statements regarding its labour practices in Asia. It was held to be "commercial speech" by the majority, yet it was not solely concerning the economic interests of Nike. Such speech concerned Nike's corporate image and ethical reputation. It was speech on a matter of public concern thus had political implications not "solely" related to economic interests.

Another example concerns advertising for abortion. The information may be commercial in nature as clinics operate as a business. Yet, the implications of the advertising are of public concern in that the morality of abortions is a matter of public debate.[43]

Speech may have artistic and creative elements as well as commercial elements. Advertising such as classified advertisements in a newspaper column may not be seen to have artistic merit.[44] However, can the same be said of the sophisticated advertisements we see on billboards and television? Given the amount of money invested in marketing campaigns, the results frequently do represent creative endeavours.

4 *Three factors in* Bolger v Youngs Drug Corp

In *Bolger v Youngs Drug Corp (Bolger)*[45] the Supreme Court found three factors indicated whether speech was commercial. First, the speech was in advertising format. Secondly, it referenced a specific product. Thirdly, the speaker had economic motivation for making the statements.[46] Each factor in isolation was insufficient to turn statements into commercial speech, whereas the combination of all factors strongly supported characterising the speech as commercial.[47] In *Bolger,* the speech at issue was informational pamphlets about contraception, which contained only passing references to a brand of condom. The Supreme Court determined that it was commercial speech. Arguably, it should have been speech on a matter of public concern. Further, informational

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[43] See *Bigelow v Virginia* (1975) 421 US 809, where a statute which prohibited promotion of abortions was held to violate the First Amendment.
[44] See Munro, above n 18, 150.
[45] *Bolger v Youngs Drug Corp* (1983) 463 US 60.
[46] *Bolger v Youngs Drug Corp*, above n 45, 66-67.
[47] *Bolger v Youngs Drug Corp*, above n 45, 67.

pamphlets do not necessarily parallel traditional advertising format. Moreover, references to a specific product surely should amount to more than mere passing references.

However, *Bolger* stated that "advertising which 'links a product to a current public debate' is not thereby entitled to constitutional protection afforded non-commercial speech".[48] This qualification was added to prevent businesses from deviously attempting to gain non-commercial speech protection by attaching a matter of public concern to advertisements.[49]

However, sometimes speech is "inextricably intertwined" with speech of public concern and it is not a devious attempt to gain protection, but genuine speech that should be afforded greater protection. The Supreme Court has reasoned that assuming speech was commercial, it does not retain "its commercial character when it was inextricably intertwined with otherwise fully protected speech".[50]

Brown J dissents in *Kasky v Nike* and observes that "Nike's speech is more like non-commercial speech than commercial speech because its commercial elements are inextricably intertwined with its non-commercial elements".[51] The commercial elements, being references to Nike's own factory conditions in Asia, were inseparable from Nike's comments on globalisation and labour practices. Many commentators have argued the majority in *Kasky v Nike* were incorrect to have held Nike's speech was commercial.[52]

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[48] *Bolger v Youngs Drug Corp*, above n 45, 68.
[49] See *Valentine v Chrestensen* (1942) 316 US 52, where an advertisement for submarine tours was on one side of a handbill, with a protest on the other side.
[50] *Riley, District Attorney v National Federation of the Blind of North Carolina Inc* (1988) 487 US 781, 796.
[51] *Kasky v Nike*, above n 38, 274 Brown J (dissent).
[52] See Deborah La Fetra "Kick it up a Notch: First Amendment Protection for Commercial Speech" (2004) 54 Case W Res 1205. See also Elliot Dozier "The Effect of the Commercial Speech Classification on Corporate Statements" (2004) 33 Stetson L Rev 1035. See also Bruce Johnson and Jeffrey Fisher "Why Format, not Content, is the Key to Identifying Commercial Speech" (2004) 54 Case W Res 1243. See also O'Neil, above n 34.

B Summary of Definitions

Efforts to define commercial speech have been criticised by subsequent cases and commentators alike. It is difficult to define as speech can serve many interests. Also sophisticated marketing methods make it more difficult to articulate a workable definition. There will be situations where speech should in substance be included as commercial speech, yet may not as it fails to fit within the commercial speech definition. For example, guerrilla marketing techniques do not fit within the "advertising format" requirement of *Bolger*. Conversely, there will be situations in which the speech in substance is not commercial speech and yet is included in the definition, such as speech by a commercial speaker on a matter of public debate.[53] Yet, due to the lower level of protection afforded to commercial speech in the United States, it is a necessary task to determine what constitutes commercial speech. The Supreme Court recently had the chance to re-examine the commercial speech definition and category, as it initially agreed to review the *Kasky v Nike* decision.[54] However, after full briefing and oral argument the Court dismissed the case as "improvidently granted",[55] thus chose not to decide, much to the disappointment of many academics.

In contrast, Canadian courts do not afford lower level protection to commercial speech at the outset. However, restrictions can still be justified if section 1 of the Charter is satisfied. This avoids much of the definitional dramas that occur in the United States. However, in Canada, it has been acknowledged that restrictions on commercial expression may be easier to justify than restrictions on other types of speech.[56] This may suggest that Canada may nevertheless have to inquire into some sort of definition for commercial expression if indeed it is easier to justify. Yet the Canadian courts avoid defining the term, because it is unnecessary. The Canadian approach allows for a balancing approach for the circumstances in each case. The balancing approach

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[53] See *Kasky v Nike*, above n 38.
[54] See *Nike v Kasky* (2003) 537 US 1099.
[55] See *Nike v Kasky* (2003) 539 US 654.
[56] *RJR-MacDonald v Canada*, above n 15, 348 McLachlin J.

does not turn on the definition as it does so in the United States. This point is further explained at a later point in this paper.[57]

VI JUSTIFIED LIMITATIONS

A United States

Once speech has been categorised as "commercial speech", then intermediate scrutiny applies to such speech.[58] This is in contrast to non-commercial speech, for instance political speech, which strict scrutiny applies. In the case of strict scrutiny, Courts scrutinise any restrictions much more rigorously than in the case of intermediate scrutiny.

In *Central Hudson,* a four-step test was developed that provided the process for intermediate scrutiny of commercial speech. This is consistent with the speech's "subordinate position in the scale of First Amendment values".[59]

First, speech must be within the protection of the First Amendment. Commercial speech which advertised unlawful activity or was false or misleading was not protected. This is significant, as other speech, such as political speech is protected even if false or misleading. Thus commercial speech is singled out. Secondly, there must be a substantial governmental interest in restricting the speech. Thirdly, the restriction must directly advance the governmental interest asserted. Finally, the restriction must not be more than necessary to serve that interest.[60] The last step was further defined later to require a "reasonable fit" as opposed to the "least restrictive means".[61]

The Supreme Court has applied this test and invalidated various state restrictions including restrictions on professional legal advertising, [62]

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[57] See Part VI C *Comparing Approaches.*
[58] *Central Hudson v New York*, above n 27.
[59] *Ohralik v Ohio State Bar Association* (1978) 436 US 447, 456.
[60] *Central Hudson v New York*, above n 27, 565-566.
[61] *Board of Trustees of State University of New York v Fox* (1989) 492 US 469, 479.
[62] *Bates v State Bar of Arizona* (1977) 433 US 350.

advertisements for electricity supply, [63] use of news-racks to distribute "commercial handbills" while permitting use of news-racks for newspapers,[64] prices of alcoholic beverages, [65] disclosure of beer strengths, [66] and outdoor billboards for tobacco.[67] The restrictions usually satisfy substantial government objectives, yet fail on the fourth step. Restrictions have been too broad when other alternatives are available that would be less detrimental to freedom of speech.

However, it appears the Supreme Court is ready to uphold restrictions when there is a vulnerable group to protect. The Court has upheld restrictions on personal solicitation by professionals[68] due to inherent dangers of fraud, undue influence, and intimidation. In one case the Court upheld a rule that banned professionals targeting accident and disaster victims soon after the event, due to the special vulnerability of the victims.[69] Additionally, protecting children is a common asserted justification for restricting speech. The Court of Appeals for the Fourth Circuit upheld a restriction on outdoor advertising of alcohol and tobacco due to the state interest of promoting "welfare and temperance" of children.[70]

The recent controversial case *Kasky v Nike* concerned misleading statements about labour practices. Due to the "commercial speech" classification, Nike's speech was subjected to the *Central Hudson* test. Given the speech was misleading, application of the first step of the test meant that Nike's speech was not protected under the First Amendment. The core issue was that had the speech been defined as "non-commercial speech" or "inextricable intertwined speech", and elevated to strict scrutiny, then most likely the competition laws, that Nike's speech was penalised under, would have been invalidated. This is because the Court's treatment of false or misleading non-commercial speech differs in that

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[63] *Central Hudson v New York*, above n 27.
[64] *Cincinatti v Discovery Network* (1993) 507 US 410.
[65] *44 Liquormart Inc v Rhode Island* (1996) 517 US 484.
[66] *Rubin v Coors* (1995) 514 US 476.
[67] *Lorillard Tobacco Co v Reilly, A-G of Massachusetts* (2001) 533 US 525.
[68] See *Ohralik v Ohio State Bar Association*, above n 59.
[69] See *Florida Bar v Went For It Inc* (1995) 515 US 618.
[70] *Anheuser-Busch v Schmoke (1997)* 101 F 3d 325. However, it is likely that since *Lorillard Tobacco Co v Reilly*, if a similar case arose, it may be decided in favour of freedom of commercial expression.

"erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive'".[71]

In *Nike v Kasky,* the statements were made through the media and in the context of a fast-moving public debate in which Nike had to respond immediately. This differs from the unlimited timeframe that Nike may have to devise a hard-sell advertising campaign for shoes.[72] It is strongly arguable however, that the former should be protected even if misleading, the media is likely to reveal any misleading statements. In contrast, the latter should not be protected if misleading, due to the consumer's inability to reflect on or check the information before engaging in economic transactions.[73] Moreover, the media is more prone to analysing expression in the political arena and commercial advertising is not commonly scrutinised to a similar extent.

B Canada

Canadian Courts justify limitations using section 1 of the Charter. In *R v Oakes*[74], the Supreme Court set out guidelines for determining whether a limitation was justified under section 1. The government has the burden of proving, on the balance of probabilities, that the limitation was "demonstrably justified".

First, the objective must be of sufficient importance to warrant overriding a constitutional right. Secondly, the measures chosen must be proportional. In determining proportionality, the Court must consider whether the measures chosen are rationally connected to the objective; whether the measures impair the guaranteed right as little as possible; and whether there is proportionality between the deleterious effects of the measures and their salutary effects.[75]

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[71] *New York Times v Sullivan,* above n 35, 271-2.
[72] Bruce Johnson and Jeffrey Fisher "Why Format, not Content, is the Key to Identifying Commercial Speech" (2004) 54 Case W Res 1243, 1252.
[73] See Johnson and Fisher, above n 72, 1250-1255.
[74] *R v Oakes* [1986] 1 SCR 103.
[75] The *Oakes* test as restated in *R v Edwards Books & Art Ltd* [1986] 2 SCR 713, 768-69.

