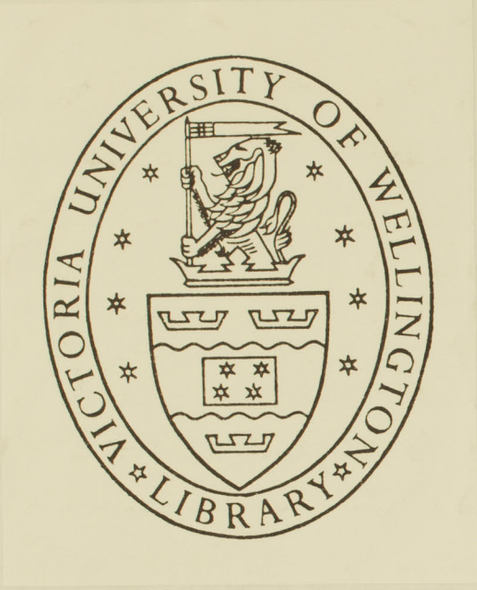
BRIDGET CATHERINE FORBES

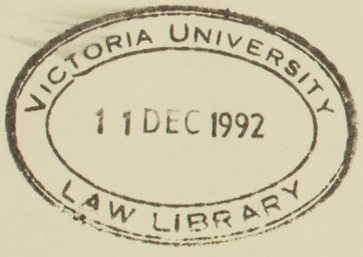
THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

DOES IT HAVE FORCE OR EFFECT?

Submitted for the LLB (Honours) Degree at the
Victoria University of Wellington

1 September 1992


VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY


VICTORIA UNIVERSITY
11 DEC 1992
LAW LIBRARY

CONTENTS

CASES

I INTRODUCTION

The case law which governs the offence of obstruction of an officer in the execution of his or her duty in regard to demonstrators has been developing for forty years and is now well established. The arrest for obstruction will be lawful if there is a genuine and reasonable apprehension on the part of the police of a breach of the peace, and the instruction to avoid the breach of the peace, which is disobeyed by the protester, is itself reasonable.[1] It is no defence that the possibility of the breach of the peace did not emanate from the protester but from irate bystanders, spectators, or passers-by.[2]

As a result a demonstrator who is properly exercising his or her right to peaceful protest can be rendered liable to arrest by the actions of bystanders or spectators who, in the view of the police, threaten a breach of the peace:[3]

> [I]t seems clear law that, in the appropriate circumstances, the attention of irate bystanders, who in the opinion of the police threaten a breach of the peace, can place an obligation upon an innocent protester to comply with reasonable police requests.

However, subsequent to the establishment of this law, the New Zealand Bill of Rights Act 1990 was passed[4] and section 16 of the Bill guarantees the right to freedom of peaceful assembly. The rights and freedoms in that Bill of Rights do not derive from the Act; that is, they are not granted by the state. The rights and freedoms contained in the Bill of Rights are fundamental; the Act is merely declaratory of them.[5] It is an

---

[1] *Police* v *Newnham* [1978] 1 NZLR 845; *Police* v *Peek* [1973] 2 NZLR 595; *Burton* v *Power* [1940] NZLR 305.

[2] *Duncan* v *Jones* [1936] 1 KB 219; *Burton* v *Power* [1940] NZLR 305; *Williams* v *Police* (1986) 2 CRNZ 131.

[3] *Williams* v *Police* (1986) 2 CRNZ 131, 135.

[4] Hereafter referred to as the "New Zealand Bill of Rights", the "Bill of Rights", or "the Bill".

[5] Antony Shaw and Andrew Butler "The New Zealand Bill of Rights Comes Alive (I)" (1991) NZLJ 400, 405-406.

affirmation of New Zealand's commitment to the International Covenant on Civil and Political Rights[6] and an undertaking to protect and promote human rights in New Zealand.

One question which now arises is whether the old case law gives adequate weight to freedom of peaceful assembly, or whether the law can be revised so as to give more accommodation to the section 16 right. This question was discussed in *Minto* v *Police*.[7]

In this case, the appellants were protesting outside a tennis stadium in Auckland as some of the participants in a tournament being held there had previously played in South Africa. The protesters were attracting abuse from passing motorists and also from a queue of people waiting to enter the stadium. They were asked to move by a police inspector who was concerned that a breach of the peace would occur as the prospective spectators might become violent towards the protesters. The appellants refused and consequently they were arrested and charged with obstruction under section 23 of the Summary Offences Act 1981 which provides:

> **23. Resisting Police, prison, or traffic officer**—Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $1000 who resists or intentionally obstructs, or incites or encourages any other person to resist or obstruct,—
>
> (a) Any constable, or any prison officer, or any traffic officer, acting in the execution of his duty; or
>
> (b) Any other person acting in aid of any such constable, prison officer, or traffic officer.

