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THE NEW ZEALAND BILL OF RIGHTS ACT 1990
AN ANALYSIS OF SECTIONS 4, 5 AND 6:
MAKING THE BILL OF RIGHTS WORK

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ABSTRACT

This paper examines ss4, 5 and 6 of the New Zealand Bill of Rights Act 1990. A trilogy of sections referred to as the Bill of Rights' "operational provisions".

The writer notes that the application of the operational provisions has proved to be difficult and examines how the Courts have applied the provisions to date. The writer concludes that the operational provisions can be said to be working, although, this is due more to a judicial willingness to make the Bill of Rights work rather than by any obvious operation of the provisions themselves. In concluding the writer argues for the primacy of s5 as a clear, discernable and proven limitation clause for the Bill.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 15,000 words.

I. INTRODUCTION

A. The Operational Sections of the Bill of Rights

The New Zealand Bill of Rights Act 1990 (hereafter referred to as "the Bill of Rights" or "the Bill") is divided into three parts. Part III of the Bill contains two miscellaneous provisions which, to date, have raised little comment. Part II of the Bill sets out the rights and freedoms affirmed by the Bill. They are, if you like, the glamour provisions of the Bill.

> "They are the stuff of anthems, literature and eulogy. They puff the chest and wet the eye. When society grants rights to persons who have flouted its most basic rules, it is done in a spirit of generosity. This engenders pride, perhaps even a feeling of self-righteousness. It expresses the dignity of turning the other cheek. It is the kindness of the good Samaritan. It is the embrace of the prodigal son."[1]

Somewhat to the contrary, Part I of the Bill is rather vaguely headed "General Provisions". However, it is a heading which belies the importance of the sections it contains. For it is in Part I of the Bill that the operational provisions[2] of the Bill are to be found. These are the provisions that tell you how the Bill of Rights actually works. Who the Bill applies to and how it fits into our legal system. It is these provisions which are the focus of this paper.

For ease of reference, ss4, 5 and 6 of the Bill are set out below:

> "**4. Other enactments not affected**- No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-

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1 DM Paciocco "The Pragmatic Application of Fundamental Principles: Keeping a Rouges' Charter Respectable" (Legal Research Foundation, Auckland, August 1992) at 7.

2 An expression used by commentators to describe the provisions of Part I of the Bill, in particular, ss 4, 5 and 6. For example PA Joseph in Constitutional and Administrative Law in New Zealand, The Law Book Company Ltd, 1993, Sydney at 851 and PT Rishworth in "Two Comments on Ministry of Transport v Noort" (1992) NZ Recent L. Rev. at 189.

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(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.

5. **Justified limitations-** Subject to section 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.

6. **Interpretation consistent with Bill of Rights to be preferred-** 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."

As it has happened, the application of the operational provisions has proved to be difficult. Despite being the subject of a leading judgment of the Court of Appeal,[3] judicial opinion on the role of the various provisions has been divided. Commentators on the topic do not agree.[4] The law in this area remains far from settled. As Cooke P said: [5]

> "It seems to me that the last word on the interrelationship of the four[6] sections is far from having been said. It may safely be predicted that the debate will continue."

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3 Ministry of Transport v Noort [1992] 3 NZLR 260, see Part IV of this paper

4 For example, c.f. F M Brookfield "Freedom: the New Zealand Bill of Rights Act 1990" [1993] NZ Recent LR 288 and P A Rishworth "Two Comments on Ministry of Transport v Noort" [1992] NZ Recent LR 189

5 Temese v Police (1992) 9 CRNZ 425 at 427

6 The "four" sections Cooke P refers to are ss4, 5, 6 and 7. It is suggested that s7 is more of a stand alone provision and is not discussed in this paper. However, see P. Fitzgerald "Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well intentioned nonsense" (1992) 22 VUWLR 135

The purpose of this paper is to analysise the subject of the debate and review the arguments to date. It does not purport to be the "last word" on the interrelationship of the operational provisions. That, of course, will come from the Courts, not from a commentator. But it is hoped that, in some small way, it may contribute to the debate. In particular, in support of the argument for the primacy of s5.

B. The New Zealand Bill of Rights Act 1990

In order to understand some of the difficulties that bedevil the operational provisions of the Bill, it is necessary to understand something of the history of the Bill. It is a history not without controversy.

The Bill of Rights came into force on 25 September 1990. How New Zealand came to have a Bill of Rights is in itself interesting. Certainly the Bill did not result from any particular constitutional crisis. Nor was there any public clamour for a Bill of Rights. As a Labour Party political measure:[7]

> "It must be said there was no great enthusiasm for it by Labour MPs then or later."

Rather it seems clear that the New Zealand Bill owes its genesis to Geoffrey Palmer's personal interest in the subject:[8]

> "On becoming Minister of Justice, I set up a group of officials to work intensively on the production of a high quality white paper presenting a draft Bill of Rights and the arguments for it."

After the White Paper was published it was referred to Parliament's Justice and Law Reform select committee. While there was little discernable interest in a Bill of Rights prior to Sir Geoffrey's initiative, the White Paper certainly provoked public comment.

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7 G Palmer New Zealand's Constitution in Crisis, John McIndoe, 1992, Dunedin at 52

8 Ibid at 53.

The select committee received four hundred and thirty one submissions on the draft Bill and heard submissions over a period of two years. The majority of the submissions were against the draft Bill. While there were many miscellaneous submissions,[9] two features of the draft Bill attracted the most criticism. They were, first, that the Bill was to be entrenched as the supreme law of New Zealand.[10] And, second, the inclusion of the Treaty of Waitangi.[11]

By the time the select committee reported back to the House the National Party in Opposition had decided that it was opposed to the Bill. Effectively that spelt the end to an entrenched Bill of Rights. Obviously, such a fundamental constitutional change could not be made law by a simple majority in the House. Accordingly, the select committee recommended a Bill of Rights Act, similar to the Bill of Rights drafted in the White Paper, but to be enacted as an ordinary Act of Parliament. In addition, the provisions relating to the Treaty of Waitangi were deleted.

That the Bill of Rights was to become law as only an ordinary statute must have been disappointing to its proponents. Much was made of the Bill's reduced status as an ordinary statute. The National Party in Opposition referred to the Bill as a "Clayton's version of a Bill of Rights"[12] and legislating by "bumper sticker".[13] Academic commentators have called the Bill "watered down",[14] "debilitated"[15] and "disembowel [ed]".[16] The New Zealand Herald's editorial of 12 October 1989 referred to a "pale and lonely bill". And,

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9 For a critical summary of the submissions, see ibid 53-56.

10 Clauses 1 and 28 of the draft Bill.

11 Clause 4 of the draft Bill.

12 NZPD Vol. 509 (1990) 2800 and 2802 (P.East)

13 NZPD Vol.509 (1990) at 2801 (P.East) quoting D Dugdale on behalf of the NZ Law Society.

14 P Rishworth "The Potential of the NZ Bill of Rights" (1990) NZLJ 68.

15 D Paciocco "The NZ Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" (1990) NZ Recent L. Rev. 351.

16 D Paciocco "The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable" Legal Research Foundation August 1992.

even the Court of Appeal has referred to the Bill's history as being "far from unequivocal."[17]

Perhaps in keeping with its somewhat discredited beginning, initial references to the Bill were cautious. "[I]n interpreting and applying the New Zealand Bill of Rights Act it is well to proceed gradually."[18] However, there began to emerge from the Court of Appeal, in particular, "an increasingly confident jurisprudence"[19] which after the decision in R v Butcher[20] moved Shaw & Butler to exclaim that the Bill of Rights "comes alive".[21] However, "that was not to say it was dead",[22] indeed, it was not even moribund.

Even as an ordinary Act of Parliament the Bill of Rights always had the potential to be a significant constitutional document.[23] But perhaps not even the most "dyed in the wool" enthusiasts of the Bill could have quite foreseen what today the Bill of Rights has become. If Butler is correct, then the Bill applies to private common law litigation[24] which surely was not intended.[25] And in Baigent v Attorney-General[26] the Court of Appeal has "invent[ed] a new concept of public law compensation"[27] for breaches of the Bill. Daily our

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17 Baigent v Attorney-General, Unreported, 29 July 1994, Court of Appeal, CA 207/93, Hardie Boys J at 14.

18 Cooke P in Ministry of Transport v Noort [1992] 3 NZLR 260 at 274. See also R v Butcher [1992] 2 NZLR 257 at 264

19 A Shaw & A S Butler "The New Zealand Bill of Rights Comes Alive (I)" (1991) NZLJ 400

20 [1992] 2 NZLR 257

21 n19

22 P Rishworth "Ironing Out The Creases in the Bill of Rights Act" Continuing Legal Education Programme of the Auckland District Law Society, August, 1993 at 9.32

23 In particular, n14

24 AS Butler "The New Zealand Bill of Rights and private common law litigation" (1991) NZLJ 261

25 For example, the Justice and Law Reform Select Committee supported the confinement of the Bill to "public" action: see Interim Report of the Justice and Law Reform Committee Inquiry into the White Paper. A Bill of Rights for NZ (2nd sess. 41 Part 1987) at 25

26 Unreported, 29 July 1994, Court of Appeal, CA 207/93

27 J Hodder in The Capital Letter Vol 17 No 28 at 1

Courts hear submissions on the application of the Bill of Rights. There are now hundreds of Court decisions on the Bill. Many of these decisions have been reported. Indeed, a separate series of law reports featuring cases on the Bill has been published[28]. Truly, it can be said that the Bill could become the new dynamic in litigation proceedings over the next few years. The Bill of Rights is more than alive, it is "up and moving".

C. Categories of Bill of Rights Cases

It should be noted at the outset that many of the Bill of Rights cases do not invoke Part I of the Bill at all. These sort of cases usually involve a complaint that the state (usually the police) has carried out some certain conduct in breach of the Bill. Most of the s23(1)(b) cases fall into this category. Other examples include the cases on the meaning of arrest and detention (e.g. R v Butcher[29], R v Goodwin[30] and R v Goodwin (No 2)[31]) and the cases on unreasonable search and seizure (e.g. R v Jeffries[32] and R v Davis[33]).

While these cases can raise issues of interpretation of considerable difficulty, they are relatively straightforward. They require the Courts to interpret the provisions of the Bill of Rights itself. But they do not require the Courts to interpret the provisions of the Bill against an apparently inconsistent statute. Necessarily, such an exercise requires the Courts to apply the operational provisions in Part I of the Bill.