The Canadian Supreme Court has similarly invalidated state restrictions including restrictions on English signs in Quebec,[76] tobacco advertising,[77] and professional advertising of dental services,[78] and signs with trade names outside the industrial zone.[79]

Again, the sufficiently pressing objective requirement is usually satisfied. Most restrictions fail in that they are not proportional. For instance, in *RJR-MacDonald v Canada (RJR-MacDonald)*[80] a total ban on tobacco advertising was found to be too broad and the government had not proven that a partial ban on "lifestyle advertising" would not be sufficient to meet the objective of discouraging smoking.[81]

However, the Supreme Court upheld a restriction when the objective was the protection of children. The case concerned a prohibition against advertising directed at children under the age of thirteen.[82] Therefore it appears that the Court can justify restrictions in order to protect a vulnerable group.

If *Kasky v Nike* had occurred in Canada, the Court in applying the *Oakes* test may have found that the law was disproportionate. The competition law that imposed strict liability may have been too detrimental to Nike's right to speak, thus invalidated.[83] This analysis would occur without having to characterise the speech as "commercial". The difference is misleading speech is not within the *Central Hudson* test, whereas it is clearly "expression" under section 2(b) of the Charter. Therefore analysis of the restriction can proceed in the latter approach but not the former.

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[76] *Ford v Quebec*, above n 4.
[77] *RJR-MacDonald Inc v Canada*, above n 15.
[78] *Rocket v Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232.
[79] *R v Guignard* [2000] 1 SCR 472.
[80] *RJR-MacDonald Inc v Canada*, above n 15.
[81] *RJR-MacDonald v Canada,* above n 15, 347 McLachlin J.
[82] *Irwin Toy v Quebec,* above n 29.
[83] Karla Gower "Looking Northward: Canada's Approach to Commercial Expression" (2005) 10 Comm L & Pol'y 29, 61.

1 Deference

The Canadian Supreme Court has acknowledged that restrictions on commercial expression may be easier to justify than restrictions on other types of speech.[84] This essentially means there is lower scrutiny of the restrictions on commercial expression. However, this finding does not turn on the motive of the speaker. A "profit-motive" is irrelevant to whether the government has established that a law is reasonable or justified.[85]

The reason why restrictions on commercial expression are easier to justify is essentially an act of deference to Parliament. It has been suggested that greater deference to Parliament may be appropriate if the law is concerned with competing rights between different sectors of society.[86] This deference is justified on the basis that commercial speech cases usually involve policy matters, where the legislature has attempted to protect a vulnerable group, for example children, or balanced the interests of two competing groups, for example businesses and consumers.[87] The legislature has access to resources and processes for consideration of all supporting and opposing views, and has the ability to debate such policy matters. La Forest J illustrates this point in his dissent in *RJR-MacDonald:*[88]

> Courts are specialists in the protection of liberty and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be.

However, McLachlin J, in the majority, in *RJR-MacDonald* cautions that "deference must not be carried to the point of relieving the government of the burden ... of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justified".[89] This is the crucial point: limits on commercial expression may be easier to justify, but the government must still bring forward

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[84] *RJR-MacDonald v Canada,* above n 15, 348 McLachlin J.
[85] *RJR-MacDonald v Canada,* above n 15, 348 McLachlin J.
[86] *Irwin Toy v Quebec*, above n 29, 993-4.
[87] Gower, above n 83, 59.
[88] *RJR-MacDonald v Canada,* above n 15, 277 La Forest J (dissent).
[89] *RJR-MacDonald v Canada,* above n 15, 332 McLachlin J.

evidence and show that the limitation is rationally connected, minimally impairs the right, and is proportional.

In examining the evidence brought forward, the courts may give greater deference to Parliament. For example, in *Irwin Toy v Quebec*, evidence indicated that children under the age of six were unable to distinguish fact from fiction, but at some stage between seven and thirteen they become capable of understanding advertisements. A majority of the Court accepted Parliament's decision to impose the upper age limit of 13 as opposed to a younger age. It held that the government should be afforded a "margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence".[90]

The specific weighting of what a government must establish to warrant a finding of a "reasonable limitation" depends on the consumer group being protected and the extent of harm that advertising can cause to that group.[91]

C Comparing Approaches

In comparing the two approaches, the *Central Hudson* test is very similar to the *Oakes* test. However, the balancing occurs at a different location.[92] It is arguable that the Canadian Courts similarly engage in a categorisation process, due to the acknowledgment that restrictions on "commercial expression" may be easier to justify than restrictions on other types of speech. Yet this "categorisation" is done under section 1 rather than section 2(b) of the Charter.[93]

Karla Gower argues that location matters for three reasons. First, acknowledgement that speech is protected at outset avoids definitions of categories, which is arbitrary and difficult.[94]

Secondly, the principle of freedom of expression is preserved as it does not create a hierarchy of speech in contrast to the First Amendment.[95] Although it

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[90] *Irwin Toy v Quebec*, above n 29, 990.
[91] Gower, above n 83, 59.
[92] Gower, above n 83, 58.
[93] Canada Charter of Rights and Freedoms 1982.
[94] Gower, above n 83, 59.

is arguable, if some restrictions on certain "expression" are easier to justify than others then arguably in substance a "hierarchy" does exist. However, there is no hierarchy at the outset, which may serve to strengthen the principle of freedom of expression.

Thirdly, it permits the "right" to be balanced against the "regulation" in a more substantive way.[96] Instead of arbitrary distinctions at the outset, all expression is included and then subject to the section 1 of the Charter. Section 1 is "an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions".[97] This allows for greater balancing of rights and restrictions, which takes into account the contextual circumstances of individual cases.

It seems arguable that Canadian courts similarly must inquire into some form of a definition for commercial expression due to the acknowledgment that commercial expression is easier to justify. However, the Canadian courts do not need a determinative definition precisely due to its ability to balance the right and limitation within the circumstances of each case. It appears that a common-sense approach is taken as to what constitutes commercial expression, and the cases that have reached the Supreme Court to date have clearly concerned commercial expression.[98] Pure commercial expression may be more easily justified. However, expression which may not be purely commercial expression may be harder to justify. There is no need for a determinative definition as the balancing approach in Canada does not turn on the definition as it does in the United States.

It is questionable whether there are any real differences in results between the two approaches. If we examine the track record for both the courts we can see that the rate of upholding restrictions is relatively similar. In the United States, as David Vladeck observes, since *Virginia Pharmacy* was decided in 1976, there have been twenty four core commercial speech cases decided in the Supreme

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[95] Gower, above n 83, 59.
[96] Gower, above n 83, 59.
[97] *RJR-MacDonald v Canada,* above n 15, 331 McLachlin J.
[98] See *Ford v Quebec*, above n 4; *Irwin Toy Ltd v Quebec,* above n 29; *Rocket v Royal College of Dental Surgeons of Ontario,* above n 78; *RJR-MacDonald Inc v Canada*, above n 15; *R v Guignard*, above n 79.

Court.[99] In only five cases were the restraints upheld.[100] By comparison in Canada, since the Charter came into force in 1982, only five commercial expression cases have come before the Canadian Supreme Court.[101] The Supreme Court only upheld the restriction in *Irwin Toy v Quebec.* Thus both jurisdictions have an upholding rate of 20 per cent.

Obviously these findings are not definitive, but they are interesting to see that the results seem to be somewhat similar. In particular, as mentioned earlier, the cases that have upheld restrictions, usually concern protecting vulnerable groups. More significantly, these findings show that commercial expression is being firmly protected in both jurisdictions.

VII NEW ZEALAND

As already observed, the concept of "freedom of commercial expression" is largely unexplored in New Zealand. Therefore, New Zealand is likely to look to judicial decisions in other jurisdictions. Such authority is not binding on the courts in New Zealand. Despite this, such decisions will be highly persuasive as they offer both extensive legal analysis as to the values of commercial expression, and thorough frameworks to apply in determining whether a restriction on commercial expression is justified. Such justifications and frameworks can have universal application, especially in exemplifying a universal character to human rights.[102]

However, it is important to acknowledge that New Zealand may have different historical and social circumstances, and thus care needs to be taken when adopting comparative case law. Moreover, it is especially significant that the

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[99] David Vladeck "Nike v Kasky and the Modern Commercial Speech Doctrine: Lessons from a Story Untold" (2004) 54 Case W Res 1049, 1067-8.
[100] See *Ohralik v Ohio State Bar Association*, above n 59; *Friedman v Rogers* (1979) 440 US 1; *Posadas de Peurto Rico Associates v Tourism Co* (1986) 478 US 328; *United States v Edge Broadcasting* (1993) 509 US 418; and *Florida Bar v Went For It,* above n 69.
[101] See *Ford v Quebec*, above n 4; *Irwin Toy Ltd v Quebec,* above n 29; *Rocket v Royal College of Dental Surgeons of Ontario,* above n 78; *RJR-MacDonald Inc v Canada*, above n 15; *R v Guignard*, above n 79.
[102] Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 66.

Canadian Charter and the United States Constitution are constitutional documents that entrench rights and freedoms. This gives their courts the power to strike down legislation. Conversely, in New Zealand, the BORA is not supreme law and nor do our courts have the power to strike down legislation.

New Zealand is likely to follow the Canadian approach as the BORA draws heavily on the Canadian Charter.[103] However, it is worth mentioning that in turn, Canadian jurisprudence drew on First Amendment jurisprudence in developing their approach to commercial expression in the Charter.[104]

First, it is necessary to examine the BORA framework. Secondly, New Zealand case law will be examined and the extent, if any, it has given to the recognition of commercial expression. Thirdly, New Zealand legislation will be examined for current breaches of freedom of commercial expression. Fourthly, the Attorney-General's duty to report on BORA inconsistencies[105] shall be examined; and finally, in order to give a complete picture, it is necessary to examine the Advertising Standards Authority (ASA) and its role in regulating commercial expression.

VIII BILL OF RIGHTS ACT FRAMEWORK

Freedom of expression is protected under section 14 of the BORA which provides:

> Everyone has the right to freedom of expression, including the right to seek, receive, and impart information and opinions of any kind in any form.

Of particular significance is that the right includes the right to "seek" and "receive" information. Therefore in the context of commercial expression, the right of consumers to be fully informed about goods and services is expressly protected, in addition to the commercial speaker's right to "impart" the information.

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[103] See *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48.
[104] See *Ford v Quebec*, above n 4.
[105] New Zealand Bill of Rights Act 1990, s 7.

As already mentioned, section 29 of the BORA expressly recognises that the BORA provisions apply "for the benefit of all legal persons as well as for the benefit of all natural persons". Thus, commercial entities can legitimately invoke their rights to freedom of expression.

However, rights and freedoms are not absolute and section 5 of the BORA expressly recognises that there may be justifiable limitations on such rights and freedoms. Section 5 provides:

> Subject to s 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

To determine whether a limitation is "demonstrably justified" in terms of section 5, a framework was developed in *Moonen v Board of Film and Literature Review (Moonen).*[106] This framework is, in effect, a restatement of the *Oakes* test applied in Canada. First, an objective must be identified which the legislature is endeavouring to achieve, by the limitation. The importance and significance of the objective must be assessed. Secondly, there must be reasonable proportionality between the objective and the limitation as a "sledgehammer should not be used to crack a nut".[107] Thirdly, there must be a rational connection between the limitation and the objective. Finally, there must be as little interference with the right as possible.[108]

However, in any event, section 5 is subject to section 4. Therefore even if a limitation is not justified, section 4 requires the courts to nevertheless apply the infringing statutory provisions. Section 4 provides:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), -
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

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[106] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
[107] *Moonen v Film and Literature Board of Review*, above n 106, 16.
[108] *Moonen v Film and Literature Board of Review*, above n 106,16-17.