---

6 Entered into force in New Zealand on 28 March 1979.

7 Unreported, 7 February 1991, High Court Auckland Registry AP 161/90.

The appellants based part of their defence argument on section 16 of the New Zealand Bill of Rights Act which guarantees the right to freedom of peaceful assembly. The judge said he did not have to decide whether the New Zealand Bill of Rights Act changed the law with regard to summary offences as this offence was committed prior to the Bill of Rights becoming law and as the Bill of Rights is not retrospective it was not applicable. However, he did recognise that the right may now have new and different aspects.[8]

In order to decide if the right to freedom of peaceful assembly has new and different aspects it is necessary to apply the Bill of Rights Act to the case. The emphasis in this paper will be on how the Bill of Rights Act is to be applied once it has been shown that there was a prima facie breach by someone who is subject to the Bill of Rights. The *Minto* case will be used as a reference point to put the discussion into context. For this reason an in-depth debate as to whether protesting falls within the scope of freedom of peaceful assembly will not be undertaken.[9] It is assumed that the appellants' rights were prima facie infringed.

The first issue to be decided is whether the Bill of Rights applies to the case. In order to be invoked, the requirements of section 3 must be met:

> **3. Application**—This Bill of Rights applies only to acts done —
>
> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
>
> (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

---

[8] Ibid 12.

[9] For a discussion on this point see McLeod Takach Morton Segal *The Canadian Charter of Rights: the Prosecution and Defence of Criminal and Other Statutory Offences* (Carswell, 1989) vol 3 ch 23.8; G A Beaudoin and Ed Ratushny (ed) *The Canadian Charter of Rights and Freedoms* (2 ed, Carswell, 1989) ch 7.1.

The Bill of Rights is applicable to this case under section 3(b) as the appellants were arrested by a police officer who was exercising a power conferred on him pursuant to the law. The Bill of Rights may also be invoked in this case under section 3(a) because, although it is debatable,[10] the police are often classed as members of the Executive. Therefore, in *Minto* v *Police* there was a prima facie breach by a person who is subject to the Bill of Rights.

Not all prima facie infringements of rights and freedoms guaranteed by the Bill are unlawful. The Bill does not declare rights to be absolute; they may be subjected to reasonable limits.[11] In order to decide whether the infringement is lawful or not, the court must consider the effect of sections 4, 5, and 6 on the particular case. These sections provide:

> **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),—
>
> (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.

---

[10] One view is that Executive power in New Zealand is vested in the Governor-General and Cabinet. A second view is that the Executive branch of government includes government departments and state enforcement agencies.

[11] New Zealand Bill of Rights Act 1990, s5.

> **6. Interpretation consistent with the Bill of Rights to be preferred**— Whenever 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 the New Zealand Bill of Rights Act is relatively new, the case law on the way in which these sections are to be interpreted and applied in New Zealand is limited. However, one Court of Appeal decision, *Ministry of Transport* v *Noort*;[12] has dealt with these sections in detail and it is also possible to draw on overseas experience to obtain an indication of how the issues may be dealt with here.

---

12 *Ministry of Transport* v *Noort*; *Police* v *Curran* Unreported, 30 April 1992, Court of Appeal CA 369/91 and 378/91. Two appeals were heard together. Judgements were delivered by Richardson J (McKay J concurring), Cooke P, Hardie Boys J, Gault J.

II THE INTERPRETATION AND ROLE OF SECTIONS 4, 5, AND 6

A Interpretation Approach

The New Zealand Bill of Rights Act is to be interpreted purposively. That is, regard is to be had to the spirit of the Bill of Rights which was passed in order to affirm, protect, and promote human rights and fundamental freedoms. In *Flickinger* v *Crown Colony of Hong Kong*,[13] Cooke P stated[14] that the court must interpret the Bill of Rights Act in a way which was described by Lord Wilberforce[15] as "Suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

This purposive principle is followed by many of the bodies which interpret human rights instruments and the New Zealand courts appear to be following the same line.[16]

B Section 5

Section 5 of the New Zealand Bill of Rights Act is the section that recognises that rights are not absolute and that they are subject to limitations. It is equivalent to section 1 in the Canadian Charter which, in turn, is derived from provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights. All limitations on rights which arise in cases before the Canadian courts are analysed under section 1. There is a great deal of case law concerning this section and both the European and the Canadian courts have laid down detailed tests which are used to decide whether the limitation is lawful.

---

13 [1991] 1 NZLR 439.

14 Ibid 440.

15 *Minister of Home Affairs* v *Fisher* [1980] AC 319, 328-329.