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28 New Zealand Bill of Rights Reports ("NZBORR")

29 [1992] 2 NZLR 257

30 [1993] 2 NZLR 153

31 [1993]2 NZLR 390

32 [1994] 1 NZLR 290

33 Unreported, 30 July 1993, Court of Appeal, CA 306/93

II. THE ORIGINS OF SECTIONS 4, 5 AND 6

Why are the operational provisions of the Bill of Rights so difficult? Surely, they should not be. Ideally, the operation of our Bill should be as straightforward as possible. And, as will be discussed, it would seem that a number of the difficulties caused by the wording of the three sections, that have so confounded the judiciary,[34] could have been avoided. Rather humbly, the cause of the difficulties, at least in part, lies with the Bill's checkered origins.

It will be recalled that the Bill was originally drafted to be entrenched as the supreme law of New Zealand. Unashamably, much of the draft Bill followed the wording of the Canadian Charter of Rights and Freedoms ("the Canadian Charter") which in turn drew on the International Covenant on Civil and Political Rights ("the International Covenant") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention").

Clearly, s5 (or clause 3 as it was then) was based on s1 of the Canadian Charter. Typical of declarations of human rights, the rights in the Canadian Charter are not absolute. Section 1 of the Canadian Charter provided a general limitations clause as follows:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 1 of the Canadian Charter has been described as:

> "... [the] mechanism through which the courts are to determine the justiciability of particular issues that come before it."[35]

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34 In particular in Ministry of Transport v Noort [1992] 3 NZLR 260, see Part IV of this paper

35 Operation Dismantle v R (1985) 18 DLR (4th) 481 at 518

Therefore, it was entirely appropriate to include on equivalent section to s1 of the Canadian Charter in an entrenched Bill of Rights for New Zealand. It provided the criteria whereby the Courts would strike down offending legislation. But the Courts have no such role in a Bill of Rights enacted only as an ordinary statute. No longer is the Bill supreme law. Obviously, the drafters of the Bill wished to make the Bill's reduced status clear by making s5 subject to s4. But it is not at all obvious what is the role of a "reasonable limits" section like s5 in an unentrenched Bill of Rights. The only express indicia as to why s5 was retained can be found in explanatory note (d) to the Bill. That is, to confirm that the rights and freedoms in the Bill are not absolute. Why the legislature should think that that was necessary is bizarre. The Courts have long recognised this as "elementary".[36] In the event, s5 remains, as Hardie Boys J nicely understated it, "a difficult provision".[37]

Unlike s5, s6 has no equivalent in the Canadian Charter. It can be found in the original draft of the Bill but in a somewhat different form. As clause 23 it expressly required the Courts not to strike down legislation where there was a possible interpretation of an enactment that would be consistent with the Bill of Rights.[38] There was strong opposition to the inclusion of a clause like clause 23 in the Bill. Elkind and Shaw[39] argued that it would create a "presumption of consistency[40] and undermine the scope of clause 3 (section 5).

When the decision was made to proceed with a Bill of Rights Act enacted only as an ordinary Act of Parliament, clauses 3 and 23 necessarily had to be revisited. Essentially, four changes[41] were made:

(i) a new s4 was drafted to confirm the Bill's reduced status as an ordinary Act of Parliament; and

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36 McCarthy J in Melser v Police [1967] NZLR 437 at 446. See n67 of this paper

37 Ministry of Transport v Noort [1992] 3 NZLR 260 at 287

38 "A Bill of Rights for New Zealand", A White Paper Government Paper 1985 at para 10.180

39 A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand, Oxford University Press, 1986, Oxford

40 Ibid at 137

41 Other changes were made but they are not relevant here.

(ii) clause 3 became s5 and was made subject to s4; and

(iii) clause 23 was redrafted to provide a rule of interpretation; and

(iv) the redrafted clause 23 was moved into Part I of the Bill adjacent to ss4 and 5 and became s6.

Clumped together as ss4, 5 and 6, the three sections are easily identifiable as the operational or mechanical provisions of the Bill. But what is not at all clear is how the three sections interrelate with each other. The result is untidy and confusing. Rishworth called it an "imbroglio."[42]

III. AN ANALYSIS OF SECTIONS 4, 5 AND 6

A. Section 4

Section 4 is an uncompromising section. "[I]t is more cleaver than scalpel."[43] On a plain reading, it provides that where there is inconsistency between a provision of an enactment and the Bill of Rights, the enactment prevails. Any argument that the Bill should prevail is eliminated. There is no discretion and no criteria. Any enactment, no matter how unreasonable or unjustified, will prevail over the Bill.

Section 4 lists what the Courts must not do in such circumstances. A judge must not hold the enactment to be in any repealed, revoked, invalid or ineffective. Nor may a judge decline to apply the enactment. Thus, fundamental as the rights and freedoms in the Bill might be, s4 confirms parliamentary supremacy over the Bill.

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42 n22 at 9.36

43 n16 at 9

1. "Enactment"

In order to determine the scope of s4, it is necessary to define the term "enactment". The Bill provides no such definition. Nor does the Acts Interpretation Act 1924.

There is no doubt that enactment includes a section or part of a section of an Act of Parliament.[44] But can the rights and freedoms in the Bill be overborne by subordinate legislation? The answer would seem to be yes. In Black v Fulcher,[45] the Court of Appeal found:[46]

> " 'Enactment' is not defined in the Acts Interpretation Act, though frequently used in the Act. We think that in general (whether there are any exceptions need not now be considered) and in particular in s20(h) [of the Acts Interpretation Act] it is used as a convenient and succinct term to embrace any Act or rules or regulations thereunder and any provision thereof."

There may well be a case to argue that the Bill of Rights should be an exception to the general rule laid down by the Court of Appeal. However, an intention to include subordinate legislation is further shown by the use of the words "made" and "revoked" in s4.[47]

As the jurisprudence on the Bill of Rights has developed, it has become "part of the fabric of New Zealand law."[48] In the circumstances, it seems altogether inappropriate that subordinate legislation should be able to prevail over the Bill.

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44 Munro v Auckland City [1967] NZLR 873

45 [1988] 1 NZLR 417

46 Ibid at 419

47 As opposed to "passed" and "replaced" which is terminology more consistent with Acts

48 Cooke P in Baigent v Attorney-General, Unreported, 23 July 1994, Court of Appeal, CA 207/93 at 11

2. The Effect of Section 4

The effect of s4 is obvious enough. And, not surprisingly, arguments have developed that seek to limit s4's applicability.[49] But s4 has been used by the Courts to produce results that perhaps few would argue with. In TV3 Network Services Ltd v R[50], TV3 wished to screen a television documentary about incest. The programme was to feature a family where the father of five daughters (since grown up) had been found guilty of rape and sexual abuse of his daughters when they had been children. TV3 intended to include in the programme information that may have identified the daughters. Of the five daughters, two objected to publication, two consented and the fifth gave qualified consent. Later, the fifth daughter changed her mind and withdrew her qualified consent. TV3 applied to the Court for permission to screen the programme under s139 of the Criminal Justice Act 1985. Section 139 prohibits the publication of the names of offenders and victims in specified sexual cases where the publication is likely to lead to the identification of the victims. The Court of Appeal found:[51]

> "It is true that freedom of expression, both by the media and in this case by the two consenting sisters, is a factor the importance of which is underlined by s14 of the New Zealand Bill of Rights 1990, but in the circumstances of the present case freedom of expression is to be subordinated to the public policy indicated by Parliament under s139(2). By virtue of s4 of the New Zealand Bill of Rights Act that policy must prevail over s14."[52]

3. "Decline to Apply"

While the effect of s4(a) of the Bill is obvious enough, s4(b) is a little more difficult. It would seem that declining to apply an enactment under s4(b) is to

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49 In particular, J B Elkind "On the limited applicability of section 4, Bill of Rights Act" (1993) NZLJ 111

50 [1993] 3 NZLR 421

51 Ibid at 423

52 The writer argues that the Court could have equally reached the same result using s5, see Part VB of this paper

be something different from holding it to be impliedly repealed etc. under s4(a). Its application will be where a provision in an enactment is found to be inconsistent with a provision of the Bill on the facts of a particular case. In such a case the Court might find, short of holding the enactment to be repealed or invalid, on the facts of the case, the enactment to be of no application. Section 4(b) forbids the Courts from taking such an approach. It well illustrates the difference between the New Zealand Bill of Rights and the Canadian Charter. In R v Rao[53] s10(1)(a) of the Canadian Narcotic Control Act authorised police officers to enter and search premises without a warrant. However, s8 of the Canadian Charter provides that "Everyone has the right to be secure against unreasonable search or seizure." The Ontario Court of Appeal held that s10(1)(a) was not unconstitutional but it was inoperative to the extent that it was inconsistent with s8. Martin JA said:[54]

> "In my opinion, s10(1)(a) is inoperative to the extent that it authorises the search of a person's office without a warrant, in the absence of circumstances which made the obtaining of a warrant impracticable;"

Accordingly, the Court declined to apply s10(1)(a) in circumstances where the obtaining of a warrant in advance was practicable. Such a finding would not be available to the New Zealand courts because of s4(b).

4. Is Section 4 Necessary?

Section 4 can be seen as a device to eliminate any argument that, even as only an ordinary Act of Parliament, the Bill prevailed over other legislation. The drafters of the unentrenched version of the Bill may well have been aware that there was Canadian authority to support such an argument. In R v Drybones[55] the Supreme Court of Canada held that s94 of the Canadian Indian Act, which made it an offence for an Indian to be intoxicated off a reserve, was rendered inoperative by the unentrenched Canadian Bill of Rights[56]. This

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53 (1984) 46 OR (2d) 80

54 Ibid at 110

55 (1970) 9 DLR 473

56 8 - 9 Elizabeth II, c.44. As distinct from the Canadian Charter of Rights and Freedoms 1982

was because the Indian Act denied an Indian "equality before the law" as guaranteed by s(1)(b) of the Canadian Bill of Rights.[57] Brookfield[58] argued that, in any event, s4 was unnecessary because the New Zealand Bill lacked the "particular obstante formula" which enabled the Canadian Supreme Court in Drybones to hold legislation inoperative to the extent of inconsistency with the Canadian Bill of Rights.[59] And, further, Drybones was an exceptional case. The Canadian Supreme Court never again held a legislative provision as inoperative under the Canadian Bill of Rights.[60]

Accordingly, the inclusion of s4 can be seen as an example of a "belts and braces" approach.

B. Section 5

Section 5's role in our unentrenched Bill of Rights is an enigma. Copied as it is from s1 of the Canadian Charter, it appears to be the cornerstone section of the Bill. However, as will be discussed, there is impressive judicial dicta to say that the role of s5 is limited and peripheral.[61] What is certain about s5 though is that it makes clear that the rights and freedoms contained in the Bill are not absolute. With some of the rights and freedoms in the Bill, this is implicit from the wording of the Bill itself. Such as the right to be secure against "unreasonable" search or seizure,[62] the right not to "arbitrarily" arrested or detained,[63] the right to be released on "reasonable" terms and conditions,[64] the right to "adequate" time and facilities to prepare a defence[65]

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57 (1970) 9 DLR 473 at 484, 485

58 See (1990) NZ Recent L. Rev 223 at 224 and (1991) NZ Recent L. Rev 253 at 264

59 I.e. s2 of the Canadian Bill of Rights included the words "unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights."