(b) Decline to apply any provision of the enactment –

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

On the other hand, the courts may make a declaration or indication of inconsistency with the BORA.[109] Obviously, this does not have similar bite in comparison to the Canadian and United States' invalidations. But a declaration of inconsistency may bring the inconsistency to Parliament's attention and may have moral authority. There is no known instance where such a declaration or indication has been given. Therefore the remedy is far from developed, and its significance and impact will turn on Parliament's response to a declaration of inconsistency.[110]

Many BORA cases have more reliance on section 6. Section 6 of BORA provides that:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The Canadian Charter does not contain a provision similar to section 6 of the BORA. It is unnecessary because if a provision is not justified it can simply be invalidated. However, it is significant in the New Zealand context because if a BORA consistent interpretation is available and applied then it may affect the result of the case. Whereas a finding of a limitation being merely unjustified under section 5 may not affect the result of the case due to section 4.

An approach towards the application of sections 4, 5 and 6 was discussed in *Moonen*. First, it is necessary to identify all the different interpretations of the words of the limiting provision that are properly open. Secondly, the meaning which constitutes the least possible limitation on the right is adopted. Thirdly, the extent to which the meaning limits the relevant right is identified. Fourthly, it is

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[109] *Moonen v Film and Literature Board of Review,* above n 106.
[110] Rishworth, above n 102, 837.

necessary to consider whether any limitations are "demonstrably justified". Finally, if not justified, then the provision must still stand by dint of section 4.

The *Moonen* test applies section 6 before section 5. However, it is noted that this test is not a determinative approach towards the application of sections 4, 5 and 6, but is merely only one possible approach.[111] There is a danger that if section 6 was applied first then, so long as a consistent BORA interpretation is tenable, then the court may not proceed with a section 5 analysis to see if the limitation generally, is not justified. Therefore parties may on a case-by-case basis interpret certain words in their favour and perhaps succeed in individual cases. Yet, a wide-reaching limitation on commercial expression may remain intact and thus continue to be detrimental in the long-term.[112]

An alternative approach towards sections 4, 5 and 6 was discussed in *Hopkinson v Police.*[113] First, does the relevant conduct fall within the natural meaning of the relevant statutory provision? Secondly, is the prohibition of that conduct prima facie inconsistent with the BORA? If so, is it a justified limitation by virtue of section 5? If not, then can the section be read consistently with the BORA by virtue of section 6? If so, then it should be read in that way. If not, then section 4 applies regardless, and the statutory provision must be applied.[114]

This approach will serve to better protect freedom of commercial expression as it will first force consideration of the justifications for the statutory restrictions, before reliance on section 6. Therefore a court may declare the overall provision inconsistent with the BORA, yet then continue on to prefer a BORA consistent interpretation, if available, of the statutory provision.

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[111] *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754, 760 (CA).
[112] For example, see *Director-General of Health v Rothmans of Pall Mall* [1996] DCR 353, discussed later in this paper. The section 6 argument turned on whether a price notice could be given a certain interpretation. The Court decided that the interpretation contended for was a "strained interpretation". However, had the Court accepted the interpretation, Rothmans of Pall Mall may have avoided liability by virtue of section 6. Yet, the comprehensive ban on tobacco products is still kept intact in section 22 of the Smoke-free Environments Act 1990. Thus, although Rothmans of Pall Mall may get a decision in their favour, ultimately their freedom of expression, along with other tobacco companies continues to be infringed.
[113] *Hopkinson v Police* [2004] 3 NZLR 704 (HC).
[114] *Hopkinson v Police*, above n 113, 709.

It is important to remember that the government[115] has the burden of justifying that limits imposed are reasonable and demonstrably justified in a free and democratic society. This must be established on a balance of probabilities.[116]

IX CASE LAW

There is no real rigorous consideration of freedom of commercial expression in New Zealand. Nonetheless, the courts have referred, albeit in passing, to freedom of expression in a few cases where commercial expression has or potentially has been implicated.

A Hosking v Runting[117]

This case, does not concern what can be termed "commercial expression" but concerns expression motivated by commercial motive, which is outside the scope of this paper. However, this case is significant as it provides Court of Appeal statements on commercial expression in general.

This is a privacy law case where the appellants, submitted that speech of a "commercially motivated gossip nature" should receive lesser protection.[118] Interestingly, they relied on *Virginia Pharmacy* as authority for such a proposition. It appears that the appellants misunderstood *Virginia Pharmacy's* position on commercial expression. It was a landmark case that afforded commercial speech protection, albeit lesser protection than political and artistic speech. But more significantly, as mentioned earlier, it limited commercial speech to speech that "does no more than propose a commercial transaction"[119] seeking solely to promote a sale of a good or service.[120] The expression concerned in *Hosking v Runting* was the publication of a photograph accompanied

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[115] Typically it will be the government. However, under section 3 of the BORA, it could also be a person or body performing a public function.
[116] *R v Oakes*, above n 74, followed in New Zealand decisions. See *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).
[117] *Hosking v Runting* [2005] 1 NZLR 1 (CA).
[118] *Hosking v Runting*, above n 117, 35 Gault P.
[119] *Virginia Pharmacy,* above n 2, 762.
[120] See Part V A 2 *Speech that does no more than propose a commercial transaction.*

with an article, and in any event, would not have satisfied the definition for commercial speech.

Of more significance is Gault P's statement on categories of speech:[121]

> We do not think it is helpful in an area like this for the Court to adopt categories such as "commercial" and "non-commercial" speech. Instead we prefer an approach that takes into account in each individual case community norms, values and standards.

Gault P refers to "an area like this" which may suggest the statement is limited to the area of privacy law. However, an alternative view could be that this is a statement of general application. It might suggest that New Zealand courts may be reluctant to draw distinctions between "commercial" and "non-commercial" in commercial expression cases and opt for a more flexible approach similar to Canada.

In a separate judgment, Tipping J observed that "the right to freedom of expression is sometimes cynically invoked in aid of commercial advantage".[122] Although this statement is undoubtedly true in some circumstances, it must not be forgotten that "profit-motive" cannot be a reason to justify restrictions on commercial expression.[123] Tipping J then goes on to accept that "the right to freedom of expression exists in the commercial field".[124]

B PC Direct v Best Buy[125]

This case was an application for an interlocutory application which concerned comparative advertising. Best Buy placed newspaper advertisements comparing its computer products directly with PC Direct's computer products. Elias J found there was a "serious question to be tried" and the establishment of a

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[121] *Hosking v Runting*, above n 117, 36 Gault P.
[122] *Hosking v Runting*, above n 117, 62 Tipping J.
[123] *RJR-MacDonald v Canada,* above n 15, 348 McLachlin J.
[124] *Hosking v Runting*, above n 117, 62 Tipping J. Although he warns that the legitimate commercial objective should not have a substantial adverse impact on privacy.
[125] *PC Direct Ltd v Best Buy Ltd* [1997] 1 NZLR 723 (HC).

"strong prima facie case" for a finding of trademark infringement. [126] Notwithstanding this, she declined the application for an injunction due to a concern not to "cut across the rights to freedom of speech and to receive information protected by s 14 of the New Zealand Bill of Rights Act 1990".[127]

Further, earlier in the judgment, she observed that "for the purposes of comparative advertising, a registered proprietor whose trading name incorporates a trademark would be protected to an extent not available to traders who operate under names not registered as trademarks".[128] Therefore identification of the trading name for comment would be almost impossible and constitute a significant fetter upon freedom of expression.[129]

The BORA was implicated in two distinct ways. First, the overall result, in declining the application, was because freedom of expression was important and as injunctions are discretionary, they should not be issued where damages are appropriate. Secondly, the BORA was used in questioning the comparative advertising itself. However, this issue was not to be resolved in the interlocutory proceeding. It is worth mentioning that *PC Direct v Best Buy (PC Direct)* was decided under the Trade Marks Act 1953. The new Trade Marks Act 2002 expressly provides that there is no infringement for comparative advertising of a registered trade mark.[130] This new provision serves to promote freedom of commercial expression.

PC Direct does not mention "freedom of commercial expression" or give any analysis into commercial expression. Yet, the expression concerned is advertising for a product and clearly constitutes commercial expression. The lack of any analysis does not do "freedom of commercial expression" any justice, especially if *PC Direct* is in effect an authority for freedom of commercial expression in New Zealand.

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[126] *PC Direct v Best Buy*, above n 125, 733.
[127] *PC Direct v Best Buy*, above n 125, 733.
[128] *PC Direct v Best Buy*, above n 125, 730.
[129] *PC Direct v Best Buy*, above n 125, 730.
[130] Trade Marks Act 2002, s 94.

Perhaps the lack of in-depth analysis was due to the case being an interlocutory application. Nevertheless the Court could have mentioned how important commercial expression was and examined the values underlying freedom of commercial expression. If it undertook a section 5 analysis, there may have been a difficulty in coming up with a legitimate objective which the restriction served to protect. Protecting the use of competitors' trademarks for purposes of passing off may constitute a legitimate purpose of protecting the dilution of a trademark or protecting consumers.[131] However, where a trademark is used for comparative advertising purposes and not for passing off, the restriction seems to result in promoting anti-competition which is hardly a basis for finding a legitimate objective.[132] Thus, falling down at the first hurdle, it would have followed that the limitation was not justified.

PC Direct was referred to in *McCann-Erickson v Television New Zealand.*[133] This case concerned the commercial use of video footage of Prince William and a "Buzzy Bee" toy. Regulations existed in New Zealand restricting the commercial use of royal photographs.[134] Counsel submitted that the regulations must be given a possible meaning that is consistent with the BORA,[135] and that the right to freedom of expression has been applied to advertising[136], citing *PC Direct*. However, the BORA submission was not central to the issue to be determined in the case and the High Court did not make any statements on the BORA. What can be drawn from *McCann-Erickson v Television New Zealand* is that *PC Direct* may well be authority for commercial expression as counsel attempted to apply it as support for their submissions. Further, it demonstrates that legal counsel are presenting arguments for protection of commercial expression which in turn, forces the judiciary to consider such issues, albeit not necessarily ruling decisively on such issues.

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[131] See generally: Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2002) 399-513, which provides a chapter on trademarks.
[132] Section 94 in the Trade Marks Act 2004 was enacted to address this issue.
[133] *McCann-Erickson v Television New Zealand* (2000) 15 PRNZ 202 (HC).
[134] Commercial Use of Royal Photographs Rules 1955; Commercial Use of Royal Photographs Rules 1959; Commercial Use of Royal Photographs Rules 1962. These are regulations made under the Royal Prerogative and issued in New Zealand.
[135] *McCann-Erickson v Television New Zealand*, above n 133, 206.
[136] *McCann-Erickson v Television New Zealand*, above n 133, 206.

C *Director-General of Health v Rothmans of Pall Mall*[137]

Director-General of Health v Rothmans of Pall Mall (Rothmans) is the most definitive authority in New Zealand for "freedom of commercial expression". Yet such a status does not have much bearing. It may be the most comprehensive case that looks into commercial expression in New Zealand. However, by comparison to cases in Canada and United States, it is hardly strong authority for freedom of commercial expression.