16 P. Rishworth "The New Zealand Bill of Rights Act 1990: the First Fifteen Months" (1992) The Legal Research Foundation Publication number 32, 9-10.

1 The tests established by the Canadian and European courts

(a) Prescribed by Law

Prior to 1979, when deciding whether a limitation was "prescribed by law" the European Court looked at whether the limitation was in accordance with domestic law. In 1979 in *Sunday Times* v *United Kingdom*,[17] the leading case on this issue, it was held that both statutory provisions and common law restrictions could be classed as "prescribed by law". It was also held that two other requirements must be met:[18]

> First 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 a 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 practise.

In Canada, the Supreme Court held in *R* v *Therens*[19] that a limit will be prescribed by law if it is expressly provided for by statute or regulation or results by necessary implication from the terms of a statute or regulation or from its operating requirements. It may also result from the application of a common law rule. The Canadian approach is not as strict as that laid down by the European Court and problems arise when a discretion is given as to whether to impose a limitation or not,

---

17 (1979) 2 EHRR 245.

18 Ibid 271.

19 [1985] 1 SCR 613, 645.

as the Supreme Court has not followed a clear line with respect to the amount of certainty required. In 1988 in *R* v *Hufsky*,[20] the court held that an unfettered discretion given to officers to stop whichever drivers they choose was a limit which was "prescribed by law". However, in 1989 in *Attorney General of Quebec* v *Irwin Toy Ltd*,[21] it was held that where the legislature gives a plenary discretion to do whatever seems best, there is no limit "prescribed by law".[22] There was no reference in this latter case to *Hufsky* and therefore it is not clear which approach the Supreme Court prefers. Consequently there is uncertainty as to what degree of prescription is needed.

It is submitted that the approach taken in *Irwin Toy Ltd* is the preferable one. Guidelines should be set down by the legislator so that a right will not be limited simply on the whim of an official and so that citizens can have a reasonably clear idea as to under what circumstances a limitation will be imposed. The way in which the law is developing means power is being delegated more often and in varying circumstances. This is accepted as necessary for effective government, but when the power includes a discretion to limit fundamental rights and freedoms, guidelines should be set down by the delegator if the limitation is to be "prescribed by law". It is not suggested that guidelines be extremely strict and precise, as the strictness of the standards will very much depend on the circumstances. For example, very few guidelines should be set down for officers carrying out random stops at check points. However, more detailed guidelines should be set down for bodies such as film censor boards.

---

20 [1988] 1 SCR 621.

21 [1989] 1 SCR 927.

22 Ibid 983.

(b) Reasonable and Demonstrably Justified in a Free and Democratic Society

The similar provisions in the European Convention for the Protection of Human Rights and the International Covenant on Civil and Political Rights differ in two ways from the limitation section in the New Zealand Bill of Rights Act. The first difference is that section 5 of the New Zealand Bill of Rights is a general section which applies to all the rights contained in the Bill of Rights, whereas the limitations in the European Convention and the International Covenant are specific. They appear in various provisions in the instruments and only limit the particular right which the provision guarantees. Therefore, a right which does not have a specific limitation provision cannot be limited in any way, even if the limitation would have passed the reasonableness test, whereas in New Zealand any right can be limited. The second difference is that in the European and International instruments, rights may only be restricted to achieve the aims which are stated in the limitation clauses themselves. It is the instruments which determine the reasons for which limitations are necessary; it is not left to the courts to decide. The limitation section in the New Zealand Bill of Rights Act is more general and does not state reasons for which rights may be limited; it is up to the court to decide whether the reason is sufficiently important to warrant the protection of section 5.

It was held in *Handyside*[23] by the European Court of Human Rights that "necessary" is not so flexible as to mean "useful" or "desirable", there must be a pressing social need for the limitation. It was also held that the views of the majority do not always have to prevail. A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Finally, it was held that any limitation imposed on a Convention right must be proportionate to the legitimate aim pursued.

---

[23] (1976) 1 EHRR 737.

In *R* v *Oakes*,[24] the Supreme Court of Canada set down the test which must be met for a limitation on a right to be "reasonable" and "demonstrably justified in a free and democratic society" for the purposes of section 1 of the Charter.[25] The first criterion is that the objective or reason for the limit must be of sufficient importance to warrant overriding the right or freedom. In order to meet this criterion, the objective to be achieved must relate to concerns which are pressing and substantial in a free and democratic society. A high standard is needed so that trivial objectives do not obtain the protection of section 1.