60 Despite the argument being made, for example, see A.G. v Lavell (1973) 38 DLR (3d) 481, R v Burnshine (1974) 44 DLR (3d) 584, MacKay v R (1980) 114 DLR (3d) 393 but note the minority judgments

61 See Part IV F and G of this paper

62 s21

63 s22

64 s24(b)

and the right to be tried without "undue" delay.[66] But most of the rights and freedoms in the Bill are drafted in the broadest of terms with no limitations. Section 5 then provides the criteria whereby the Courts must decide what is to be the balance between an individual's right and freedom's versus the interests of society as a whole.

There is nothing particularly new in this function for the Courts. Long before ss5 and 14 of the Bill of Rights were enacted, McCarthy J said:[67]

> "Unquestionably, freedom of opinion, including the right to protest against political decisions, is now accepted as a fundamental human right in any modern society which deserves to be called democratic. Its general acceptance is one of the most precious of our individual freedoms. It needed no Charter of the United Nations to make it acceptable to us; it has long been part of our way of life. But a democracy is compounded of many different freedoms, some of which conflict with others, and the right of protest, in particular, if exercised without restraint may interfere with other people's rights of privacy and freedom from molestation. Freedom of speech, freedom of behaviour, academic freedom, none of these is absolute. The purposes of a democratic society are only made practicable by accepting some limitations on absolute individual freedoms. All this, of course, is rather elementary.
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> The task of the law is to define the limitations which our society, for its social health, puts on such freedoms. Sometimes the law defines with precision the boundaries of these limitations; often the definition is stated only in general terms. In these latter cases, the Courts must lay down the boundaries themselves, bearing in mind that freedoms are of different qualities and values and that the higher and more important should not be unduly restricted in favour of lower or less important ones."

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65 s24(d)

66 s25(b)

67 Melser v Police [1967] NZLR 437 at 445, 446

1. **Limited Application of Section 5?**

Any application of s5 will depend on how widely the scope of a particular right or freedom is defined by the Courts at the outset. This point is well illustrated by the Canadian cases on the application of s1 of the Canadian Charter. As Richardson J observed in Ministry of Transport v Noort ("Noort"):[68]

> "Section 5 is largely derived from the Canadian Charter and the Canadians in turn drew on the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Decisions under the Canadian provision and other comparable provisions are likely to provide much useful guidance to New Zealand Courts in the interpretation and application of this key provision."

An example of where a right was interpreted widely and thereby fell to be determined by s1 of the Canadian Charter is Irwin Toy Ltd v A.G. Quebec.[69] At issue was the validity of ss248 and 249 of the Quebec Consumer Protection Act which prohibited commercial advertising directed to children under the age of thirteen. The Supreme Court of Canada held that commercial advertising was covered by s2(b) of the Charter which guarantees (inter alia) freedom of expression and ss248 and 249 infringed s2(b). Therefore, the Court turned to the question of whether ss248 and 249 were saved by s1 of the Charter. The majority of the Court said yes. The purpose of ss248 and 249 was to protect children who were a vulnerable group. The Court concluded:[70]

> "In sum, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising."

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68 [1992] 3 NZLR 260 at 283

69 [1989] 1 SCR 927

70 Ibid at 999

However, the point is that the Court's finding that commercial advertising was covered by s2(b) of the Charter was a generous one. Indeed, there was Canadian authority to the contrary.[71] If the Court had found that commercial advertising was not covered by s2(b), no analysis under s1 would have been necessary.

An example of the other extreme is the Supreme Court of Canada's decision in Reference Re Workers' Compensation Act 1983 (Nfld).[72] At issue was the validity of ss32 and 34 of the Newfoundland Workers' Compensation Act. These sections denied to an injured worker the right to sue his or her employer in tort. It was argued that ss32 and 34 violated s15(1) of the Canadian Charter which provides:

> "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The Court delivered a one paragraph judgment dismissing the argument. The Court found that the situation of work-related accident victims did not fall within any of the listed grounds of discrimination in s15(1) and therefore there was no violation. Accordingly, that was the end of the appeal and no analysis under s1 of the Charter was necessary.

2. Onus

It is now well established that a person invoking the Bill of Rights has the initial evidential burden to show, on the balance of probabilities, that a breach of the Bill has occurred.[73] If this evidential onus is discharged, the evidential burden then shifts to the Crown.[74] The onus on the Crown is to show that

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71 For example Re Klein and Law Society of Upper Canada (1985) 50 OR (2d)118

72 [1989] 1 SCR 922

73 R v Te Kira [1993] 3 NZLR 257 at 276. Also R v Dobler [1993] 1 NZLR 431 at 438 and R v Jeffries [1994] 1 NZLR 290.

74 Ibid

the alleged breach did not in fact occur. Or, if seeking to rely on s5, the onus is on the Crown to show that the substantive requirements of s5 are satisfied.[75] They are:

1) is the limitation reasonable?

2) is the limitation prescribed by law?

3) can the limitation be demonstrably justified in a free and democratic society?

Typically, the Canadian courts have considered questions 1 and 3 together. And in Noort, Richardson J, the only Court of Appeal judge to really apply s5, followed that approach.[76]

3. Reasonable limits ... demonstrably justified in a free and democratic society

The Canadian courts have developed over a number of decisions, a test for the operation of these questions. It has become known as the "Oakes test" after the case of R v Oakes[77] where the test originated. In Oakes the Supreme Court of Canada considered s8 of the Canadian Narcotic Control Act which reversed the traditional onus of proof, placing on the accused person the onus to disprove that he or she did not have a narcotic for the purpose of trafficking. Section 8 clearly violated the guarantee to the presumption of innocence in s11(d) of the Canadian Charter. In the circumstances of such a blatant case, the Court laid down an extremely structured test for s1 of the Canadian Charter. The Oakes test required the Crown to satisfy the court, on the balance of probabilities, that the limitation on the right or freedom was:[78]

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75 Richardson J in Ministry of Transport v Noort [1992] 3 NZLR 260 at 283. This is consistent with the Canadian position, e.g. R v Butler (1990) 50 C.C.C. (3rd) 97 at 119

76 [1992] 3 NZLR 260 at 283

77 (1986) 1 SCR 103

78 Ibid

1) prescribed by law;

2) that the legislative objective which the limitation is designed to promote bears on a pressing and substantial concern, and

3) that the means chosen to attain those objectives are proportional or appropriate to the ends. This generally requires:

   a) the limiting measures must be carefully designed and rationally connected to the objective;

   b) they must impair the right as little as possible, and

   c) their effects must not so severely trench on the right that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

The Oakes test has proved to work well in the criminal law field[79] but in other areas there has been concern about the appropriateness of the courts effectively reviewing the policy and decisions of the legislature. Accordingly, the Oakes test has undergone a number of restatements and, in particular, there has been a retreat from criteria 3(a) and 3(b).[80]

Indeed, in Andrews v Law Society of British Columbia,[81] a case about equality rights under s15 of the Canadian Charter, some of the Supreme Court judges mooted a different test for s15, suggesting that the Oakes test was not appropriate.

More importantly, in the New Zealand context, was Richardson J's adoption of the Oakes test as restated in Re A Reference re Public Service Employee Relations Act [1987] 1 SCR 313:[82]

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79 n16 at 8.11.129.

80 Edwards Books and Art Ltd v R [1986] 2 SCR 173 is commonly cited as authority for the relaxing of the Oakes test

81 [1989] 1 SCR 143

82 Ministry of Transport v Noort [1992] 3 NZLR 260 at 283.

> "The constituent elements of any s1 inquiry are as follows. First, the legislative objective, in pursuit of which the measures in question are implemented, must be sufficiently significant to warrant overriding a constitutionally guaranteed right: it must be related to 'concerns which are pressing and substantial in a free and democratic society'. Second, the means chosen to advance such an objective must be reasonable and demonstrably justified in a free and democratic society. This requirement of proportionality of means to ends normally has three aspects: a) there must be a rational connection between the measures and the objective they are to serve; b) the measures should impair as little as possible the right or freedom in question; and, c) the deleterious effects of the measures must be justifiable in light of the objective which they are to serve."[83]

Richardson J emphasised that in its application to s5, the Oakes test (as restated) must be modified to reflect the status of the New Zealand Bill, as an ordinary act of Parliament and an abridging inquiry under s5 will involve consideration of all economic, administrative and social implications.[84]

A balancing exercise is required weighing:

> "(1) the significance in the particular case of the values underlying the Bill of Rights Act;
>
> (2) the importance of the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
>
> (3) the limits sought to be placed on the application of the Act provision in the particular case;
>
> (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits."[85]

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83 [1987] 1 SCR 313 at 373, 374

84 Ministry of Transport v Noort [1992] 3 NZLR 260 at 283

85 Ibid at 284

4. A Free and Democratic Society

What is a free and democratic society? And, is New Zealand one? As to the second question, in Federated Farmers of New Zealand & Ors v New Zealand Post Ltd,[86] McGechan J said:[87]

> "(The assumption seems to be that New Zealand presently is a free and democratic society, and the phrase no doubt is to be read in that light)"

Of course not all would agree with McGechan J's assumption. "Political philosophers offer competing conceptions of freedom and democracy with which lawyers and judges have by and large only a passing acquaintance."[88] As Justice Wilson goes on to ask, how are judges to identify the essential characteristics of a free and democratic society?[89]

In the writer's view, the Courts should not make such an assumption. It is not helpful to consider what New Zealand presently is. Rather, New Zealand is to be free and democratic. Whatever that means. The Chief Justice of Canada in R v Oakes[90] offered this:[91]

> "The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and

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86 Unreported, 1 December 1992, High Court, Wellington Registry, CP 661/92

87 Ibid at 56

88 Madam Justice Wilson "The Charter of Rights and Freedoms" (1985) 50 Saskatchewan L.Rev. 169 at 173

89 Ibid

90 [1986] 1 SCR 103

91 Ibid at 136

groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

The inclusion of the words a free and democratic society is to refer the Courts to the very purpose for which the Bill was enacted. It is nothing less than "the kind of society [New Zealanders] want to live in."[92]

5. Prescribed by law

"... when s5 does arise for consideration the phrase "prescribed by law" will be important."[93]

(i) Accessibility

Section 5 requires that the limitation of any right or freedom in the Bill must be prescribed by law. If the limitation is not prescribed by law then, no matter how reasonable that limitation may be, s5 will not be complied with.