First, it is only a District Court decision, and thus does not carry much weight. Secondly, although it recognises that Rothmans of Pall Mall has a "right to free commercial expression",[138] it barely gives effect to such a right.

Rothmans of Pall Mall was charged with breaching section 22 of the Smoke-free Environments Act 1990.[139] Section 22 provides that:[140]

> No person shall publish, or arrange for any other person to publish, any tobacco product advertisement in New Zealand.

Section 2 gives an exhaustive definition of "tobacco product advertisement". In effect, virtually all advertising, promotion and sponsorship of tobacco products was banned. A series of technical exceptions were provided for mediums that originated outside of New Zealand; tobacco products in various forms of art; and manufacturer price lists to retailers.[141] Another exception was a "point-of-sale" exception in section 23(1)(b), thus a retailer may display,[142]

> [I]nside the retailer's place of business, any notice identifying the tobacco products that are available for purchase in that place and indicating their price.

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[137] *Director-General of Health v Rothmans of Pall Mall* [1996] DCR 353.
[138] *Director-General of Health v Rothmans of Pall Mall,* above n 137, 11.
[139] Interestingly, both the Smoke-free Environments Act 1990 and the Bill of Rights Act 1990 received its Royal Assent on 28 August 1990. The Smoke-Free Environments Act was number 108 and the Bill of Rights Act was no 109. Therefore, there was never any legal possibility for a section 7 report.
[140] Smoke-free Environments Act 1990, s 22(1).
[141] Smoke-free Environments Act 1990, s 22(2)-(5).
[142] Smoke-free Environments Act 1990, s 23(1)(b).

Rothmans of Pall Mall relied on section 23(1)(b) and argued that the advertisement displayed in a dairy, constituted a price notice.

Rothmans can be given some credit as it refers to *RJR-MacDonald,* the landmark decision in Canada with respect to commercial expression. *Rothmans* observes that "Canadian analysis can have its place" as it "underscores the need under s 5 of the New Zealand Bill of Rights Act to be aware of the need for proportion between ends and means".[143]

However, the Court goes on to merely apply section 6 of the BORA and concludes that the meaning which the defendant was contending was a "strained interpretation"[144] of section 23(1)(b) of the Smoke-free Environments Act 1990. The Court fails to apply any section 5 analysis to determine if the provisions of the Smoke-free Environments Act are justified limitations on the right to freedom of commercial expression. Therefore its reference to *RJR-MacDonald* was a hollow reference. The Court failed to implement the framework applied in *RJR-MacDonald* or any in-depth analysis of the relevant restrictions. Of course, the Court is still free to depart from the result in *RJR-MacDonald*, but it should do so only after examining whether such restrictions support a legitimate objective, are rationally connected to the objective, are of minimal impairment and are proportional between the ends and the means.[145]

The Court observed that the ban on publication of advertisements was "far from absolute".[146] The Court believed that the existence of exceptions in sections 22(2)-(5) and 23(1)(b) supported this contention. Technically, due to such exceptions it may not constitute an "absolute" ban. Yet in substance the ban is extremely far-reaching and comprehensive, and thus the finding that such a ban was "far from" absolute is simply erroneous. Point of sale notices barely give effect to Rothmans of Pall Mall's freedom of commercial expression. Moreover, in *RJR-MacDonald,* the relevant Canadian Act had similar point-of-sale

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[143] *Director-General of Health v Rothmans of Pall Mall*, above n 137, 10.
[144] *Ministry of Transport v Noort,* above n 116.
[145] *R v Oakes*, above n 74, the *Oakes* test has been adopted in New Zealand. See *Moonen v Film and Literature Board of Review*, above n 106. However, note *Moonen* was decided after *Director-General of Health v Rothmans of Pall Mall.*
[146] *Director-General of Health v Rothmans of Pall Mall*, above n 137, 10.

exceptions[147], yet the Supreme Court treated the ban as a "complete" ban. McLachlin J stated:[148]

> A full prohibition would only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification ... is not established.

The burden is on the Government to prove that a limitation was justified. It failed to bring any evidence that a partial ban on lifestyle advertising would not suffice, nor was any consideration given to other methods available to reduce demand for tobacco products, such as anti-smoking campaigns both through counter-advertising and in schools.

The lack of any framework or in-depth analysis meant that in this case, freedom of commercial expression was merely given lip-service.

D Summary of Case Law

The above cases are the only known instances to support recognition of commercial expression.[149] The subject-matter in *Hosking v Runting* did not even concern "commercial expression"; *PC Direct* was only an interlocutory proceeding with a brief reference to freedom of expression; and *Rothmans* was a District Court judgment that failed to give any in-depth analysis. Thus New Zealand's present state of case law does not adequately address freedom of commercial expression.

Furthermore, cases exist where commercial expression was potentially implicated without any mention of freedom of expression and the BORA. These

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[147] Tobacco Products Control Act, S.C. 1988, s 5(1)(b).

[148] *RJR-MacDonald v Canada,* above n 15, 343 McLachlin J.

[149] The cases are the only known instances to the author. Further support for this contention is that the leading text on the Bill of Rights Act (Rishworth, above n 102) does not mention any New Zealand authority at all for commercial expression. In addition, no other case apart from *Director-General of Health v Rothmans of Pall Mall*, has cited the leading Canadian case, *RJR-MacDonald v Canada*.

include cases which concerned alleged misleading advertising which breached the Fair Trading Act 1986.[150] Another case was *Mitre 10 v Benchmark Building Supplies,* [151] which concerned the use of Mitre 10 advertising brochures. Benchmark had placed actual Mitre 10 brochures outside Benchmark's stores with stickers over Mitre 10's prices, stating lower prices. The claims alleged were both trade mark and copyright infringement. Interestingly, *PC Direct* was cited, and the High Court even issued an interim injunction, which was overturned by the Court of Appeal. Yet, both courts were silent as to freedom of expression.

The lack of relevant case law could be due to the existence of the Advertising Standards Authority (ASA). It is possible that many restrictions on advertising and breaches of such restrictions are assumed at this lower level, and thus do not proceed into the court system. However, the Advertising Standards Complaints Board (ASCB) applies the ASA's advertising Codes of Practice. Thus its decisions are not necessarily based on statutory provisions. Therefore it is questionable whether the ASA and ASCB have in fact assumed such a role in determining conflicts over statutory restrictions.

X LEGISLATION

Legislation may have an indirect effect of restricting commercial expression. For instance, legislation that prevents intellectual property infringements, does not specifically refer to advertising, but may catch advertising if such advertisements satisfy the requirements for infringement. This was the case in *PC Direct* and *Mitre 10 v Benchmark Building Supplies*.

Alternatively, legislation may directly restrict commercial expression. There are a vast amount of statutes in New Zealand that directly restrict advertising. These include the Fair Trading Act 1986, Food Act 1981, Health Act 1956, Medicines Act 1981, Smoke-free Environments Act 1990, Securities Act

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[150] See *Commerce Commission v Griffins Foods Ltd* [1997] DCR 797; *Commerce Commission v The Fresh Juice Company Ltd* (1997) 6 NZBLC 102, 393 (HC); *Commerce Commission v Adair & Anor* (1995) 5 NZBLC 103, 936 (CA).

[151] *Mitre 10 (NZ) Ltd v Benchmark Building Supplies Ltd* [2004] 1 NZLR 26 (CA). See also *Mitre 10 (NZ) Ltd v Benchmark Building Supplies Ltd* [2003] 3 NZLR 186 (HC).

1978, Local Government Act 2002, Adoption Act 1955, Flags, Emblems, and Names Protection Act 1981, and more recently the Prostitution Reform Act 2003.

It is worth mentioning that most of the statutes referred to above, were enacted prior to 1990 and therefore passed before the BORA even existed. This is a significant finding, as had those statutes been passed later when the BORA was applicable, then they may have been vetted for inconsistency with the BORA under section 7. Vetting for BORA consistency will be examined later in this paper.

All those statutes clearly infringe freedom of commercial expression, protected by section 14 of the BORA. Nevertheless, they may be justified restrictions in terms of section 5 of the BORA. Yet, to determine whether a restriction is justified, a case must be brought to the courts, in order for the courts to make that determination. Herein lies a predicament: there is an overwhelming absence of such cases to date. Thus many restrictions continue to be law, yet may not be demonstrably justified in a free and democratic society.

Yet, there exists an additional barrier. Even if cases were brought, and the courts decided that certain statutory restrictions were not justified, such restrictions still stand by virtue of section 4. As already mentioned, the BORA is not supreme law and the courts in New Zealand, in contrast to the Canadian and United States courts, cannot invalidate legislation. Could this be a reason why commercial entities are not challenging such restrictions through the court system? It is possible that commercial entities do not want to go through the expense of litigation, only to get judgment, with no real remedy. However, there is still the possibility of a declaration or indication of inconsistency with the BORA.[152]

Section 6 may mean that commercial entities can obtain decisions in their favour on a case-by-case basis. But the statutory restriction may still be wide-

[152] *Moonen v Film and Literature Board of Review*, above n 106.

reaching and comprehensive in other respects. Thus ultimately freedom of commercial expression is not protected.

To examine all the statutes that restrict commercial expression would be a lengthy task. A brief examination of two legislative restrictions on commercial expression is provided. What is important is that, in the future, if any statutory provisions are infringed then a section 5 analysis should be applied to determine whether such statutory restrictions are demonstrably justified in a free and democratic society.

A Health Claims

In New Zealand, the regulation of food is a joint effort between Food Standards Australia New Zealand (FSANZ)[153] and the New Zealand Food Safety Authority. FSANZ produced the "Australia New Zealand Food Standards Code" (Food Code).[154] The Food Code heavily regulates, amongst other things, commercial expression that relates to food.

One current issue is the ability of advertisers to make health claims in relation to food.[155] At present, except for a few permitted exceptions, it is generally illegal to advertise the health benefits of nutritious food.[156] On the one hand, there is a fear that advertisers would misuse the terms such as "healthy" and cause harm to consumers. However, the ASA's Code for Advertising of Food and general legislation such as the Fair Trading Act 1986, should adequately deal with any misleading health claims. Therefore, is there truly a sufficiently legitimate and significant objective that a restriction on health claims serves to promote? It appears that restrictions on health claims serves to be detrimental to health, as

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[153] FSANZ is a bi-national independent statutory authority that develops joint food standards for Australia and New Zealand. See Food Standards Australia New Zealand <http://www.foodstandards.gov.au> (last accessed 25 September 2005). FSANZ was established by an Australian statute the Food Standards Australia New Zealand Act 1991.

[154] The code is incorporated into New Zealand law through the "New Zealand (Australia New Zealand Food Standards Code) Food Standards 2002". The Minister for Food Safety, issued the standard, under section 11c of the Food Act 1981.

[155] See Glen Wiggs "Why An Apple A Day Should Not Be Illegal Advertising" at New Zealand Televisions Broadcasters' Council <http://www.nztbc.co.nz> (last accessed 30 July 2005).

[156] Australia New Zealand Food Standards Code 2001, Standard 1.1A.2.

consumers cannot be informed about the nutritional benefits of advertised foods. Currently FSANZ is considering proposals [157] for reform which will allow nutritional and health claims to be made for nutritious food. This will be a triumph for freedom of commercial expression.