Once it has been shown that the objective is sufficiently important, it must be shown that the means of achieving the objective are reasonable and demonstrably justified. In order to decide this, a proportionality test must be carried out. The nature of the test varies depending on the circumstances, but in short the courts are required to balance the interests of society with those of individuals and groups. There are three components to the proportionality test. The first is that the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. The means must be rationally connected to the objective. Secondly, the right or freedom in question should be impaired as little as possible by the measures adopted. Finally, there must be proportionality between the effects of the measures which are responsible for limiting the right or freedom, and the objective which has been identified as of "sufficient importance". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

---

[24] (1985) 50 CR (3d) 1.

[25] Ibid 30-31.

2 This section in the New Zealand Bill of Rights Act

One important difference between section 1 in the Canadian Charter and section 5 in the New Zealand Bill of Rights is that the Canadian Charter is supreme law. It is used to strike down legislation which imposes unreasonable limitations on rights. Section 5 in the New Zealand Bill of Rights, however, is subject to section 4. Therefore, when dealing with statutes once it has been established that the limitation is provided for in the statute, the inconsistent enactment must nevertheless prevail even if the limitation imposed by it is unreasonable. The reason for this contradiction is that when the Bill of Rights was introduced as a White Paper, it was proposed that the Bill be entrenched, and therefore section 5 would have had the same role as that played by section 1 in the Canadian Charter. There was debate over whether the Bill should have this status. The principal reason for opposition to an entrenched Bill of Rights was that power would be given to the judiciary who, unlike parliament, are not accountable to the public. The Select Committee which considered the Bill was of the opinion that the public did not understand the role of the judiciary under an entrenched Bill of Rights, that is, the judiciary do not strike down legislation unless there is a very good reason for doing so. As a result, the committee concluded that the New Zealand public was not ready for an entrenched Bill and recommended that a Bill of Rights in the form of an ordinary statute should be introduced.[26] Section 5 was not removed to reflect this change in status but it was still feared that the judiciary would be able to override existing legislation, and therefore section 4 was added at the eleventh hour to ensure no power was given to the judiciary to strike down inconsistent legislation.[27] The *Noort* judgment showed that this contradiction is problematic for the court when it is called upon to apply the Bill of Rights to an inconsistent enactment.

---

26 The Justice and Law Reform Committee *Final Report on a White Paper on a Bill of Rights for New Zealand* (House of Representatives 1988) 3.

27 P. Rishworth "Two Comments on *Ministry of Transport* v *Noort*: A. How does the Bill of Rights Work?" [1992] NZ Recent Law Review 189, 191-192.

Cooke P felt that section 5 is irrelevant when the court is dealing with a statute as section 4 prevails.[28] Gault J was also of the opinion that section 5 is irrelevant but his reasoning was that it is no part of the court's function to say whether a limitation is reasonable or not.[29] The majority, however, did feel that section 5 plays a part in the analysis of an infringement which is prescribed by law in the sense that it is provided for by a statute. Richardson J (McKay concurring) treated section 5 as an abridging provision. He used the section to read down the right and to ascertain what limits should be implied by the statute and what the appellant should be entitled to. In doing this he adopted and modified the approach taken in the second part of the section 1 test under the Canadian Charter:[30]

> ...an abridging enquiry under section 5 will properly involve consideration of all economic, administrative and social implications. In the end it is a matter of weighing (1) the significance in the particular case of the values underlying the Bill of Rights; (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights; (3) the limits sought to be placed on the particular provision in the particular case; and (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

Hardie Boys J expressed a similar opinion as to the role of section 5. He felt that it was designed to enable statutes which cannot be given a meaning consistent with the rights and freedoms in their entirety, to be given a meaning consistent with the rights and freedoms in an abridged form.[31]

3 Conclusion on section 5

It is accepted by the New Zealand Court of Appeal that the complete section 5 enquiry is relevant when the court is considering a common law limitation which is

---

28 Above n12 judgment of Cooke P, 20.

29 Above n12 judgment of Gault J, 17.

30 Above n12 judgment of Richardson J, 18.

31 Above n12 judgment of Hardie Boys J, 4.

inconsistent with the Bill of Rights, and when the Attorney-General is carrying out his or her function under section 7[32] of the Act. Three of the judges agree that section 5 also plays a role in the consideration of inconsistent enactments. It is submitted that this opinion is preferable. Statutes are going to require that limitations be placed on rights. It is not irrelevant whether the limitations are reasonable or not, and the courts should always attempt to use a reasonable limitation rather than an unreasonable one even though statutes that impose unreasonable limitations will still prevail. Therefore it is appropriate that judges be guided by section 5 reasonableness criteria to decide what limitations should be imposed, rather than follow the approach taken by Cooke P and Gault J and apply a personal, unarticulated assessment.