In Noort Richardson J explained that the requirement that any limit be prescribed by law "ensures that if rights are to be limited then those limits should be imposed by law so that they are adequately identifiable and accessible by members of the public, and further are formulated with sufficient precision to enable citizens to regulate their conduct and to foresee the consequences which a given action may entail."[94] As authority for this rationale of accessibility, in Noort, both Cooke P and Richardson J referred to the famous Sunday Times case, in the European Court of Human Rights, Sunday Times v United Kingdom.[95] In this case, between 1958 and 1961, a company

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92 n88

93 Cooke P in Ministry of Transport v Noort [1992] 3 NZLR 260 at 272. In Noort Richardson J considered that s5 did arise for consideration in that case, see Part IV H of this paper

94 Ibid at 283

95 (1979)58 ILR 491

named Distillers Company (Distillers) manufactured and marketed drugs containing thalidomide. The drugs were prescribed as sedatives for pregnant women. Thereafter, a considerable number of women who had been prescribed the drug gave birth to babies suffering severe deformities. Legal proceedings alleging negligence and claiming damages were issued against Distillers on behalf of the parents of some of the children. Eventually a settlement involving the establishment of a trust fund for the children was negotiated. However, a number of the affected parents did not agree to the negotiated terms. In 1972 the Sunday Times published an article examining the settlement proposals and described them as "grotesquely out of proportion to the injuries suffered". The article also criticised the English law on damages and urged Distillers to make a better offer. The article also stated that a further article would be published tracing how the tragedy had occurred.

The Attorney-General sought and obtained an injunction against the publication of the second article on the ground it was in contempt of court. The Sunday Times appealed the injunction to the Court of Appeal who removed it. However, in turn, the Attorney-General appealed and the injunction was restored, albeit in a modified format, by the House of Lords. Eventually the injunction was discontinued on the Attorney-General's own motion and the second article was published, differing in some respects to the original. However, the litigation continued and was referred to the European Court of Human Rights in respect of some of the original claims.

In the European Court, Sunday Times argued that the law was so uncertain and the principles of the House of Lords decision so novel, that the injunction could not be said to be prescribed by law under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court disagreed and said:[96]

> "49. In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the

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96 Ibid at 524-527

citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

. . .

52. . . . To sum up, the Court does not consider that the applicants were without an indication that was adequate in the circumstances of the existence of the 'prejudgment principle'. Even if the Court does have certain doubts concerning the precision with which that principle was formulated at the relevant time, it considers that the applicants were able to foresee, to a degree that was reasonable in the circumstances, a risk that publication of the draft article might fall foul of the principle."

(ii) Scope

In Noort, Cooke P and Richardson J[97] approved the extended meaning to the phrase "prescribed by law" given by the Canadian Supreme Court in R v Thomsen.[98] Le Dain J said:[99]

"The limit will be prescribed by law within the meaning of s1 [s5] if it is expressly provided for by the statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule."

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97 In fact, Richardson J approved the identical words of Le Dain J in R v Therens (1985) 18 DLR (4th) 655 at 680

98 (1988) 63 CR (3d) 1

99 Ibid at 10

Both judges referred to Le Dain J's "operating requirements" as the New Zealand equivalent of making an enactment work. In the context of the Noort case, the operating requirements of the Transport Act required a minimum of delay in the administration of tests for breath/blood alcohol levels.[100]

Where an enactment constitutes the limit on a right or freedom, there is no issue that the limit is prescribed by law. But what of limits imposed by discretionary powers? It could be argued that if a discretionary power infringes a right, then the limit imposed is not prescribed by law. In other words, it is the exercise of the discretionary power that imposes the limit, not any law. The point arose in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors.[101] In this case, four films had been submitted to the board of censors for approval for public showing. The board approved two of the films but on a limited basis and rejected the other two. The board's power to censor the films was under a broad discretion conferred by ss3, 35 and 38 of the Ontario Theatres Act. The Court found that these sections infringed the freedom of expression guaranteed by s2(b) of the Canadian Charter. The Attorney-General argued that the board's authority to curtail freedom of expression was prescribed in law by ss3, 35 and 38. The Ontario High Court disagreed.[102] The board's powers were not sufficiently defined and the Court found that the limits on s2(b) were being infringed not by the law but by the exercise of the board's discretion. Accordingly, the board's decision was quashed.

However, the Canadian Supreme Court has since resolved the argument to the contrary in Slaight Communications Inc v Davidson.[103] In this case, a labour arbitrator's award included an order forbidding an employer to reply to any enquiries about an former employee's employment with the employer except by a letter of reference. The Court agreed that the arbitrator's order violated the employer's freedom of expression as guaranteed in s2(b) of the Canadian

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100 Ministry of Transport v Noort [1992] 3 NZLR 260 at 272-283

101 (1983) 41 OR (2d) 583, affirmed (1984) 45 OR (2d) 80

102 Affirmed by the Ontario Court of Appeal

103 (1989)59 DLR (4th) 416

Charter. However, the Court found the order was nevertheless a "reasonable limit prescribed by law" under s1 of the Charter. Lamer J said:[104]

> "However, this limitation is prescribed by law and can therefore be justified under s1. The adjudicator derives all his powers from statute and can only do what he is allowed to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorises the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the Charter."

The effect of the Slaight Communications case is that as long as the discretion is supplied by statute, such discretions are covered by the phrase "prescribed by law". It remains to be seen whether the Slaight Communications approach will be followed in New Zealand. In the writer's view it should be. Otherwise, decisions made under broad statutory powers are unlikely to ever be justified under s5 as reasonable limits prescribed by law. This may have the result that an otherwise reasonable decision could be invalidated. Under the Slaight Communications approach the phrase "prescribed by law" is much more easily satisfied and therefore the Court's focus is rightly shifted to the reasonableness of the decision.

But in the New Zealand context there is a further difficulty with the phrase because of the operation of s4. If the rights and freedoms contained in the bill are limited by law, and the law is expressed by an enactment, then s4 says that those limits shall prevail. Any analysis under s5 is redundant. It is simply irrelevant whether the limit is unreasonable or cannot be demonstrably justified in a free and democratic society. Section 4 says that the limiting enactment must be applied nevertheless.

It is issues such as this that have confounded judges and commentators alike as to what is the proper application of s5.

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104 Ibid at 446

C. Section 6

Given the "numbing application of s4"[105] and the uncertainty as to the role of s5, not surprisingly, of the three sections, s6 has assumed increasing importance. Certainly Cooke P has made it clear how he views s6. In R v Phillips[106] he referred to s6 as "an important section".[107] And, in Noort he said:[108]

> "Turning to s6, it is to be noted that this is one of the key features of the New Zealand Bill of Rights Act. It lays down a rule of interpretation comparable in importance to - perhaps of even greater importance than - s5(j) of the Acts Interpretation Act 1924 ..."

Essentially, s6 provides a rule of interpretation for all enactments.[109] It requires, as a prerequisite to its application, that an enactment is capable of at least two meanings, one consistent with the rights and freedoms in the Bill and an another not. In such a situation, s6 mandates what the Courts approach must be. If the enactment "can be given a meaning" consistent with the Bill, the Court must "prefer" that meaning to any other.

When one considers the unequivocal statement of legislative primacy in s4 and the peremptory directive to the Courts in s6, the impression is given that s6 offers the Courts little scope in the interpretation of enactments.

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105 PA Joseph Constitutional and Administrative Law in New Zealand The Law Book Company Ltd, 1993, Sydney at 864

106 [1991] 3 NZLR 175

107 Ibid at 176

108 [1992] 3 NZLR 260 at 272

109 See Part III A of this paper

However, this is illusory.[110] In fact a raft of methods of interpretation are available to the Courts.[111]

1. Interpreting the Bill of Rights Itself

The New Zealand Courts were quick to note that the Bill of Rights was not to be interpreted according to principles of interpretation applicable to ordinary statutes. This is because of the very nature of declarations of human rights. Necessarily, they are drafted in "a broad and ample style which lays down principles of width and generality".[112]

In one of the first Supreme Court of Canada decisions dealing with the Canadian Charter, Hunter v Southam Inc,[113] Dickson J said:[114]

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with any eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot be easily repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."

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110 P Rishworth "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZ Recent L. Rev 337 at 344

111 See J F Burrows Statute Law In New Zealand, Butterworths, 1992, Wellington at 339

112 Minister of Home Affairs v Fisher [1980] AC 319 at 328 per Lord Wilberforce

113 [1984] 2 SCR 145

114 Ibid at 155

Or as Lord Sankey more colourfully put it:[115]

> "[A constitution] is a living tree capable of growth and expansion within its natural limits."

Accordingly, it is said that declarations of human rights call for a purposive approach:

> "The meaning of a right or freedom guaranteed by the declaration of human rights [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect."[116]

A purposive approach is to interpret the Bill of Rights generously rather than "narrowly or technically".[117] Often cited as authority for a generous approach are the "immortal"[118] words of Lord Wilberforce in Ministry of Home Affairs v Fisher.[119]

> "[Bill of Rights] call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".[120]

Therefore, it was not without significance that in the very first Bill of Rights case to reach the Court of Appeal, Flickinger v Crown Colony of Hong Kong[121] Cooke P referred to "the purpose or spirit of the New Zealand Bill of

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115 Edwards v Attorney-General for Canada [1930] AC 124 at 136

116 R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 at 359

117 Cooke P in R v Butcher [1992] 2 NZLR 257 at 264

118 Lord Wilberforce's statement appears to be a particular favourite of Cooke P. In Ministry of Transport v Noort [1992] 3 NZLR 260 at 268 he refers to the statement being "destined for judicial immortality" and in his remarks at the "Bill of Rights Reports launch" (1993) NZLJ 123 at 124 he refers to the statement as "an immortal note".

119 [1980] AC 319

120 Ibid at 328

121 [1991] 1 NZLR 439

Rights Act"[122] thereby heralding that the New Zealand courts should adopt a purposive approach.

2. The frozen concepts approach

The adoption of a purposive approach to interpreting the Bill of Rights has been to reject its antithesis, the "frozen concepts" approach. The expression comes from Canada where it was used to describe the approach of some judges to the Canadian Bill of Rights Act.[123] That Act provided that the rights therein "have existed and shall continue to exist."[124] Accordingly, some judges considered that the content of the rights in the Act had to be determined in accordance with their state as in 1960. The frozen concepts approach was eventually rejected by the Canadian Supreme Court.[125] But some of the early New Zealand Bill of Rights cases, referring to s2 which "affirms" the rights in the Bill, did flirt with the concept.[126] However, now the weight of New Zealand authority is to reject the frozen concepts approach. In Re S[127] Barker J noted that the Long Title to the Bill:[128]

> " ... indicates that a commitment to individual constitutional rights is not only required by international law, but that that commitment must develop."