B Commercial Sexual Services

The Prostitution Reform Act 2003 made prostitution legal in New Zealand. However, it imposed severe restrictions on advertising for commercial sexual services. Commercial sexual services may not be broadcast on radio or television, published in a newspaper or periodical, or screened at a public cinema.[158] Further, the Act delegates the power to make bylaws controlling signage advertising commercial sexual services.[159] There is an exception in that advertisements for such services may be published in a classified section of a newspaper or periodical.[160]

Perhaps the restrictions on advertising were a compromise in order to allow for the legalisation of prostitution. Nevertheless, prostitution is a legal service now and the restrictions are effectively very comprehensive and wide-reaching. The objective appears to be to minimise general demand for commercial sexual services and perhaps uphold community standards. However, on closer analysis the restrictions may serve to have arbitrary effects. For instance, it is odd that an advertisement may legitimately appear in a community newspaper, such as in *The Wellingtonian*, yet is prohibited from airing on an adult entertainment channels[161]. In the latter medium, the audience may be far more likely to utilise such services than the community at large in the former medium. Therefore the restrictions may not be rationally connected nor proportionate. Perhaps a code could be established by the ASA that provides aspirational type

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[157] Food Standards Australia New Zealand "Proposal 293: Nutrition, Health and Related Claims" (Initial Assessment Report, 11 August 2004). See Food Standards Australia New Zealand <http://www.foodstandards.gov.au > (last accessed 25 September 2005).
[158] Prostitution Reform Act 2003, s 11.
[159] Prostitution Reform Act 2003, s 12.
[160] Prostitution Reform Act 2003, s 11(b).
[161] See Sky Television <http://www.skytv.co.nz> (last accessed 25 September 2005). Playboy TV, Spice and Spice 2 are pay per view adult entertainment channels that are available through Sky Television.

standards that deal with offensiveness and social responsibility, that would serve to promote the objective and have less arbitrary effects.

XI ATTORNEY-GENERAL'S REPORTING DUTY

The Attorney-General has a duty to report to Parliament, any provisions of a Bill that appears to be inconsistent with the BORA. Section 7 provides that for a Government Bill, the report is required on introduction of the Bill, whereas in any other case, such as a Member Bill, the report is required as soon as practicable after introduction. This section 7 duty to report is all the more significant given the absence of the courts' power to strike down legislation inconsistent with the BORA. Any statutory restrictions on commercial expression enacted after 1990 could be subject to this vetting process.

However, an Attorney-General report is not binding on Parliament. In any event, parliamentary sovereignty means that Parliament may legislate in a manner that is inconsistent with the BORA. However, it must be noted that there is room for disagreement as to the proper interpretation of a right and whether a limitation is reasonable and demonstrably justified in a free and democratic society. Therefore the Attorney-General's report is not conclusive.[162] Thus if Parliament chooses to reject an Attorney-General's report it could be doing so either because it wishes to legislate in violation of the BORA, or alternatively, it could be rejecting the report because Parliament believes that the Attorney-General's opinion is incorrect in finding an inconsistency with the BORA.

Nevertheless, there is a notion that a report will dissuade Parliament from acting inconsistently with the BORA.[163] Moreover, a consequence of this reporting duty is the formalisation of the BORA in the policy development process.[164] The Cabinet Manual requires Ministers to confirm compliance with the BORA, and identify aspects to proposals that may implicate the BORA.[165]

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[162] Rishworth, above n 102, 196.
[163] Rishworth, above n 102, 195.
[164] Rishworth, above n 102, 196.
[165] Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 5.35.

The Ministry of Justice usually provides advice to the Attorney-General on the consistency of Bills with the BORA.[166] To date, there has been one Attorney-General report[167] that concerns commercial expression. This was a report on the Sale of Liquor (Health Warnings) Amendment Bill 2000. There have been various other instances[168] where the Ministry of Justice has provided advice, which has not resulted in a section 7 report.

A *Report on the Sale of Liquor (Health Warnings) Amendment Bill 2000*

This is the only report that has concerned commercial expression. The Attorney-General Margaret Wilson observed that:[169]

> The Supreme Court of Canada has held on a number of occasions that "commercial expression" or advertising is protected by the guarantee of freedom of expression in the Canadian Charter of Rights and Freedoms. The High Court appears to have also accepted this proposition.

The former proposition is correct. The latter proposition was supported with a citation to *Solicitor-General v Radio New Zealand.*[170] I question whether citing this authority is correct as the case did not even concern commercial expression. Rather, it concerned contempt of court and had no more than a passing reference to a Canadian case that concerned commercial expression. A better authority would have been *PC Direct* or *Rothmans.*

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[166] If the Bill concerned is developed by the Ministry of Justice, then the Crown Law Office advises the Attorney-General. See Ministry of Justice <http://www.justice.govt.nz> (last accessed 25 September 2005).

[167] Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sale of Liquor (Health Warnings) Amendment Bill 2000 (5 September 2000).

[168] See Ministry of Justice "Legal Advice on Consistency with the New Zealand Bill of Rights Act 1990: Public Finance (State Sector Management) Bill" (1 December 2003); Ministry of Justice "Legal Advice on Consistency with the New Zealand Bill of Rights Act 1990: Misuse of Drugs Amendment Bill (No3) SOP" (27October 2004); Ministry of Justice "Legal Advice on Consistency with the New Zealand Bill of Rights Act 1990: Overseas Investment Bill" (1 November 2004); Ministry of Justice "Legal Advice on Consistency with the New Zealand Bill of Rights Act 1990: Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill" (10 May 2005).

[169] Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sale of Liquor (Health Warnings) Amendment Bill 2000 (5 September 2000) 2.

[170] *Solicitor-General v Radio New Zealand*, above n 103.

The Bill did not concern the restriction of commercial expression. Conversely, it forced commercial expression to be expressed in the form of health warnings on liquor containers. The warnings were to be attributed to the Ministry of Health and provide:

> (1) Women should not drink liquor during pregnancy because of the risk of birth defects.
> (2) Consumption of liquor impairs your ability to drive a car or operate machinery and may cause health problems.

The Attorney-General termed such expression as "compelled expression". As support, she stated that Canadian case law had held that "the right to freedom of expression carries with it a corresponding right not to be compelled to say certain things". She acknowledged that there is no case law in New Zealand on "compelled expression", but considers that the position in New Zealand is the same as Canada. Thus she considered that the health warnings constituted a prima facie breach of freedom of expression.

Then she considered whether the limitation was reasonable and justified in terms of section 5 of the BORA as applied in *Moonen.*[171] The legitimate objective was to "educate those purchasing liquor about the possible risks of drinking". This was accepted to be an important objective and justifies "some" limits of freedom of expression.

The measure was believed to be rationally connected, yet may not be proportionate. She considered that the warnings stated the possible risks more strongly than evidence suggests was warranted, such as the reference to "health problems" did not reflect evidence "which suggests that alcohol-related health problems generally result from excessive consumption" in comparison to mere consumption. Nor did it reflect the health benefits of moderate consumption for some types of alcohol, such as red wine. Additionally, the proposed warnings were believed to have an overly broad application, as requirements applied even

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[171] *Moonen v Film and Literature Board of Review*, above n 106.

for liquor containers where ultimately the labels would not be seen by consumers, such as for kegs sold for tap beer.

A health warning was also challenged in *RJR-MacDonald*. However, the distinction was that in Canada, the Tobacco Products Control Act 1988 required unattributed warnings.[172] McLachlin J held that the Government had not proved that attributed warnings would not suffice. Thus unattributed health warnings, together with a prohibition against manufacturers responding with messages of their own, were more than minimal impairment.[173]

The Attorney-General in this case, recognises that the warnings are attributed to the Ministry of Health, and acknowledges that this "may be seen as mitigating the extent to which the message impairs the right to freedom of expression". She also expressly recognises the view of the Supreme Court of Canada that "commercial expression may be easier to justify than other infringements of freedom of expression".[174] Nevertheless, she held that it was "not clear" that the warnings were necessarily proportionate to the objective of the Bill. She considered that she should "err on the side of caution" and thus proceeded with a section 7 report of inconsistency.

The Canadian Courts appeared to be prepared to accept attributed warnings. Therefore the Attorney-General went even further in protecting freedom of commercial expression than the Supreme Court of Canada. Although this is undoubtedly a triumph for freedom of commercial expression, it may not have been the better result. If the Attorney-General is to apply Canadian law as support for the concept of "compelled expression", she should similarly recognise the approach towards attributed warnings. It is well-established that freedom of expression is not absolute.

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[172] Tobacco Products Control Act, S.C. 1988, s 9.
[173] *RJR-MacDonald v Canada*, above n 15, 348-9 McLachlin J.
[174] See *RJR-MacDonald v Canada*, above n 15, 348 McLachlin J.

There has been further criticism of this Attorney-General report. It has been argued that:[175]

> [T]here is a significant distinction between compelling an act of expression and requiring that a person provide information pursuant to an otherwise legitimate state regulatory purpose: the former is at the heart of the right, while the latter has little to do with it.

The failure to recognise this distinction resulted in this section 7 report. It is even more problematic when the proposed warnings contained factual information and were attributed to the Ministry of Health. It is argued that even if it was assumed that freedom of expression was infringed, it is "difficult to see how such an infringement could not have been justified".[176]

Further, it has been criticised that the medical evidence used as support was incomplete and the Ministry of Justice had acknowledged that it was a marginal call to advise that the Bill was not justified. It is argued that "erring on the side of caution" may diminish the seriousness of the reporting duty, and that the Attorney-General should not report under section 7 unless it is "clearly" inconsistent with the BORA.[177] The Bill was subsequently defeated at first reading.[178]

Clearly, there are problems as to the application of the concept of "compelled expression" to product labelling regimes. However, it is not the focus of this paper to address these issues. For our purposes, this report is significant for its recognition of freedom of commercial expression. The Attorney-General, albeit being criticised for her conclusion, must be commended for her recognition of freedom of commercial expression. This report demonstrates that provisions of Bills that potentially infringe freedom of commercial expression, may not be justified, and if so, will be drawn to the attention of the House of Representatives.

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[175] Rishworth, above n 102, 333.
[176] Rishworth, above n 102, 334.
[177] Rishworth, above n 102, 215.
[178] (11 October 2000) 588 NZPD 6089.

It will then be a conscious decision to legislate against a freedom guaranteed by the BORA.

B Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill 2005

The Ministry of Justice advised the Attorney-General on the Sale of Liquor (Youth Alcohol Harm Reduction) Amendment Bill 2005. One amendment that the Bill proposed concerned inserting a new part into the Sale of Liquor Act 1989 restricting broadcasting of liquor advertising to after 10:00 pm on any day. It also sought to give the Broadcasting Standards Authority "sole jurisdiction" over all matters that may arise relating to liquor advertising. Currently, liquor advertising is already heavily regulated under the jurisdiction of the ASA and its Code for Advertising Liquor.[179]

The Ministry correctly recognised that section 14 "extends to commercial speech (such as advertising)". It also correctly recognised that limitations on commercial expression may be "easier to justify". However, it was wrong in suggesting that overseas case law considered commercial expression resided "within the periphery of the right" of freedom of expression. United States and Canadian case law may provide that commercial expression is less important than some other forms of expression, such as political.[180] Yet it is another thing to say that commercial expression is at the borderline. Quite the contrary, as earlier examined, a majority of the commercial expression cases in both United States and Canada, have been decided in favour of freedom of commercial expression.[181] Moreover, the value of commercial expression has been expressed in various cases already mentioned.[182]

Expression that comes within the "periphery of the right" should be reserved for expression such as hate speech, pornography, gossip, and the like.