Although it has not been necessary for the New Zealand court to carry out a full section 5 analysis yet, it appears that when that time does arrive much reliance will be placed on the decisions of other jurisdictions. With regard to the first step of the test, that is whether a limitation is "prescribed by law", Richardson J[33] (McKay concurring) and Cooke P[34] both approved the Canadian approach and that taken by the European Court of Human Rights. Richardson J also cited the Canadian Court as authority for the second step of the test, that is whether a limitation is "reasonable" and "demonstrably justified in a free and democratic society".[35]

---

[32] **7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights**-Where any Bill is introduced into the House of Representatives, the Attorney-General shall,-
(a) In the case of a Government Bill, on the introduction of that Bill; or
(b) In any other case, as soon as practicable after the introduction of the Bill,-
bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

[33] Above n29, 17.

[34] Above n27, 20-21.

[35] Above n29, 17-18.

C Section 6

Section 6 requires that where an enactment can be interpreted consistently with the Bill of Rights Act, that consistent meaning is to be preferred.

1 Interpretation of section 6

This section was discussed by the New Zealand Court of Appeal in *Flickinger* v *Crown Colony of Hong Kong*,[36] the first Bill of Rights case to be decided in New Zealand. For 90 years the court had given one meaning to section 66 of the Judicature Act 1908. Section 6 of the Bill of Rights Act was to put that meaning in doubt. This was so, even though the same argument to change the meaning had been put forward in cases prior to the passing of Bill of Rights Act but not accepted as it was not the intended meaning. Cooke P adopted the approach put forward by Lord Wilberforce in *Minister of Home Affairs* v *Fisher*[37] and said that the provision ought to be construed generously in a manner that was described by Lord Wilberforce[38] as "Suitable to give to individuals the full measure of the fundamental rights and freedoms referred to." The President's conclusion, although obiter, was that if a meaning consistent with the rights and freedoms can be given to the enactment, that meaning must be preferred. Any meaning that has previously been given to the enactment can be rejected in favour of a consistent meaning even if the meaning to be preferred is not that which was intended by the legislator. Similarly, in *Knight* v *CIR*,[39] section 6 was discussed and the court concluded[40] that where there is ambiguity in a statute then it should be interpreted against a meaning that is inconsistent with the Bill of Rights. In *R* v *Phillips*,[41] Cooke P declined to apply

---

36 Above n13.

37 Above n15.

38 Ibid.

39 [1991] 2 NZLR 30.

40 Ibid 31.

41 [1991] 3 NZLR 175.

section 6 of the Bill of Rights to s6(6) of the Misuse of Drugs Act as, although it was possible to give the section a consistent meaning, it would be a strained and unnatural interpretation which the court would not be justified in adopting.

(a) Conclusion on the Interpretation of Section 6

The court does not have to have regard to previous interpretations of an enactment, they can be rejected even if this is contrary to legislative intent. However, a strained and unnatural interpretation must not be adopted.

2 The role of section 6

Section 6 was also discussed in *M.O.T* v *Noort*. While Richardson J (McKay concurring) did not find it necessary to reach a conclusion on the role of section 6, it appears that it is to be considered following the application of section 5. In his view, the section is not to be an abridging provision but is a way of softening the potential impact of section 4; that is, if it is possible to read the enactment and the right as modified by section 5 consistently, then he will do that rather than have section 4 prevail.[42] Hardie Boys J is of the opinion that section 6 does not permit any limitation on the Bill's rights or freedoms. Rather, he sees it as directed to the meaning of the other enactment. However, he does recognise that this approach leaves rights open to the application of section 4, as in their full and complete state they are less likely to be read consistently with the other enactment. He overcomes this by applying his view of section 5 to limit the right so that the statute can be read consistently with the right or freedom, although not in its entirety, in an abridged form.[43] Gault J, on the other hand, who does not believe that section 5 is applicable to statutes, uses section 6 to modify the right if a meaning of the enactment which is consistent with the full rights cannot be given. This is his solution to the problem that

---

[42] Above n29, 16.

[43] Above n30, 4-5.

if rights and freedoms are fully and broadly assured they are more likely to be excluded by other statutes. Therefore, a right or freedom will be read down by Gault J under section 6 to the extent that it can be given effect to consistently with the other enactment.[44]

(a) Conclusion on the Role of Section 6

The majority in the Court of Appeal do not use section 6 to read down the rights and freedoms. They believe that this is the role of section 5. It is submitted that this is the correct approach as rights should only be modified by applying the section 5 reasonableness criteria which have been articulated. Both judges in the majority, although by different processes, use section 6 to prevent the application of section 4. That is, they use section 6 to read the enactment consistently with the rights and freedoms in their abridged form even though the limitations may not be reasonable.