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122 Ibid at 441

123 As distinct from the Canadian Charter of Rights and Freedoms 1982

124 Section 1

125 See Curr v R (1972) 26 DLR (3d) 603 at 609

126 E.g. R v Nikau (1991) 7 CRNZ 214, Minto v Police (1991) 7 CRNZ 38, R v Waddel Unreported, 25 October 1991, High Court, Auckland Registry, T119/91 and R v Butcher [1992] 2 NZLR 257

127 [1992] 1 NZLR 363

128 Ibid at 374

In Noort, Cooke P cited Barker J's judgment in Re S and said:[129]

> "[the Bill] requires development of the law where necessary. Such a measure is not to be approached as if it did not more than preserve the status quo."

Interestingly, in Noort the Crown specifically urged the Court of Appeal not to take a purposive approach on the ground that the Bill was not a constitutional document. The Crown sought to distinguish the Bill from the Bermuda Constitution which was the subject of the Privy Council decision in Ministry of Home Affairs v Fisher.[130] In particular, the Crown referred to the following passage:[131]

> "When therefore it becomes necessary to interpret "the subsequent provisions of "Chapter I - in this case section 11 - the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that "child" means "legitimate child" but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
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> It is possible that, as regards the question now for decision, either

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129 [1992] 3 NZLR 260 at 270

130 [1980] AC 319

131 Ibid at 329

method would lead to the same result. But their Lordships prefer the second."

Instead the Crown argued that "generosity, and nothing more than generosity" is needed.[132] Cooke P thought the debate to be of "minimal importance" in the context of the Noort case[133] and Richardson J doubted whether any such choice had to be made.[134] Richardson J did, however, categorically endorse the purposive approach which he said was "mandated for all statutory interpretation in New Zealand by s5(j) of the Acts Interpretation Act 1924."[135]

3. Can Be Given A Meaning

How wide is the rule of interpretation that s6 gives the judiciary? And, what are the limits and criteria to which a Court can give a meaning to an enactment? Traditionally, the task of an interpreter is to give effect to the intention of Parliament. As Somers J said:[136]

> "The function of the Court in relation to a statute is to discover the intention of the legislature. That intent is to be ascertained from the words it has used. But the richness of the English language is such that the same words or phrases may convey different ideas depending upon the context and circumstances in which they are used. So it is that the words used in an enactment are to be considered in the light of the objects which the statute as a whole is intended to achieve. In modern legal parlance that is called a "purposive" construction. But it has still to be stressed that the inquiry is not as to what the legislature meant to say but as to what is means by what it has in fact said in the framework of the Act as a whole."

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132 [1992] 3 NZLR 260 at 269

133 Ibid

134 Ibid at 278

135 Ibid

136 Donselaar v Donselaar [1982] 1 NZLR 87 at 114

In the event, the potency of s6 as a rule of interpretation will be decided by the Courts themselves. Section 6 appears to offer ample scope for interpretation by the Courts. It only requires that the enactment in question can be given a meaning that is consistent with the Bill. In the context of the Canadian Charter, Beetz J said the courts:

> "can do some relatively crude surgery on deficient legislative provisions, but not plastic or reconstructive surgery"[137]

However, to date, the New Zealand courts have taken a much more cautious approach. In R v Phillips,[138] Phillips was convicted under s6 of the Misuse of Drugs Act on two counts of possession of cannabis for sale. Section 6(6) of that Act creates a presumption that, "until the contrary is proved", a person is deemed to be in possession of cannabis for a prohibited purpose where there is possession of 28 grams or more of cannabis. In the Court of Appeal, Phillips argued that the expression "until the contrary is proved" in s6(6) should be interpreted, in accordance with s25(c) of the Bill, to require Phillips only to raise some evidential foundation sufficient to create a reasonable doubt.

However, Cooke P was:[139]

> " ... not persuaded that the ordinary and natural meaning of the word "proof" or "proved" is capable of extending so far. To suggest that s6(6) of the Misuse of Drugs Act can be used in the sense contended for is, in our view, a strained and unnatural interpretation which, even with the aid of [s6 of] the New Zealand Bill of Rights Act, this Court would not be justified in adopting."

Accordingly, important as the rule of interpretation that s6 lays down is, it will not allow the Courts to adopt "a strained and unnatural interpretation."[140]

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137 Re Singh and MEI (1985) 17 DLR (4th ed) 422 at 439

138 [1991] 3 NZLR 175

139 Ibid at 277

140 Ibid

And, in Knight v Commissioner of Inland Revenue[141] Hardie Boys J thought that:[142]

> "Section 6 is unlikely to be available except where there is ambiguity or uncertainty."

But, perhaps most significantly, Cooke P has introduced an element of reasonableness into the application of s6. In Noort he said that s6 will only come into play when the enactment "can reasonably be given [ ] a meaning [consistent with the rights and freedoms in the Bill]. A strained interpretation would not be enough."[143]
(The underlining is the writer's.)

And, in Baigent v Attorney-General,[144] he said:[145]

> "Moreover, the effect of s6 of the Bill of Rights Act is that [enactments] are all to be given, so far as reasonably possible, a meaning consistent with the rights affirmed in s21 [of the Bill]"

(Again, the underlining is the writer's.)

So it would see that there will be little crude surgery done by the New Zealand courts using s6.

4. Meaning

Perhaps of only academic interest, the use of the word "meaning" in s6 was considered at length by Hammond J in Simpson v Police.[146] After citing several distinguished philosophers of language who have damned the word

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141 [1991] 2 NZLR 30

142 Ibid at 43

143 [1992] 3 NZLR 260 at 272

144 Unreported, 29 July 1994, Court of Appeal, CA 207/93

145 Ibid at 13

146 Unreported, 17 June 1993, High Court, Hamilton Registry, AP 53/91

"meaning" as "a harlot amongst words" and noting that whole books have been written on the meaning of meaning, Hammond J rebuked the drafters of the Bill for using the word and suggested that the word "construction" should be substituted. What practical difference this will make escapes the writer.

5. Preferred

The use of the term "preferred" in s6 suggests a further element of judicial discretion for the Courts. But the exact nature of the discretion remains unclear. What can be safely said is that it would be wrong for the Courts to prefer a consistent meaning to the Bill when it is clear that an inconsistent meaning was intended by Parliament. Unlike s5, s6 is not expressed to be subject to s4. But nevertheless s4 prevails.

6. Relationship with s5(j) Acts Interpretation Act

The exact relationship between s6 of the Bill of Rights and s5(j) of the Acts Interpretation Act is also unclear.

Indeed, there is a certain tension between the two sections. On the one hand, s6 requires an interpretation of an enactment in accordance with the Bill of Rights. But, on the other hand, s5(j) requires:

> "... such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit:"

In other words, s5(j) requires an interpretation which best furthers the purpose of the enactment.

Obviously, there will be no difficulty if an interpretation of an enactment both furthers the purpose of the enactment and is consistent with the Bill. But what if the purpose of the enactment is not consistent with the Bill of Rights? Which prevails?

In Noort Cooke P said that s6 "lays down a rule of interpretation comparable in importance to perhaps of even greater than - s5(j) of the Acts

Interpretation Act"[147] But this, in the writer's view, is doubtful. An interpretation which furthers the purpose of an enactment is more consistent with parliamentary primacy, which the Bill, through s4, clearly confirms. As Gault J in Noort said:[148]

> "It is no more and no less than an exercise in statutory interpretation assisted where necessary by the objects of the legislation. Section 6 does not repeal s5(j) of the Acts Interpretation Act 1924."

Not that that in itself is negative. Section 5(j) mandates a purposive approach to the Bill as discussed.[149] But s5(j), not s6, remains the "cardinal rule of statutory construction in New Zealand."[150]

7. Internationalism - A s6A?

A feature of the Court of Appeal's approach to the Bill of Rights has been its preparedness to draw on the experience of other jurisdictions in the interpretation and application of similiar declarations of human rights. Of course, this is not altogether surprising. The drafters of the Bill drew heavily on the Canadian Charter and the Canadians, in turn, drew on the International Convenant and the European Convention. Obviously then, decisions on the Canadian provisions and other comparable provisions were going to assist the New Zealand courts. This is particularly so with s5, which so closely follows s1 of the Canadian Charter.

There is then a concept of internationalism in the interpretation and application of the Bill. And, indeed, this is reinforced by the Long Title to the Bill which identifies as one of the purposes of the Bill "To affirm New Zealand's Commitment to the International Covenant on Civil and Political Rights". No better illustration is the judgment of Hardie Boys J in Baigent v Attorney-General.[151] During the course of his judgment, Hardie Boys J

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147 [1992] 3 NZLR 260 at 272

148 Ibid at 294

149 See 133

150 Police v Christie [1962] NZLR 1109 at 1112

151 Unreported, 29 July 1994, Court of Appeal, CA 207/93

includes references to the decisions of the courts of New Zealand,[152] England,[153] Australia,[154] Canada,[155] the United States,[156] India,[157] Ireland,[158] the Human Rights Committee,[159] the Inter-American Court of Human Rights[160] and the European Court of Human Rights.[161]

One might be tempted to elevate this theme of internationalism to be the equivalent of an operational provision of the Bill. A s6A if you like. But it would be a mistake to overstate this. New Zealand's Bill of Rights will never be a clone of the others. It will remain as individual as New Zealand is itself. As Richardson J said:[162]

> " ... there are obvious differences in our legal and social history, differences in societies and cultures; and a constitution plays a different role in a federation from an unentrenched statement of rights which does not override inconsistent legislation in a unitary state. Jurisprudence in other jurisdictions provides valuable insights but can never be determinative of New Zealand law."

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152 Eg, ibid at 3

153 Eg, ibid

154 Eg, ibid at 4

155 Ibid at 20

156 Ibid at 19

157 Ibid at 17

158 Eg, ibid at 18

159 Ibid at 15

160 Ibid

161 Ibid at 16

162 R v Jefferies [1994] 1 NZLR 290 at 299, 300

IV. AN ANALYSIS OF HOW THE OPERATIONAL SECTIONS INTERRELATE

A. Ministry of Transport v Noort[163]

Rishworth commented:[164]

> "Few Court of Appeal decisions in recent years were awaited with such keen anticipation as that in Ministry of Transport v Noort; Police v Curran."[165]

This was largely because Noort was the first case in which the New Zealand Court of Appeal had to fully consider the meaning and effect of the operational provisions of the Bill of Rights, in particular, ss4, 5 and 6. This is not to say that Noort was the first case where the Courts had utilised ss4, 5 or 6. Indeed in the first Bill of Rights case to reach the Court of Appeal, Flickinger v Crown Colony of Hong Kong,[166] the Court used s6 to help decide the appeal.[167] However, Noort was the first case where the Court of Appeal had to consider the operational provisions of the Bill in the context of an argument that another statute was inconsistent with the Bill of Rights and should prevail over the Bill.