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[179] ASA Code for Advertising Liquor (1 September 2003).
[180] See Part V *Defining Commercial Expression*, which explains that the United States subjects commercial speech to intermediate scrutiny. See also Part V B *Summary of Definitions*, which explains that restrictions on commercial expression are easier to justify in Canada.
[181] See Part VI C *Comparing Approaches*, which reveals that the rate of restrictions on commercial expression being invalidated is quite high in both Canada and the United States.
[182] See *Virginia Pharmacy*, above n 2. See also *Ford v Quebec*, above n 4.

To equate commercial expression to those forms of expression ignores commercial expression's inherent value. It appears that this mistaken attitude of the Ministry may have negatively influenced the subsequent BORA analysis, which led to advice that the Bill was consistent with BORA.

The Ministry considered that the purpose of the restriction was to "limit the exposure of young persons to alcohol advertising, thereby reducing their consumption of alcohol". This was considered to be a sufficiently important and significant objective.

The Ministry then determined that the restriction was a proportionate response as it impacted only on broadcasting and the liquor industry was still able to advertise through other mediums, such as billboards and newspapers.

Yet, the Bill significantly changes the way liquor advertising is regulated. It transfers jurisdiction over such issues from the ASA to the Broadcasting Standards Authority. Surely the ASA would be the ideal body to consider issues dealing with liquor advertising as they have the experience of dealing with advertising issues and can come to a workable result in balancing the interests of the advertising industry and the general public. The Broadcasting Standards Authority is inexperienced in dealing with advertising disputes.[183]

More significantly it reduces the period of permissible liquor advertising from nine and a half hours to just two hours under clause 184C(1). Current restrictions on advertising include that liquor advertisements must not be shown between 6:00 am and 8:30 pm.[184] Furthermore, the Code for Advertising Liquor provides for further rules and guidelines that further restrict how liquor consumption is portrayed and how much time may be allocated to liquor advertising in any given hour. The Code for Advertising Liquor already provides for a "reasonable limitation on the right to freedom of expression", which the

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[183] See Broadcasting Act 1989, s 21(3), which provides that the Broadcasting Standards Authority has no function in relation to advertising programmes, except where neither the broadcaster nor the advertiser recognise the jurisdiction of the Advertising Standards Complaints Board.
[184] ASA Code for Advertising Liquor, principle 4.

Ministry expressly acknowledged. Therefore surely further changes would be disproportionate.

Furthermore, the Ministry failed to do any analysis as to whether the restriction was rationally connected. It does not appear in the advice, that any evidence was brought forward to justify that limiting the period available for liquor advertising to the hours between 10:00 pm and midnight, would actually decrease consumption of youths. In particular, it seems extremely arbitrary to disallow liquor advertising between the hours of 12:00 am and 6:00 am. Why would the chances of youths being exposed to liquor advertising be higher during the 12:00 am to 6:00 am period as opposed to the 10:00 pm and 12:00 am period?

Furthermore, there is no evidence brought forward that liquor consumption increases due to the liquor advertising and not due to social culture. Liquor advertising may serve to inform consumers about the brands and types of liquor available. Even with a restriction on advertising, youth consumption of liquor may stay the same due to the culture of drinking. Therefore perhaps the restriction is not rationally connected at all. On the other hand alternatives such as educational programmes in schools, and counter-advertisements may serve to promote the objective more effectively. The problem is how liquor is consumed rather than an objection to liquor itself. Education is the answer.[185] Therefore rules that require advertisers to be "socially responsible"[186] are far more effective than arbitrary bans.

Furthermore, there have been instances where liquor is advertised at low prices and distributed in student magazines and the like. These instances are more likely to attract higher consumption of liquor in youths than television advertisements for liquor, such as for Baileys. Yet the former is allowed and the latter heavily restricted. The result is somewhat arbitrary.

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[185] "The Right to Advertise", above n 14, 8.
[186] ASA Code for Advertising Liquor, principle 2.

The restriction does not constitute minimal impairment. In effect, it nearly bans all broadcasting of liquor advertising, which can hardly be said to be minimal.

The Ministry does undertake BORA analysis, yet, does so without questioning whether the evidence is to show that the legitimate objective is actually being met. Ultimately the Ministry's advice concluded that the Bill was consistent with the BORA. Therefore it logically followed that the Attorney-General did not report. Currently the Bill has passed its first reading and awaits the Select Committee stage. It appears that the advice may have been flawed from the outset due to the mistaken attitude towards commercial expression. It would serve to better protect commercial expression if the section 7 vetting process stringently applies BORA analysis to justified limitations and insists on appropriate evidence to justify such limitations.

C Shortcomings of Vetting Process

The duty to report, under section 7, applies only to inconsistencies that exist at the time of first reading of a Bill and thus does not apply to any subsequent amendments made later in the legislative process. In effect, restrictions on rights and freedoms could be enacted without consideration of the impact on the BORA. This has already occurred in the commercial expression context. The Prostitution Reform Act 2003, as already mentioned, provides for a restriction on advertising of commercial sexual services in section 11. Section 11 clearly infringes section 14 of the BORA. However, there was no section 7 report nor advice issued by the Ministry. The reason for this absence was because the provision was an amendment to the original Bill and was only inserted at the Committee of the Whole House stage.

Another restriction on commercial expression recently passed was in the Misuse of Drugs Amendment Act 2005. Section 43 of the Act, restricts the advertising for "restricted substances", which was inserted at the Select Committee stage. Without going into the intricacies of what constitutes "restricted substances", it is enough to mention that it covers substances deemed

to be low risk to individuals and society by the Expert Advisory Committee on Drugs,[187] and includes substances commonly known as "party pills".

These two examples show that the hurdles of section 7 may be easily avoided by introducing provisions restricting commercial expression as amendments to an original Bill.

However, it is argued that section 7 is not exhaustive of the Attorney-General's constitutional obligations.[188] There is nothing to prevent the Attorney-General informing the House of Representatives of a BORA inconsistency later in the legislative process. It merely means that there is no positive duty to do so. There have been instances where the Ministry has advised the Attorney-General on proposed Supplementary Order Papers that propose amendments.[189]

D Summary of Vetting Process

The vetting process may be a highly useful weapon in the scheme of protecting rights and freedoms guaranteed by the BORA, particularly as the BORA is not supreme law and thus the courts cannot invalidate legislation that conflicts with it. It is commendable that freedom of commercial expression is recognised as being protected under the BORA.

However, as noted, there are potential shortcomings. Whether or not such shortcomings are overstated or understated will turn on whether the Attorney-General is proactive in bringing amendments, which are inconsistent with the BORA, to the attention of the House of Representatives.

Additionally, the Ministry must endeavour to ask crucial questions that inquire into where the actual evidence is to show that any limitation is justified. Further, the Ministry must change its present attitude towards commercial

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[187] See Ministry of Justice "Legal Advice on Consistency with the New Zealand Bill of Rights Act 1990: Misuse of Drugs Amendment Bill (No3) SOP" (27October 2004).
[188] Rishworth, above n 102, 197.
[189] See Ministry of Justice "Legal Advice on Consistency with the New Zealand Bill of Rights Act 1990: Misuse of Drugs Amendment Bill (No3) SOP" (27October 2004).

expression. It should recognise that freedom of commercial expression is a fundamental right that does not reside anywhere near the "periphery" of the right.

XII ADVERTISING STANDARDS AUTHORITY

An analysis of freedom of commercial expression in New Zealand would be incomplete without mentioning the role of the ASA. The ASA has an instrumental role in regulating advertising. It develops various Advertising Codes of Practice (Codes) which provide the rules by which all advertisements in all media should comply.[190] The Codes are administered by the ASCB, which is the independent self-regulatory body established by the ASA. The ASA is a creature of self-regulation and is not established by statute. Its membership comprises the representatives of the media including newspaper and magazine publishers, television and radio service operators, and advertising agents.[191] Herein lies a predicament: is the BORA even applicable to the ASA and the decisions of the ASCB?

A Application of the Bill of Rights Act

1 Public function

Section 3 of the BORA provides:

> This Bill of Rights applies only to acts done –
>
> (a) By the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law.

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[190] Advertising Standards Authority *Annual Report* (31 December 2004) 2.

[191] Advertising Standards Authority *Advertising Codes of Practice* (July 2005) 13. The members of the ASA are: Association of New Zealand Advertisers (Inc); Communication Agencies Association of New Zealand (Inc); Community Newspapers; Letterbox Media Association; Magazine Publishers' Association (Inc); Newspaper Publishers' Association (Inc); New Zealand Television Broadcasters Council; New Zealand Community Newspapers Association; New Zealand Cinema Advertising Council; New Zealand Marketing Association; New Zealand Post Limited; Online Publishers Group; Outdoor Advertising Association of New Zealand; Pay Television Group; and Radio Broadcasters Association.

Clearly the ASA does not satisfy the requirements of section 3(a). However, it is arguable that it may meet the requirements of "public function" in section 3(b). The "public function" element is a determination that is already required in judicial review cases concerning private bodies.

The English Court of Appeal in *R v Panel on Take-overs & Mergers, ex parte Datafin plc (Datafin)*[192] identified relevant considerations in determining whether a private body is performing a public function and is thus judicially reviewable. One significant consideration was whether "but for" the existence of the private body, the government would itself inevitably intervene to regulate the activity.[193]

These principles were readily applied in New Zealand in *Electoral Commission v Cameron.*[194] It is convenient that this decision directly concerned the role of the ASCB. Mr Cameron, the named defendant, was the chairman of the ASA at that time. It was held that the ASCB was susceptible to judicial review.[195] Furthermore, "there was unanimity among the parties that in general"[196] the decisions of the ASCB are judicially reviewable. Therefore, in any event, the ASCB are willingly conceding the potential for judicial review.

In applying the considerations in *Datafin,* if the ASA did not regulate advertising, then the government would inevitably establish a statutory regulatory regime for the advertising industry, most likely akin to the regime that exists for the Broadcasting Standards Authority.[197] It is also worth mentioning that the regulatory role of the ASCB has had statutory recognition in the Broadcasting Act 1989.[198] This further supports the role of performing a "public function".

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[192] *R v Panel on Take-overs & Mergers, ex parte Datafin plc (Datafin)* [1987] QB 815.
[193] S De Smith, Lord Woolf, and J Jowell *Judicial Review of Administrative* Action (5ed, Sweet and Maxwell, London, 1995) para 3-027.
[194] *Electoral Commission v Cameron* [1997] 2 NZLR 421 (CA).
[195] *Electoral Commission v Cameron*, above n 194, 429.
[196] *Electoral Commission v Cameron*, above n 194, 429.
[197] The Broadcasting Standards Authority (BSA) was established by the Broadcasting Standards Act 1989, s 20. The functions of the BSA are provided in section 21.
[198] Broadcasting Act 1989, s 8, which provides in respect of advertising programmes, demarcation of the jurisdictions of the ASCB and the BSA.