D Section 4

Section 4 requires that legislation which is inconsistent with the Bill of Rights must prevail. *In M.O.T.* v *Noort*, Richardson J (McKay concurring) stated that section 4 should be interpreted using the purposive approach and therefore in determining under section 4 whether there is an inconsistency the court should have regard to the statutory objectives of protecting and promoting human rights in New Zealand. His Honour said that it would be a question of determining whether there is room for reading the Bill of Rights provision along with the other enactment. Section 4 only falls for consideration once sections 5 and 6 have been considered, and the right modified if necessary, and an inconsistency still exists. The inconsistent enactment

---

[44] Above n28, 17-18.

will prevail to the extent of the remaining inconsistencies.[45] Hardie boys J expressed a similar view.[46]

E Conclusion

When it has been determined that a right or freedom has been infringed by a person who is subject to the Bill of Rights, the courts must consider sections 4, 5, and 6. In most respects, the New Zealand Court of Appeal is far from unanimous on how this should be done.

The approach of Richardson J (McKay concurring) is to first decide whether a limitation is "prescribed by law" in terms of section 5. The criteria he uses are those laid down by the Supreme Court of Canada in *R* v *Therens*.[47] If the limitation is prescribed by law in the sense that it is provided for by statute, then section 5 is employed to ascertain what limitations on the right can be implied by the statute and whether the limitations are reasonable. He adopts and modifies the detailed test which has been enunciated by the Supreme Court of Canada. If the limitations are reasonable, the enquiry under these three sections is taken no further and it is necessary to decide whether the right was breached on the facts in the particular case. If the limitation is not reasonable the inconsistent enactment must nevertheless prevail. However, in order to preserve at least some of the right Richardson J will apply section 6 and try to read the enactment and the right, in its unreasonably modified form, consistently, so that the right will not be ousted completely. Therefore Richardson J will only apply section 6 if the limitations imposed are unreasonable in terms of section 5. Section 4 will only be applied if the enactment and the right cannot be read consistently, even following modification of the right.

---

[45] Above n29, 8,18.

[46] Above n30, 4-5.

[47] Above n17.

The approach of Hardie Boys J differs from that of Richardson J in that he applies section 6 first in order to ascertain whether the enactment and the right in its entirety can be read consistently. If that is not possible, rather than have section 4 prevail, he employs section 5 to read down the right so that the statute and the right in an abridged form can be read consistently. Only if this cannot be done does section 4 prevail.

Gault J's view is that section 5 should only be applied when the court is dealing with an inconsistent common law rule or the Attorney-General is carrying out his or her function under section 7. Therefore, when this judge is dealing with an enactment that is inconsistent with a right, he uses section 6 to impose limitations on the right so that the two can be read consistently.

Cooke P agrees with Gault J that section 5 is only relevant to the court when it is considering an inconsistent enactment, and to the role of the Attorney-General under section 7. In *Noort*, Cooke P did not see it as necessary to apply sections 4, 5, or 6. He used his own assessment to limit the right and concluded that as there was no inconsistency between the enactment and the limited right it was not necessary to apply any of the sections.

III APPLYING THE NEW ZEALAND BILL OF RIGHTS ACT TO *MINTO* V *POLICE*

A The Right to Freedom of Peaceful Assembly

This right is guaranteed by section 16 of the Bill of Rights Act. The section itself qualifies the right as it only guarantees protection to *peaceful*[48] assembly. Therefore, as soon as a demonstrator crosses the line and becomes violent, he or she is no longer exercising a right and therefore is not entitled to Bill of Rights protection. However, even if a demonstrator does not become irate, as with all rights and freedoms in the Act this right can still be subjected to limitations. Before the passing of the Bill of Rights, the demonstrators often had their right curtailed when spectators became irate or violent. This is what occurred in *Minto*.

> [T]he basic problem is one of compromise between public order and convenience on the one hand and individual liberty on the other. Throughout the analysis of the problem however there is assumed as a general proposition that a broad right of peaceful assembly is a vital element in the maintenance of the democratic process.[49]

B Possible Limitations in the Context of the Situation

In *Minto*, the demonstrators remained peaceful throughout the whole incident; it was the passers-by and the crowd waiting to enter the stadium that were the source of the apprehension of a breach of the peace. The old common law test allowed the officer to instruct the protesters to move as soon as a breach of the peace was apprehended even though the threat emanated from the bystanders. Counsel for the appellants in *Minto* argued[50] that in light of the Bill of Rights, the police should be required to do anything else which is reasonably possible to prevent a breach of the peace before

---

[48] Emphasis added.

[49] M.G. Abernathy *The Right of Assembly and Association* (2 ed, U of S Carolina Press) 4.