B. The Facts of Noort

The facts of the Noort appeal[168] are unremarkable. Noort was apprehended after driving at 85 kilometres per hour in an area within a 50 kilometre limit. He was convicted of exceeding the speed limit and driving while disqualified. No question arose in the Court of Appeal as to these two convictions. However, Noort was also requested to undergo a roadside breath screening

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163 [1992] 3 NZLR 260

164 "Two Comments on Ministry of Transport v Noort" (1992) NZ Recent L. Rev 189.

165 The two cases were heard together.

166 [1991] 1 NZLR 439

167 See Part VD of this paper

168 The facts of the Curran appeal were different but the differences are not material here.

test. The test was positive. Noort was then required to accompany the traffic officer to a police station to undergo an evidential breath test. That test showed a reading of 1000 micrograms of alcohol per litre of breath. The limit was 150 micrograms for unlicensed drivers. Noort was charged and convicted with driving with excess breath alcohol. Noort's appeal to the Court of Appeal was in respect of this conviction only.

C. The Issue in Noort

The quite narrow issue raised by Noort was whether a person who was detained to undergo an evidential breath test or a blood test under ss58B and 58C of the Transport Act must be advised of his or her right to consult and instruct a lawyer under s23(1)(b) of the Bill of Rights.

As a starting point, it was conceded by the Crown that, by being detained to take a breath test under the Transport Act, Noort was "detained under any enactment" in terms of s23(1)(b). The Crown further conceded that Noort had not been told of his right to "consult and instruct a lawyer without delay" as s23(1)(b) requires.[169]

Accordingly, on the face of it, there had been a clear violation of Noort's right to a lawyer protected by the Bill. Ordinarily, evidence obtained in consequence of a breach of the Bill of Rights is ruled out.[170] Often, in such cases the only evidence of intoxication is the breath or blood test and therefore this is usually fatal to the prosecution's case.

However, in Noort's case the Crown had a further argument. It was argued that the "operating requirements"[171] of the Transport Act excluded s23(1)(b) of the Bill and therefore the right to a lawyer altogether.

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169 In his judgment Gault J dissented that the evidence did not support this concession, [1992] 3 NZLR 260 at 289 and 290.

170 There is a line of authority for this proposition. For example, R v Kirifi [1992] 2 NZLR 8, R v Te Kira [1993] 3 NZLR 257 and Ministry of Transport v Noort [1992] 3 NZLR 260 at 267.

171 See Part III B 5(ii) of this paper

In other words, the Crown argued that the right to a lawyer was inconsistent with and would not allow the effective operation of the testing procedures under the Transport Act. Therefore, pursuant to s4 of the Bill, s23(1)(b) was overridden. Or, in the alternative, exclusion of the right to a lawyer was justified in terms of s5 of the Bill.[172]

It is important to note that the Crown did not (because it could not) base its argument on any express provision of the Transport Act. That Act is silent on the right to a lawyer. Rather, the Crown argued that the right to a lawyer under s23(1)(b) of the Bill was overridden by the Transport Act by implication. The High Court in both the Noort and Curran cases had accepted this argument. And there had been previous cases where this kind of argument on behalf of the Crown had been successful. For example, in R v Waddel[173], Waddel was charged with importing heroin into New Zealand and was strip searched under s18 the Misuse of Drugs Act. Thomas J found on the facts of the case that Waddel:

(i) had been detained under an enactment; and

(ii) had not been informed of his right to a lawyer under s23(1)(b).

However, Thomas J accepted that the operating requirements of the powers of search under the Misuse of Drugs Act would be impaired if Waddel had to be given access to a lawyer. He found that s18 of Misuse of Drugs Act was inconsistent with s23(1)(b) of the Bill of Rights. In the circumstances it was not possible to confer the s23(1)(b) right and still give effect to Parliament's intention in enacting the Misuse of Drugs Act and thus give s18 its true meaning.[174]

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172 See text accompanying n181

173 Unreported, 25 October 1991, High Court, Auckland Registry, T 119/91

174 Ibid at 22. Presumably by the use of the word "inconsistent" Thomas J in fact used s4 to reach this decision. However, at 22 he says that "ss4, 5 and 6, read collectively" brought him to his decision.

D. The Result in Noort

In the Noort case the Court of Appeal rejected the Crown's argument. Despite the dissenting judgment of Gault J, there was agreement, more or less, as to the result. The Court quashed Noort's conviction based on his evidential breath test.

However the Court could not agree on the respective roles of ss4, 5 and 6 of the Bill. In particular, the role of s5 caused the most difficulty. The five judges divided four ways (arguably three) as to their reasoning. As Rishworth commented:[175]

> "As it turns out Noort raises as many questions as it answers."

E. The Essential Problem with the Operational Provisions

It may assist if we remind ourselves what is the difficulty in all this. The essential problem is that s4 of the Bill provides that if another enactment is inconsistent with the Bill of Rights then that other enactment prevails. In particular, s4 prohibits possible judicial responses to inconsistent legislation.

Section 5 of the Bill provides that the rights and freedoms in the Bill are not absolute. They are subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. As Richardson J said:[176]

> "[Section 5] reflects the reality that rights do not exist in a vacuum, that they may be modified in the public interest to take account of the rights of others and of interests of the whole community".

The difficulty is that s5 has been made subject to s4. Unlike s5, s4 has no criteria of reasonableness. Therefore, while s5 provides that only reasonable limits to the Bill are permitted, s4 permits any kind of limits to override the Bill whether reasonable or not. Therefore, in theory, at its most extreme, s4

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175 "Two comments on Ministry of Transport v Noort" (1992) NZ Recent L. Rev. 189 at 190

176 [1992] 3 NZLR 260 at 283

permits Parliament to pass legislation enabling the murder and torture of people contrary to ss8 and 9 of the Bill.

As a result, two of the judges in Noort (Cooke P and Gault J) had reservations about the role of s5 and whether in fact it was relevant at all to their task of deciding between two arguably inconsistent statutes.[177] In the event, they decided the appeal without recourse to s5 at all.

However for the other three judges (Richardson, Hardie Boys and McKay JJ) s5 was instrumental in their reasoning. Although Hardie Boys J differed again (albeit slightly) in his approach.

F. An Analysis of the Reasoning of Cooke P

Cooke P's approach was premised by his preliminary finding that the issue in Noort was simply one of inconsistency between two statutes, the Transport Act and the Bill of Rights.[178] Accordingly, he held that that issue fell to be determined under ss4 and (if necessary) 6 of the Bill.[179]

Cooke P did not think that any question for the Court arose under s5.[180] For him, s5 was a section stating when the rights and freedoms contained in the Bill may acceptably be made subject to limits. But, as no interpretation involving a limitation of the rights in the Bill had been argued by the Crown, it was therefore unnecessary for him to form a committed opinion on the role of s5.[181]

For Cooke P the role of s5 was limited to two situations.[182]

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177 Ibid at 271 and 295

178 Ibid at 273

179 Ibid

180 Ibid at 271

181 However, this is at odds with Richardson J's judgment which at 282 refers to the Crown's submission that the exclusion of the right to a lawyer during the course of the testing process was justified in terms of s5.

182 [1992] 3 NZLR 260 at 273

(i) when the common law imposes a limit on a right; and

(ii) when the Attorney-General reports to the House of Representatives as required by s7 of the Bill.

Cooke P held that the breath testing provisions of the Transport Act were not inconsistent with the Bill of Rights. He said that the testing procedures would not be substantially impaired by the time required to give drivers a limited opportunity of making telephone contact with a lawyer and taking advice. He said that in relation to evidential breath tests and blood tests the two Acts can "reasonably stand together".[183]

G. An Analysis of the Reasoning of Gault J

Like Cooke P, Gault J did not consider that s5 was relevant in the Noort case. However, unlike Cooke P, Gault J did not articulate a distinction as to whether the issue was one of inconsistency (so as to be determined under ss4 and 6) or one of limits on rights (so as to be determined under s5). For Gault J the correct approach was to apply established rules of statutory interpretation.[184]

First, he said s6 should be applied. If the provisions of the Transport Act can be construed so as to be consistent with s23(1)(b) of the Bill that must be done. But in this case, Gault J found that any reasonable interpretation of the Transport Act provisions was inconsistent with the full and unrestricted right to consult and instruct a lawyer.[185] He found no role for s5 to assist in the circumstances:[186]

> "Where on a proper interpretation of a New Zealand statute there is a limit imposed upon a fundamental right, it is no part of the function of the Courts to examine whether that limit can be justified. The limit must be given effect to as directed by s4".

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183 Ibid at 274

184 Ibid at 294 and 296

185 Ibid at 294. This finding is of course completely contrary to Cooke P's.

186 Ibid at 295

Gault J, like Cooke P, suggested a limited role for s5:[187]

> "[Section 5] seems rather directed to the role of the Attorney General under s7. It may assist in a conflict between common law rules and the fundamental rights, but I can see no part for it to play in cases of statutory inconsistency."

After repeating his view that the correct course is to approach each case by applying the established rules of statutory interpretation Gault J said:[188]

> "If taking into account the direction in s6 that statutes are to be given meanings consistent with the rights and freedoms contained in the Bill of Rights Act, a particular statutory provision properly interpreted is inconsistent with full enjoyment of such a right or freedom, the statutory provision must be given effect and the right or freedom will remain only to the extent that it too can be given effect to."

In the event Gault J agreed with the other judges that a limited right to consult a lawyer by telephone existed. By Gault J's analysis such a right was a residual one that remained after the provisions of the Transport Act had been given effect to. He said that such a right was "sensible"[189] and "accords with fairness"[190].

H. An Analysis of the Reasoning of Richardson J[191]

In contrast to Cooke P and Gault J, Richardson J found a much more generous role for s5 and relegated s4 to being sequentially the third of the three sections to be considered. He said:[192]

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187 Ibid

188 Ibid at 296

189 Ibid

190 Ibid

191 McKay J's judgment is very short and he simply concurs with Richardson J

192 [1992] 3 NZLR 260 at 282

> "In such a case [as Noort] it is more consistent with the purposes of the Bill of Rights Act to resort to s4 only if the challenged action cannot be justified in terms of ss5 and 6. But it is not immediately apparent whether the Court should turn first to s5 or to s6."

After expressing a tentative and obviously obiter view on the role of s6, that it is designed to soften where possible the potential impact of s4, Richardson J thought "logically" s5 was the first of the three sections that should be applied.[193]

Richardson J found that the "operating requirements" of the Transport Act did impose limits on the right to a lawyer. By "operating requirements" he meant that it was implicit in the breath testing procedures that there should be no unreasonable delay in carrying through the statutory processes.[194] Necessarily the full right to a lawyer would delay the testing process.