Section 3(b) has a further requirement that "public function" must be "pursuant to law". The meaning of "pursuant to law" is unclear and case law provides little assistance.[199] One interpretation could be that the duty must be imposed by the state through legislation or perhaps the common law.[200] Alternatively, it could be interpreted to include duties voluntarily assumed by private bodies, provided the voluntary assumption occurs pursuant to legal rules.[201] The legal rules relevant to the ASA and ASCB would be the law relating to incorporated bodies and contracts.

The second interpretation is preferable, as it aligns the BORA with judicial review under the Judicature Amendment Act 1971 and the common law.[202] The critical inquiry is the "public function" aspect. It is argued that the "requirement of imposition pursuant to law will ... readily be met, since the law will have facilitated the assumption of [the public] function".[203] Therefore on this analysis the BORA, and hence section 14, is applicable to the ASCB when determining complaints. However, *Electoral Commission v Cameron,* albeit ruling on whether judicial review was available, did not concern the application of the BORA thus is not direct authority on this point. It is likely that a similar approach will be applied to "public function" in section 3(b).[204]

2 *Limits prescribed by law*

Proceeding on the basis that the BORA is applicable to the ASCB, another hurdle exists under section 5 of the BORA. Any limits on rights and freedoms, such as the Codes, must be "prescribed by law". Thus we have to determine when a limit is "prescribed" by law and further, what is "law" for purposes of authorising the relevant limit.

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[199] Rishworth, above n 102, 96.
[200] Rishworth, above n 102, 96.
[201] Rishworth, above n 102, 96.
[202] Rishworth, above n 102, 97.
[203] Rishworth, above n 102, 97.
[204] In *Shortland v Northland Health Ltd* [1998] 1 NZLR 433, 444 (CA) the Court of Appeal noted in passing, that the issue whether the Crown-owned hospital company was subject to section 3 was "related to" the issue of whether it had exercised a statutory power in terms of the Judicature Amendment Act 1972, as cited in Rishworth, above n 102, 90.

The European Court of Human Rights analysed the phrase in *Sunday Times v United Kingdom*[205] and held that the law must be both "adequately accessible" and must be formulated with "sufficient precision" to enable people to regulate their conduct by it. This approach has been accepted in Canada[206] and *Sunday Times* has also been referred to in New Zealand.[207] The Codes are both accessible[208] and set out with sufficient precision. The Codes clearly state the specific rules that members must comply with. Furthermore, it states how the Codes are to be interpreted.[209]

It is argued that in addition to the requirements of accessibility and sufficient precision, the limits must have the "force of law".[210] Legislation and regulations clearly have such "force of law". However, it is more difficult to determine whether the Codes have such "force of law". There is nothing preventing the members from withdrawing from the ASA and thus not complying with the Codes. On the other hand, if members voluntarily submit to the ASA and subsequently the ASCB's jurisdiction, then they are submitting to the Codes which are established pursuant to the law of incorporated bodies and contracts. Thus the Codes have the force of law when organisations agree to be members of the ASA.

In the United Kingdom, various cases have challenged the authority of a similar Advertising Standards Authority in the context of freedom of commercial expression.[211] In the United Kingdom, freedom of expression is protected through the Human Rights Act 1988 which enshrines the European Convention of Human Rights. Article 10.2 of the Convention contains a similar provision to section 5 of the BORA, and provides that restrictions are to be "prescribed by law". In

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[205] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271 (ECHR).
[206] See Peter Hogg *Constitutional Law of Canada* (Student ed, Carswell, Ontario, 2004) 799-801.
[207] *Ministry of Transport v Noort*, above n 116; *Solicitor-General v Radio New Zealand,* above n 103.
[208] Advertising Standards Authority <http://www.asa.co.nz> (last accessed 25 September 2005).
[209] Advertising Standards Authority *Advertising Codes of Practice* (July 2005) 15.
[210] Rishworth, above n 102, 175.
[211] See *R v Advertising Standards Authority Ltd, ex p. Charles Robertson Ltd* [2000] EMLR 463 (QBD Admin Ct); *SmithKline Beecham plc v Advertising Standards Authority* [2001] EMLR 23 (QBD Admin Ct). See also Richard Lawson "Challenging the Advertising Standards Authority" (2001) 151 New Law Journal 526.

SmithKline Beecham plc v Advertising Standards Authority,[212] Hunt J found the ASA Codes consistent with Article 10.2 and therefore by inference, must have accepted that the Codes were "prescribed by law".[213] New Zealand may follow a similar approach.

Furthermore, it must be the correct conclusion as a matter of logic. Otherwise the situation would be that we accept the BORA is applicable to the ASCB and yet do not accept that the Codes are "prescribed by law". Thus any provision in the Codes or any decision made by the ASCB in accordance with the Codes would automatically be unreasonable despite that it might well be a "demonstrably justified" limit. This seems to be bordering on absurdity.

3 Express references

There are express BORA references in some of the Codes which provide further support for the contention that the BORA applies to the ASCB. For example, the advocacy principles expressly refer to section 14 of the BORA. The advocacy principles are relevant to the interpretation of rule 11 of the Code of Ethics, which concerns advocacy advertising. There is also a reference to the BORA in principle 1 of the Code for People in Advertising. These explicit references potentially colour all the Codes and thus strengthens the contention that ASCB should consider section 14 of the BORA when ruling on complaints.

B Bill of Rights Act Issues

The BORA has impact on the ASA in two ways. First, the Codes established by the ASA may constitute unjustified limitations on commercial expression. Alternatively, the decisions of the ASCB may apply the Codes in a manner that limits freedom of commercial expression.

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[212] *SmithKline Beecham plc v Advertising Standards Authority* [2001] EMLR 23 (QBD Admin Ct).
[213] Richard Lawson "Challenging the Advertising Standards Authority" (2001) 151 New Law Journal 526, 530.

The Codes do not replace statutory or common law, but complement the law.[214] For example, advertising must not breach the Fair Trading Act 1986. The Codes include a Code of Ethics,[215] which is "the overall philosophy covering fairness, respect for people, and honest practice".[216] Other codes cover particular issues, such as advertising to children;[217] or product areas, such as financial services.[218] The Codes clearly restrict freedom of commercial expression as their whole purpose is to regulate advertising. However, they may be demonstrably justifiable limitations on freedom of commercial expression.

The Codes generally provide for rules and guidelines that are aspirational type standards. For instance, principle 4 of the Code of Ethics provides that "advertisements should be prepared with a due sense of social responsibility" and rule 5 of the Code of Ethics provides that "advertisements should not contain anything which in the light of general prevailing community standards is likely to cause serious or widespread offence".

In applying the Codes, the context, medium, audience and the product or service of the advertisement are taken into account. Advertisements are then challenged on the circumstances in each case. The Codes do not generally impose over-reaching prohibitions on advertising, but rather usually have aspirational standards that advertisements must meet.

Some products and services are regulated more severely than others. For example, the Code for Advertising Liquor imposes time and manner restrictions that may not survive a stringent BORA section 5 analysis.

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[214] Advertising Standards Authority *Advertising Codes of Practice* (July 2005) 15.
[215] ASA Advertising Code of Ethics (1 August 1996).
[216] Advertising Standards Authority *Advertising Codes of Practice* (July 2005) 15.
[217] ASA Code for Advertising to Children (1 February 2001).
[218] ASA Code for Financial Advertising (1 August 1998).

Due to earlier analysis, it appears that the ASCB is subject to the BORA. In effect, this means that its decisions should be compliant with the BORA and consequently section 14. However, an examination of a sample of recent decisions of the ASCB reveals that the BORA is rarely mentioned.

A sample of 2003 decisions concerning principle 4[219] or rule 5[220] of the Code of Ethics revealed that only in one decision[221] out of twenty[222] was the BORA mentioned. In this decision, the advertiser had included in his submission, reference to section 14 of the BORA.[223] The ASCB acknowledged "the importance for the Complaints Board not to fetter the freedom unless there was proven justification, and advised that it was well aware of its obligation in this respect". However, there was no BORA analysis to determine whether the limitation in this case was justified in terms of section 5 of the BORA. The complaint was upheld without any BORA analysis, despite the express acknowledgement that limitations must be justified.

In 2004, a sample of decisions concerning rule 5 of the Code of Ethics, revealed that only one[224] out of fifteen of the decisions, mentioned the BORA.[225]

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[219] Principle 4 concerns social responsibility.
[220] Rule 5 concerns offensiveness.
[221] ASCB (14 October 2003) Decision 03/233.
[222] 10 complaints "upheld" were examined including: ASCB (11 March 2003) Decision 03/20; ASCB (8 April 2003) Decision 03/35; ASCB (15 May 2003) Decision 03/64; ASCB (8 July 2003) Decision 03/105; ASCB (8 July 2003) Decision 03/116; ASCB (14 October 2003) Decision 03/233; ASCB (14 October 2003) Decision 03/237; ASCB (14 October 2003) Decision 03/243; ASCB (24 November 2003) Decision 03/251; ASCB (14 October 2003) Decision 03/253. 10 complaints "not upheld" were examined including: ASCB (11 March 2003) Decision 03/24; ASCB (8 April 2003) Decision 03/27; ASCB (8 April 2003) Decision 03/31; ASCB (8 April 2003) Decision 03/36; ASCB (8 April 2003) Decision 03/49; ASCB (15 May 2003) Decision 03/58; ASCB (15 May 2003) Decision 03/62; ASCB (15 May 2003) Decision 03/86; ASCB (10 June 2003) Decision 03/93; ASCB (15 June 2003) Decision 03/94.
[223] In the advertiser's submission there was a reference to Glen Wigg's essay, see "The Right to Advertise", above n 14.
[224] ASCB (16 November 2004) Decision 04/362.
[225] Only five complaints were upheld, these were: ASCB (11 May 2004) Decision 04/129; ASCB (8 June 2004) Decision 04/162; ASCB (13 July 2004) Decision 04/206; ASCB (14 September 2004) Decision 04/336; ASCB (16 November 2004) Decision 04/362. A sample of ten complaints "not upheld" included: ASCB (9 March 2004) Decision 04/35; ASCB (6 April 2004) Decision 04/68; ASCB (11 May 2004) Decision 04/104; ASCB (11 May 2004) Decision 04/117; ASCB (13 July 2004) Decision 04/124; ASCB (8 June 2004) Decision 04/154; ASCB (8 June 2004) Decision

The advertiser referred to section 14 of the BORA and submitted that it was against the background of freedom of expression that the Codes must be construed. Despite this, the ASCB did not refer to the BORA at all in its deliberations. It did not even acknowledge that BORA even applied, let alone do any section 5 analysis as to whether restricting the advertisement was justified. The complaint was upheld.

In 2005,[226] a sample of the decisions concerning rule 5, did not result in any references to the BORA.[227]

Furthermore, the advocacy principles explicitly refer to the BORA. As already mentioned, the advocacy principles are guidelines for interpretation of rule 11 of the Code of Ethics on advocacy advertising.[228] The 2005 decisions concerning rule 11, generally have explicit references to BORA.[229] The ASCB acknowledge the principles which refer to the BORA. Yet, there is a complete lack of any BORA analysis. Not only is there a lack of analysis, but there does not appear to even be a simple statement to the effect that restricting the advertisement is "justified" with respect to BORA.

Clearly, this examination is not determinative, as only samples of the decisions were examined. However, it does give some idea of how much emphasis the BORA is given in the decisions of the ASCB. In order to promote

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04/168; ASCB (13 July 2004) Decision 04/172; ASCB (13 July 2004) Decision 04/194; ASCB (13 July 2004) Decision 04/211; ASCB (8 March 2005) Decision 04/450.