[50] Above n7, 10.

interfering with a protester's section 16 right. They felt that the police should now have to prove beyond reasonable doubt that there was no other reasonable way of averting a breach of the peace. However, it is possible to go even further than this and only allow that the protesters be arrested when it is they who threaten to breach the peace. As long as the threat is emanating from the bystanders, then it is the bystanders that should be arrested and the right of the protester should continue to be protected.

C Section 23 of the Summary Offences Act

The purpose of this section is to enable a police officer to carry out his or her duty without being hindered by the public. During a protest it is the duty of the police to preserve the peace.[51] Therefore it follows by necessary implication from the terms of the Summary Offences Act that if a protester obstructs an officer when he or she is attempting to prevent a breach of the peace, the officer can arrest the protester, thereby limiting his or her right to freedom of peaceful assembly.

D When is it "Reasonable" to Arrest a Protester Under Section 23 of the Summary Offences Act?

There are a range of limitations which can be imposed on the right to freedom of peaceful assembly in the context of the *Minto* situation. The most restrictive is the old common law test which allows an officer to arrest a protester as soon as a breach of the peace is apprehended and the protester refuses to follow instructions. The least restrictive is that which would only allow an officer to arrest a protester when the protester poses a threat to the peace. In between these two restrictions falls that which was suggested by counsel for the appellants in *Minto*, that is the police must do anything else which is reasonably possible to prevent the breach before arresting the protesters.

---

51 *Halsbury's Laws of England* (4 ed, Butterworths, London, 1980) vol. 36, Police, para 320, p 200.

1 Comparing the limitations in terms of the section 5 "reasonableness" test.

The *Oakes* test[52] states two criteria which must be met in order for a limitation to be "reasonable".

The first is that the objective behind the imposition of the limitation must be reasonable. The object is to allow the police to carry out their duty to preserve the peace. Therefore if a police officer reasonably apprehends that the actions of a person may result in a breach of the peace then it is the officer's duty to prevent the person from acting.[53] Preservation of the peace is not trivial, and it is pressing and substantial in a democratic society. Therefore, it is submitted that the objective for the obstruction law is sufficiently important to warrant the protection of section 5.

It is now necessary to look at whether the means of achieving the objective are reasonable and demonstrably justified by applying the proportionality test. There are three components to this test. Firstly, there must be a rational connection between the objective and the means. In *R* v *Swain*,[54] the court looked at whether the means was a logical way of achieving the objective.[55] They said that while it may raise problems and may not be the preferred method, if it is a logical method then that will be sufficient. As the objective in this case is to preserve the peace and the primary function of the police is preservation of the peace, it is logical that the police will be called on to remove someone who threatens their ability to carry out the objective. However, the protesters in *Minto* were not the ones who were going to commit acts which would breach the peace; the spectators were the threatening group. Therefore it is not logical that the protesters be arrested in such a situation and the irate bystanders be allowed to stay. Arresting the protesters will not necessarily prevent a

---

52 Above n22.

53 Above n49.

54 (1991) 63 CCC (3d) 481.

55 Ibid 513.

breach if the irate bystanders remain, therefore it is more logical that the bystanders be arrested.

Secondly, the means must impair the right or freedom as little as possible. In *R* v *Swain*, it was held[56] that this means that the method used to limit the right cannot be unnecessarily intrusive in light of alternate means. The court looked at whether the absolute least intrusive means had to be chosen. They decided that legislative or parliamentary provisions did not have to be the least intrusive as the body which enacted the provision had to respond to competing interests of different groups and must always consider the polycentric aspects of any given course of action. Therefore, Parliament does not have to choose the least intrusive means, but it must come within a range of means which impair the right as little as possible. However, the court held that where the right is impaired by a common law rule, there is no room for judicial deference. The least intrusive rule which will obtain the objectives without disproportionately affecting the rights must be adopted by the court. *R* v *Swain* dealt with a common law rule which was not the least intrusive one. The court looked at whether it was possible to fashion a new common law rule which did not limit constitutionally protected rights more than necessary, and concluded that it was possible to do so.[57] The result was that the court found a common law rule that both met the objectives of the limitation, and protected the right of the accused. Applying the principles in *Swain* to the present case, it is submitted that this requirement of the *Oakes* test is not met by either the old common law limitation or by the limitation which was suggested by counsel for the appellants in *Minto*, as neither of these means is the least intrusive on the right. It is submitted that it would be possible to fashion a new common law rule which would both meet the objective of preserving the peace under section 23 and protect the section 16 right to freedom of peaceful assembly by

---

56 Ibid 514.

57 Ibid 517.

allowing the police officer to arrest a protester only when the threat to the peace emanates from the demonstrator, not from bystanders. This is the least intrusive test and therefore meets this requirement.