Applying Canadian precedent[195], Richardson J found that limits imposed by the "operating requirements" of an Act are limits "prescribed by law" as provided for in s5. In this situation, the operating requirements of the Transport Act limited the right to consult a lawyer to be by telephone only. However, such a limit was reasonable and could be demonstrably justified in terms of s5.[196]

Accordingly:

> "... the breath/blood alcohol provisions are not inconsistent with the Bill of Rights Act provisions for the right to a lawyer within any justifiable limits prescribed by law under s5"[197]

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193 Ibid

194 Ibid at 284

195 R v Therens (1985) 18 DLR (4th) 655

196 [1992] 3 NZLR 260 at 285

197 Ibid

I. An Analysis of the Reasoning of Hardie Boys J

The reasoning of Hardie Boys J is not dissimilar to that of Richardson J. However, while Richardson J reached his conclusion by applying s5 alone, Hardie Boys J thought:[198]

> "The Part I sections particularly ss4, 5 and 6 must be read as a whole. Only then, I think, is the true significance of s5, otherwise a difficult provision, apparent."

However, like Richardson J, Hardie Boys J gave primacy to s5 and described it as having "a reconciling or bridging role between the two sections between which it is placed, s4 and s6."[199]

For Hardie Boys J the role of s4 was limited:

> "Thus in terms of s4 there will be inconsistency between an enactment and a right or freedom only if after construing it in accordance with s6 there is no room within it for the right or freedom even in modified or abridged form."[200]

As if responding to the judgment of Gault J, Hardie Boys J went on to say:[201]

> "To view the matter in this way is no arrogation by the Court of the responsibility of determining what is a reasonable limit, and what can be demonstrably justified in a free and democratic society. Rather it is to see s5 as a mechanism to secure recognition of the Act's rights and freedoms to the fullest extent that is reasonable and practicable in a specific statutory context."

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198 Ibid at 287

199 Ibid

200 Ibid

201 Ibid

Hardie Boys J agreed with Richardson J that a limited right to consult a lawyer by telephone would not be inconsistent with the Transport Act's operating requirements.

J. Comments on the Reasoning of Cooke P and Gault J.

It is difficult to ascertain from Cooke P's judgment how, having dismissed s5 as being irrelevant, he came to his result. Necessarily Cooke P interpreted s23(1)(b) of the Bill to mean, in the context of breath testing procedures, a right to consult a lawyer by telephone only. Such a right is obviously a limited right. A full right might include the right to consult a lawyer in person before any of the testing procedures may continue. Therefore, notwithstanding his preliminary finding (that the issue in the case was about "inconsistency" rather than "limits on rights"), Cooke P obviously found that the Transport Act did impose limits on the right to a lawyer. But how did Cooke P formulate these limits? Obviously it was not by s5's test of reasonableness. Instead Cooke P's formulation seems to be, in the context of breath testing procedures, by what extent the two Acts "can reasonably stand together." Such an analysis does not accord with ss4 and 6 of the Bill. And, it seems odd one might have thought, when s5 offers the Bill's own test of reasonableness, that Cooke P should prefer his own formulation as to the extent that the rights in the Bill might be limited.

The same criticism can be made of Gault J's judgment. While, unlike Cooke P, he found in terms of s6 the two statutes were inconsistent, and by s4 the Transport Act prevailed, he still found a residual right to consult a lawyer by telephone. But on what basis did this residual right remain? Gault J comments that such a residual right was sensible and accords with fairness. But obviously they were not the tests that he applied.

In the event all the judges in the Court of Appeal came to the same result. But the approach of Cooke P and Gault J was by some unexplained evaluation of what should remain of s23(1)(b) of the Bill after applying the provisions of the Transport Act.

K. Comments on the Reasoning of Richardson and Hardie Boys JJ

The primary criticism of the reasoning of the Richardson and Hardie Boys JJ is, made by Cooke P and Gault J, that if the law[202] imposes a limit on a right in the Bill, it is no function of the Court to examine whether that limit is reasonable or not. The law is the law and, by s4, it must be applied.

In his judgment Cooke P expounded further arguments rejecting a broader role for s5. He suggested that it was simply not the role of s5 to interpret other enactments. Rather, s5 sets down a rule of substance as to when the rights and freedoms in the Bill may acceptably be made subject to limits. In other words, s6 provides the rule for interpreting other enactments, s5 does not.

A further argument is from the wording of the sections themselves "which cannot be ignored.[203] The Bill of Rights refers to itself in two different ways. Section 4 uses the words "any provision of this Bill of Rights" while ss5 and 6 [and 7] use the words "the rights and freedoms contained in this Bill of Rights". If one assumes that the distinction is deliberate and is intended to mean something, what then is a "provision" of the Bill if it not the rights and freedoms themselves? The argument follows that a "provision" must be a right or freedom after the application of s5. In other words a "provision" is a right or freedom subject to reasonable limits as opposed to a right or freedom in its absolute form.

But s6, the only section of the Bill which clearly by its wording is directed towards the interpretation of other enactments, refers to the rights and freedoms in their absolute form. If s6 had required an enactment to be given a meaning consistent with "any provision" of the Bill, only then would s5 have a function to influence the relationship between the Bill of Rights and other enactments.[204]

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202 Which includes the operating requirements of a statute, see Part III B of this paper

203 Cooke P in [1992] 3 NZLR 260 at 273

204 This reasoning is more fully developed by Fisher J in Herewini v MOT [1990-92] 3 NZBORR 113 at 140 than by Cooke P in Noort

V. AN ANALYSIS OF CASES THAT HAVE APPLIED SECTIONS 4, 5 and 6

Fortunately, Bill of Rights cases of the complexity of Noort have been few. But, ss4, 5 and 6 have featured in many cases on the Bill. This part of this paper will then give more specific consideration to how the Courts have been applying the three sections.

A. Collectively

It has to be accepted that there is certain attraction, rather than attempting to analysis the three sections individually, in lumping them together and considering them as a whole.

Certainly that was the approach of Hardie Boys J in Noort. According to Hardie Boys J, by reading the three sections together, only then, did the significance of s5 become apparent.[205] With respect to Hardie Boys J subsequent analysis,[206] there is nothing particularly apparent about s5. As much of this paper has attempted to show, s5 is a difficult section. In the event, Hardie Boys J found a generous role for s5,[207] but it is difficult to follow how, in fact, reading the three sections as a whole assisted him to coming to that decision. In the writer's view, Hardie Boys J's approach is to accept that an intricate analysis of the three sections may not be helpful or, indeed, even necessary.

Similarly, in R v Waddel[208] Thomas J found that a person who is detained for a search under the Misuse of Drugs Act is detained under an enactment for the purposes of s23(1) of the Bill. Therefore, such a person should be advised of his or her right to consult a lawyer. However, the Court found that the Misuse of Drugs Act was "inconsistent"[209] with the Bill and therefore no breach of the Bill had occurred. As such, the case seems to be a clear,

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205 [1992] 3 NZLR 260 at 287

206 Ibid

207 As opposed to the limited role that Cooke P and Gault J suggested

208 Unreported, 25 October 1991, High Court, Auckland Registry, T 119/91

209 Ibid at 22

though arguably unnecessary,[210] application of s4. But Thomas J did not identify the section that he relied upon to come to his decision. Instead, he simply referred to ss4, 5 and 6 and said that he did not need to pursue their ultimate meaning. Rather he passed the observation that read collectively, they mean that the Bill of Rights is paramount unless contrary legislation prevails.[211]

B. Unnecessary Use of Section 4

If by the operation of s5, the Bill of Rights only guarantees rights and freedoms in their limited form, then it can be argued that it is unnecessary to use s4 when enactments are really only imposing reasonable limits. R v Waddel[212] provides a good example. Rather than finding that the Misuse of Drugs Act was "inconsistent" with the Bill, it is arguable that equally Thomas J could have found that the Misuse of Drugs Act prescribed a reasonable limit on the right to consult a lawyer using s5. Another example is Police v Temese.[213] In this case the Court of Appeal had to consider whether or not a suspected drink-driving offender being dealt with at the roadside is entitled to consult a lawyer under s23(1)(b) of the Bill of Rights. The judgment of Richardson, Casey, Hardie Boys and Gault JJ was delivered by Casey J. They agreed that, while such a person is "detained", for the purposes of s23(1)(b), the provisions of the Transport Act relating to preliminary inquiries as to identity and breath screening of suspected drunk drivers at the roadside constitute justified limitations under s5 to the right to legal advice.[214] As such the New Zealand approach to this question was the same as in Canada.[215] However, Casey J went on to state that, moreover, the application of s23(1)(b) of the Bill would render "ineffective" those provisions of the Transport Act within the meaning of s4(a) of the Bill.[216] Cooke P delivered a separate

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210 See Part V B of this paper

211 Unreported, 25 October 1991, High Court, Auckland Registry, T119/91 at 22

212 Ibid

213 (1992) 9 CRNZ 425

214 Ibid at 431

215 R v Thomsen (1988) 63 CR (3d) 1

216 (1992) 9 CRNZ 425 at 431

judgment and while stating that he largely agreed[217] with the majority, consistent with his judgment in Noort, he went on to add that while the limit on s23(1)(b) imposed by the provisions of the Transport Act may be reasonable under s5, in any event, by virtue of s4, those provisions had to prevail.[218]

Another example again is TV3 Network Services Ltd v R.[219] Equally, it is argued that the Court of Appeal could have found that the prohibition of the publication of the names of offenders and victims in sexual cases was a justified limit on the freedom of expression guaranteed by s14 of the Bill.

It is suggested that in such cases no reference to s4 need be made. And it certainly assists to make some sense of the application of ss4 and 5, if any application of s4 requires, as a prerequisite, that a right or freedom in the Bill has been unreasonably overridden.

C. Section 5 in Operation

As we have already discussed,[220] the judgments of Cooke P and Gault J in Noort include powerful dicta to say that the role of s5 is limited and peripheral. Nevertheless, there have been a number of cases where the Courts have not questioned s5's role and, indeed, have used it as an integral part of their decision making process.

A good illustration is the significant decision of the High Court in Federated Farmers of New Zealand & Ors v New Zealand Post Ltd.[221] In this case, Federated Farmers sought to resist an increase in the rural delivery service fee charged to farmers by New Zealand Post. The fee was payable under contract by farmers as a condition of delivery of mail "to the gate" in rural areas. While the proposed increase was only from $40 to $80 per annum,

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217 Ibid at 426

218 Ibid at 427

219 [1993] 3 NZLR 421. See Part III A 2 of this paper

220 See Part IVF and G of this paper

221 Unreported, 1 December 1992, High Court, Wellington Registry, CP 661/92

beneath the sums involved were "deeper concerns".[222] There was concern on the part of the rural community at a perceived erosion of traditional rural services.