[226] As of 9 September 2005.

[227] Complaints "upheld" included: ASCB (12 April 2005) Decision 05/66; ASCB (14 June 2005) Decision 05/158. Complaints "not upheld" included: ASCB (8 March 2005) Decision 05/03; ASCB (8 March 2005) Decision 05/15; ASCB (10 May 2005) Decision 05/76; ASCB (10 May 2005) Decision 05/98; ASCB (10 May 2005) Decision 05/106; ASCB (10 May 2005) Decision 05/107; ASCB (12 July 2005) Decision 05/130; ASCB (14 June 2005) Decision 05/133; ASCB (14 June 2005) Decision 05/157; ASCB (14 June 2005) Decision 05/178.

[228] The advocacy guidelines explicitly require the ASCB to consider the BORA. However, advocacy advertising may not strictly speaking be commercial expression as it usually concerns political expression. Nevertheless, an examination of advocacy advertising disputes is useful to gain insight as to how much emphasis is given to the BORA when guidelines expressly require consideration of the BORA. In turn, this will give insight into how much emphasis the BORA is likely to be given when there are no guidelines expressly referring to the BORA, which is the case for the majority of the advertising rules.

[229] See decisions: ASCB (12 April 2005) Decision 05/56; ASCB (12 July 2004) Decision 05/199; ASCB (12 July 2005) Decision 05/205; ASCB (10 May 2005) Decision 05/75; ASCB (12 July 2005) Decision 05/168.

freedom of commercial expression, the ASCB should be endeavouring to apply BORA analysis to their decisions. Perhaps it is some consolation that in the event an advertiser is aggrieved, there remains the possibility of appealing to the High Court for judicial review.

Conceivably, there may be practical considerations that may inhibit an in-depth BORA analysis that may otherwise be expected of the courts. The ASCB panel are not as experienced in dealing with the BORA, as they are not judges nor even lawyers, but mere representatives from the public and the advertising industry. However, guidelines may be established to assist the panel in their BORA analysis.

Furthermore, one aspect of the self-regulatory system is that disputes are dealt with efficiently. In 2004 alone, there were 722 formal complaints, of which 257 became substantive complaints and were adjudicated on. Imposing an in-depth BORA analysis in each and every case, may serve to slow down the process and thus the system may become less efficient.

Despite these practical considerations, the BORA is nevertheless an Act that protects fundamental rights and deserves some mention in the decisions of the ASCB. Perhaps it can be conceded that the analysis may not necessarily be to the same in-depth extent as that expected of the courts. However, that does not justify the complete absence of BORA analysis in the decisions of the ASCB to date.

C Self-Regulation

The ASA must ensure justice is done and justice is seen to be done and regulate commercial expression accordingly or otherwise Parliament will intervene. Advertisers and the media "want to preserve the right to advertise but recognise that advertising should be responsible and not encourage abuse or misuse".[230] Therefore the advertising industry recognises that the right to freedom of commercial expression is not absolute and limits can be placed on advertising,

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[230] Glen Wiggs "The Role and Value of Business Self-Regulation" (Unpublished, Wellington, 1996) 5 [The Role and Value of Business Self-Regulation].

provided they are reasonable restrictions. This is the key point, reasonable restrictions on advertising are acceptable, but arbitrary bans and unworkable laws are not. Legislation has a tendency to impose arbitrary bans on advertising that are inflexible. On the other hand, the Codes aim for socially responsible advertising on a case by case basis as oppose to outright bans on all advertising on a specific product or service.

Furthermore, for self-regulation to succeed, it is argued that short-term gains must be sacrificed in order for the greater long-term goal.[231] Therefore, advertisers should ensure their advertising is socially responsible and not be misleading or offensive. This industry responsibility will instil consumer trust in advertising, which is important because without such trust consumers may disregard all advertising, which ultimately harms the advertising industry.

There may be arguments that the ASA is impartial and would inevitably favour the advertising industry in its Codes and in the decisions of the ASCB. However, the rate in 2004 of accepted complaints[232] that were upheld or settled was 48 per cent. Thus nearly half of the complaints accepted, resulted in favour of the complainants. Furthermore the Codes cover all advertising and impose some strict conditions on certain products and services, such as the Therapeutic Products Advertising Code. Given this, one may jump to the conclusion that perhaps the ASA is not as supportive of freedom of commercial expression as initially thought. However, such a conclusion ignores that freedom of commercial expression is not absolute. The Codes and upheld decisions may be instances where the limits on freedom of commercial expression are "demonstrably justified".

D Pre-Vetting Systems

Another interesting aspect relating to the ASA Codes is the pre-vetting administered by the Association of New Zealand Advertisers (ANZA). There are

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[231] "The Role and Value of Business Self-Regulation", above n 230.

[232] Note, only substantive complaints are accepted for determination by the ASCB. Reasons for non-acceptance include that complaints have previously been decided, no jurisdiction or no prima facie case.

"Pre-Vetting Systems"[233] that scrutinise advertisements for compliance with the Codes for Therapeutic Advertising and the Code for Advertising Liquor. Freedom of expression is usually at odds with this idea of prior restraint. However, as already discussed, one aspect of commercial expression is that due to its profit motive, the expression is more durable. Therefore, a little delay does not have the same effect on advertising as it may on the reporting of current affairs.

Such pre-vetting is implemented prior to the publication of the advertisements. However, it may be prudent for advertisers to voluntarily pre-vet advertisements at the "concept" stage.[234] This may avoid the result of an ASCB decision requiring withdrawal of the advertisement. This is an advantage as advertisers do not want advertisements withdrawn after the large amount of funds invested in such advertisements. Again, due to the nature of commercial expression, pre-vetting does not usually adversely affect "freedom of commercial expression" in a substantive way. Although, this is largely dependant on how strict the pre-vetting system is, in that if a large majority of advertisements are denied then clearly freedom of commercial expression may be adversely affected.

E Summary of ASA

The ASA plays a vital role in regulating commercial expression. In 2004 alone, the ASCB dealt with 257 substantive complaints. The BORA should be applicable to the ASA and ASCB due to its "public function". Furthermore, if the BORA is applicable, it should logically follow that the Codes, which are both accessible and sufficiently precise, should satisfy the "prescribed by law" requirement in section 5 of the BORA. However, this does not mean that the Codes will always be reasonable. A provision of the Code must still be "demonstrably justified" in order to be a reasonable limit on freedom of commercial expression.

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[233] See Advertising Standards Authority <http://www.asa.co.nz> (last accessed 25 September 2005); See also Association of New Zealand Advertisers <http://www.anza.co.nz> (last accessed 25 September 2005).

[234] The Television Commercial Approvals Bureau provides a service where concepts or scripts are pre-vetted for consistency with the ASA's Codes. See Television Commercial Approvals Bureau <http://www.tvcab.co.nz> (last accessed 25 September 2005).

Given the nature of the ASA, in that its members are comprised of the advertising industry, it is highly likely that the ASA will generally promote freedom of commercial expression. However, in the event that it does act in breach of freedom of commercial expression without justification, then its decisions will be reviewable by the courts.

The Codes generally provide for aspirational standards rather than comprehensive wide-reaching prohibitions on advertising. This allows for consideration of the circumstances in each case and contextual factors to be taken into account. Therefore the BORA may be implicated more likely in how the decisions of the ASCB are decided. Yet, it appears that the decisions rarely mention the BORA. This is an issue that should be addressed, as it appears that the ASCB is subject to the BORA and without some type of section 5 BORA analysis, freedom of commercial expression may be unreasonably infringed. Perhaps in many cases, the substantive result, that is whether the complaint is upheld or not, may remain the same. However, a vigilant approach that refers to the BORA, will serve to protect freedom of commercial expression in the cases that are more difficult to decide.

XIII CONCLUSION

This paper gave a broad overview of freedom of commercial expression. It explored various aspects of commercial expression and reasons against and in support of restrictions. As observed, the United States' and Canadian courts have dealt extensively with commercial expression and have developed in-depth analysis in examining issues relating to commercial expression. New Zealand has already referred to Canadian authority both in case law[235] and an Attorney-General report.[236] Thus it is likely to continue to consider Canadian authority but may also consider United States cases where relevant.

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[235] *Director-General of Health v Rothmans of Pall Mall,* above n 137.

[236] Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sale of Liquor (Health Warnings) Amendment Bill 2000 (5 September 2000).

Reviewing the current situation in New Zealand, it is commendable that there is at least some recognition of the right to freedom of commercial expression. However, the courts are slow to recognise the right. Further, when they do so, they do not adequately give in-depth analysis of the justifications for restricting commercial expression.

The section 7 vetting process will be crucial to any future proposed restrictions on commercial expression and as observed, the Attorney-General is willing to recognise freedom of commercial expression. There are many statutes that infringe commercial expression. Yet, many were enacted prior to the BORA, and therefore the vetting process was not implicated. The Attorney-General may need to be more proactive on amendments to Bills because, as observed, various amendments restricting commercial expression have slipped through the cracks. Furthermore, when the Ministry of Justice provides advice as to BORA consistency, it appears that crucial questions, as to evidence, are left unanswered.

Any future legislative restrictions on commercial expression are likely to be vigilantly lobbied against by the ASA, amongst other interested parties. It is likely the ASA's role in regulating commercial expression will be more flexible and appropriate to the circumstances of each case. Therefore this will result in protecting commercial expression generally, as broad principles will be applied in the context of the cases that are brought, instead of arbitrary and unworkable restrictions. However, the decisions of the ASCB would be improved if there are more explicit consideration of the BORA in future disputes.

It is an impediment that the Supreme Court in New Zealand does not have similar powers to strike down legislation like its counterpart in Canada. Nevertheless, courts should employ a section 5 analysis to already existing restrictions on commercial expression passed prior to the BORA and indicate declarations of inconsistency when such restrictions are too arbitrary and over-reaching that they cannot be demonstrably justified. There may at least be moral authority for Parliament to address such issues. The ASA can support this by lobbying to Parliament over both current and future unreasonable statutory restrictions. However, the ASA will need to cooperate with Parliament in

addressing reasonable restrictions on commercial expression through self-regulation.

By no means does this paper argue that freedom of commercial expression is absolute. That is simply not the case given that there are harms, as observed, that can occur through commercial expression. Furthermore, this paper does not argue that Parliament can never enact an over-reaching restriction on advertising. Rather, the Canadian courts have emphasised that the crucial point is: the government must prove that the limitation is justified and thus must bring forth evidence in support. The government cannot just implement a comprehensive ban on advertising of a product, such as liquor, simply by stating that its objective is too decrease liquor abuse. It needs to bring forth evidence such as that a partial ban, or counter-expression, or educational programmes and so forth would not be sufficient alternatives to address the objective. Subsequently, the courts may treat such evidence with a "margin of appreciation" and degree of deference. Therefore it has been observed that restrictions on commercial expression may be easier to justify as there is greater deference to Parliament in commercial expression cases due to policy considerations.

New Zealand should adopt a vigilant approach to protecting freedom of commercial expression to align New Zealand's jurisprudence with jurisprudence in overseas jurisdictions. This is all the more important due to the universal character of fundamental rights. In doing so, New Zealand will be protecting the fundamental right to freedom of expression. There is nothing more to say except that New Zealand should – "just do it".

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