Included in a raft of causes of action, Federated Farmers pleaded that, by requiring payment of the rural delivery service fee as a condition of farmers receiving their mail, the fee was in breach of s14 of the Bill of Rights. McGechan J had little difficulty finding that "the mails" fell within s14[223] and that New Zealand Post fell within s3.[224] But, the more difficult question was New Zealand Post's argument that the limitation placed upon rural gate delivery by requiring contractual agreement and a fee of $80 for the service was a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.[225]

As to the burden McGechan J agreed it fell to New Zealand Post and as to the standard, he said:[226]

> "Suffice it to say, in principle, the Court is not likely to allow such fundamental rights as those in the Bill of Rights to be displaced under s5 without a clear case made out, and bearing in mind the hurdle of showing limits postulated are "demonstrably" justified."

In this case, the "limits" were the requirement to contract, and more particularly, the rural delivery service fee. But were these limits "reasonable" and "demonstrably justified in a free and democratic society?" On the facts of the case, McGechan J thought so:

> "It is reasonable, and within the parameters of the justifiable in a free and democratic society to impose a degree of "user pays" even upon essential services. There is no undying democratic principle all such

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222 Ibid at 2

223 Ibid at 54

224 Ibid at 54, 55

225 In other words, within s5

226 n221 at 56

must be provided free of charge - which in our society means at the expense of others or all."[227]

McGechan J went on to say:[228]

> "When established as "reasonable limits" such still must be shown to be "demonstrably justified in a free and democratic society". This is a further narrowing. It would be possible to conclude in some cases, on a fine balance, a fee was a "reasonable limit, but to say "oh well, it is reasonable, I suppose it can be justified, though many might think otherwise". That would not do. The limits must not only be "reasonable", and "justifiable", but "demonstrably justifiable"."

While commenting that, on occasions, the Courts will be required to make difficult assessments involving value judgments and social balances,[229] McGechan J did not think the case before him difficult. It was reasonable and demonstrably justifiable for New Zealand Post to charge rural dwellers a modest fee to have the convenience of gate delivery.

Furthermore, referring to the Court of Appeal's decision in R v Mallinson,[230] the "reality" of the situation had to be considered. McGechan J concluded:[231]

> "I consider the reality is that an RDSF [rural delivery service fee] is necessary and appropriate, and does not in practical terms impede freedom of expression. In the circumstances, that limit so placed on the utmost exercise of freedom of expression is not only reasonable, but **demonstrably** justified in our free and democratic society."
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> (The emphasis is McGechan J's)

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227 Ibid

228 Ibid at 57

229 Ibid. Here, McGechan J referred to the judgment of Richardson J in Noort. Implicit is a rejection of a limited role for s5.

230 Unreported, 30 September 1992, Court of Appeal, CA 229/92

231 n221 at 58

The final issue was whether the limits concerned were "prescribed by law". In this case, the limits were the requirement to contract and the fee. McGechan J found that the source of the limits was the State-Owned Enterprises Act 1986 and, in particular, s4(1) of the Act which required New Zealand Post to carry on a "successful business". "In any ordinary sense, [s4(1)] "prescribes" a commercial course of conduct, and inherent within that the imposition of commercially necessary charges. There is foundation in law. While there are not actual express words of grant, specifically directed to the matter, realistically charges can only be regarded as so "prescribed".[232] Accordingly, Federated Farmers' cause of action under the Bill of Rights did not succeed.

Another illustration of s5 in operation is the Court of Appeal's decision in R v Accused (CA 421/93).[233] In this case, the accused was committed for trial on charges of burglary and rape. The complainant, the accused's former wife, had made a sworn statement, in accordance with s185C of the Summary Proceedings Act, which was admitted as evidence at the preliminary hearing. Sadly, she committed suicide prior to the trial and, obviously, there was no longer an opportunity to cross-examine her evidence. However, the High Court declined to exclude her statement from the Crown's evidence and the accused appealed to the Court of Appeal. The question raised by the appeal was in what circumstances was it proper, as a matter of discretion, to allow such a statement to be read at trial.

The answer turned on the application of ss184 and 185C of the Summary Proceedings Act 1957 and ss3 and 18 of the Evidence Amendment Act (No. 2) 1980, to be considered in the context of the standards of criminal justice under the Bill of Rights. In delivering the Court of Appeal's[234] judgment, Richardson J said:[235]

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232 n221 at 59

233 (1993) 11 CRNZ 8

234 Perhaps significantly the coram was Richardson, Casey and McKay JJ.

235 n233 at 17

> "The Bill of Rights is a legislative commitment to the protection and promotion of the fundamental rights and freedoms set out in the statute. In setting "minimum standards of criminal procedure" there can be no doubt where that legislative emphasis lies in this case. They are "minimum rights". Anyone charged with an offence has the right to a fair trial [s25(a)] and the right to cross-examine the witnesses for the prosecution [s25(f)]."

Richardson J noted that the common law, the Bill of Rights and the European Convention on Human Rights all emphasise the role of cross-examination in ensuring fair trials. And, against that background, there was every reason for the Court to exercise its discretion under s184 of the Summary Proceedings Act to ensure conformity with s25(a) and (f) of the Bill.[236] However:[237]

> "In harmony with the justified limitations on the specified rights and freedoms recognised by s5, the Court may properly assess the practical implications of the absense of an opportunity for cross-examination in the particular case. It is not enough for an accused to assert a defence and desire to cross-examine to support the defence. The likely veracity of the complainant's statement is a crucial consideration."

On the facts of the case the Court concluded that there was no basis for giving any substantial weight to the absence of an opportunity to cross-examine the complainant. Accordingly, the appeal was dismissed.

The two cases discussed illustrate the appropriateness of using s5 to read down the rights and freedoms in the Bill. The cases are but two more reminders that the rights and freedoms in the Bill are not absolute. Not that there is anything particularly magical about s5. It will often be to do no more than what the Courts would do anyway, as the judgments of Cooke P and Gault J in Noort well illustrate. But, there is then a choice. Whether to use the criteria that is s5, or some other criteria which, to date, has not been articulated. In

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236 Ibid at 18

237 Ibid

the event, perhaps the best argument in favour of using s5 is that there is simply no good reason not to apply it.[238]

D. Application of Section 6

The potential of s6 is no better illustrated than in the first Bill of Rights case to be considered by the Court of Appeal, Flickinger v Crown Colony of Hong Kong.[239] In this case, Flickinger was committed to prison under the Fugitive Offenders Act 1881 (UK) to await extradition to Hong Kong where he was wanted to face various charges of fraud. Flickinger made an application to the High Court for (inter alia) habeas corpus which was declined. He appealed to the Court of Appeal claiming a right to appeal under s66 of the Judicature Act 1908. Flickinger's argument was based on s23(1)(c) of the Bill which provides:

> "Everyone who is ... detained under any enactment -
>
> ...
>
> (c) Shall have the right to have the validity of the ... detention determined without delay by way of habeas corpus and to be released if the ... detention is not lawful."

At first blush Flickinger's right to appeal to the Court of Appeal had formidable obstacles. Since 1900[240] there had been a long line of authority that had held that a habeas corpus application is a criminal matter and s66 of the Judicature Act did not confer a right of appeal in criminal matters. Indeed, as recently as in 1985 in R v Clarke[241] Cooke P had said that a similar argument was:[242]

> "... plainly untenable. It is altogether inconsistent with statutory patterns and New Zealand legal history".

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238 n164 at 200

239 [1991] 1 NZLR 439

240 Ex Parte Bouvy (No 3) (1990) 18 NZLR 608

241 [1985]2 NZLR 212

242 Ibid at 214

But only five years later, now armed with s6 of the Bill of Rights, the Court of Appeal revisited the issue. While not actually deciding the question, Cooke P said:[243]

> "... we see force in the argument that, to give full measure to the rights specified in s23(1)(c), s66 of the Judicature Act should now receive a wider interpretation than has prevailed hitherto."

In the event, the Court of Appeal found that there were no grounds for disturbing the lower court judgments and, therefore, Cooke P's comment is only obiter. But if s6 can bring the Courts to accept an argument that had been expressly considered and rejected for nearly a century, then it is a potent tool indeed.

However, as discussed earlier in this paper[244] more recent and perhaps more considered cases on s6 have suggested a more conservative approach to the application to s6.

VI. CONCLUSION

In four short years our Bill of Rights has become an integral part of New Zealand law. As such, those who originally demeaned the Bill have been proved wrong. But that is not to say that the path forged by the Bill into our jurisprudence has not been without difficulty. An unentrenched Bill of Rights will always carry the stigma that it should be no more than any other Act of Parliament.

At the centre of any debate about the role of the rights and freedoms contained in the Bill will be the operational provisions, ss4, 5 and 6. After all these are the provisions that tell you how the Bill actually works. And how it fits into our legal system. But, as this paper has attempted to show, the application of these provisions has proved to be difficult. Individually, and

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243 [1991] 1 NZLR 439 at 441

244 See Part III C of this paper

somewhat superficially, the three sections have been referred to by the Courts with alacrity. But any analysis of how the sections interrelate defies a ready answer.

One might well ask, does any of this really matter? After all, every day, our Courts are managing to apply the Bill to any number of fact situations without undue concern. Indeed, for all the complexity of the Noort decision, all the judges in the Court of Appeal came to the same answer, albeit by differing routes.

But it is suggested that it is surely unsatisfactory that there should be such uncertainty over what is such a crucial part of our Bill of Rights. Our Bill is New Zealand's most obvious commitment to the protection of basic human rights and freedoms. But these rights and freedoms are not absolute. Nor should they be fixed. A Bill of Rights must be adaptable in a free and democratic society.

At the heart of every right and freedom there is a conflict. What is a justified limit on any such right or freedom? In the case of Noort the right was the right to consult a lawyer, "part of our basic constitutional inheritance".[245] But, on the other hand, our road toll causes enormous costs, both financial and in human suffering. Drinking and driving is a lethal combination. Few would deny the importance of protecting our roads from alcohol impaired drivers. The testing procedures in the Transport Act are an integral part of that protection.

The judges in Noort agreed that the operating requirements of the testing procedures in the Transport Act could not co-exist with suspected drivers having the full and absolute right to consult a lawyer. If then a right is to be limited, the test as to what should be that limit should be open and certain. After all the very integrity of the rights and freedoms in the Bill is threatened.

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245 Richardson J in [1992] 3 NZLR 260 at 279

While it has to be conceded that there are formidable textual arguments against s5 having such a role, at least s5 offers a discernable test for the assessment of limits. Otherwise the task is left to the subjective viewpoint of an individual judge. The rights and freedoms in the Bill of Rights are simply too important for that. Even more so what are to be the limits on those rights.

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