Finally, it is necessary to look at whether there is proportionality between the effects of the police power to curtail a protester's right by instructing him or her to move and to arrest the protester if he or she disobeys, and the objective to be achieved by the means. The effect of the measure is extremely severe in that once the protester has been arrested his or her right to freedom of peaceful assembly is curtailed completely. However, the effect of a breach of the peace can have very severe consequences also, therefore, it is submitted that there is proportionality between the effect of the limitation and the objective to be achieved.

2 Conclusion

The old case law fails the section 5 "reasonableness" test in two respects. Firstly, it is not the logical means of achieving the objective of preserving the peace. Secondly, it is not the least intrusive means of achieving the limitation. The limitation suggested by counsel for the appellants in *Minto* fails the test for the same two reasons.

The only limitation which meets the section 5 "reasonableness" criteria is that which allows an officer to arrest a protester only once the officer apprehends that the protester is going to breach the peace and gives reasonable instructions which are disobeyed.

E Can this Limitation and Section 23 of the Summary Offences Act be Read Consistently Under Section 6 of the Bill of Rights Act?

Section 6 can be employed in this case to reject the test which has been established through the common law. Adopting a new limitation which requires the police to

arrest only the person who is the actual source of the apprehended breach would not give the words of section 23 a strained or unnatural interpretation.

Therefore section 23 and this limitation can be read consistently. The purpose of section 23 in this context is to allow officers to carry out their duty to preserve the peace. If spectators threaten to breach the peace and disobey police instructions, then the spectators are obstructing the officer and should be arrested. If the protesters are threatening the peace and disobey police instructions then, and only then, should the protesters be arrested. Therefore the protesters' right ceases as soon as it is apprehended that the demonstrators will breach the peace and the duty of the officer to preserve the peace and make arrests if necessary becomes paramount. Protecting the right to this extent does not defeat the purpose of section 23 at all and therefore the two can be read consistently.

F Conclusion

It is submitted that if *Minto* v *Police* were to be decided today the outcome would be different.

If the court is concerned to guarantee rights to the fullest extent possible then they do not have to accept the old common law limitation, as a less restrictive one can be formulated which meets the section 5 "reasonableness" criteria and which can be read consistently with section 23 of the Summary Offences under section 6. That is, if the protesters threaten to breach the peace then they should be subject to police power and their right limited. But if the threat emanates from another group, then it is that threatening body of people which should be subject to police power.

IV CONCLUSION

The New Zealand Bill of Rights Act has been described as one of majestic words and low status.[58] It is true that the New Zealand Act does not have the force of the Canadian Charter or the United States Bill of Rights but it certainly does not follow that the Bill is of no force or effect. The Act is approaching the end of its second year of enforcement and was recently subjected to scrutiny in the New Zealand Court of Appeal. The outcome of this case reflected the commitment of the court to promote the purpose of the Bill even though many questions have been raised by the diversity of the approaches taken to the problematic sections 4, 5, and 6. Despite these early problems, it is submitted that the Bill does have teeth and no doubt over time, as with the Canadian Charter, a substantial body of case law will develop which will straighten out these problems, develop the application process, and strengthen the Bill's place in New Zealand law.

58 Above n 16, 8.

BIBLIOGRAPHY

G A Beaudoin and Ed Ratushny (ed) *The Canadian Charter of Rights and Freedoms* (Carswell, 1989).

The Canadian Charter of Rights: Annotated (Aurora, Ontario, Canada Law Book, 1982)

J E S Fawcett *The Application of the European Convention on Human Rights* (Clarenden Press, Oxford, 1987).

The Human Rights Commission *The Right of Peaceful Protest: A Question of Balance* (Auckland, December 1987).

F G Jacobs *Yearbook of European Law* (Clarendon Press, Oxford, 1987).

Hon Flora MacDonald *Put our World to Rights. Towards a Commonwealth Human Rights Policy* (August 1991).

McLeod Takach Morton Segal *The Canadian Charter of Rights: the Prosecution and Defence of Criminal and other Statutory Offences* (Carswell, 1989).

Encyclopedia of Public International Law Vol 8 (Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt, 1985).

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 Law 127.

P Rishworth "The New Zealand Bill of Rights Act 1990: The First Fifteen Months" (1992) The Legal Research Foundation Publication number 32.

P Rishworth "Two Comments on *Ministry of Transport v Noort*: A. How does the Bill of Rights Work?" [1992] NZ Recent Law Review 189.

J M Ross "Applying the Charter to Discretionary Authority" Alberta Law Review [Vol XXIX No 2 1991].

Hon R E Salhany *The Origin of Rights* (Carswell, 1986)

A Shaw and A Butler "The New Zealand Bill of Rights Act Comes Alive (1)" (1991) NZLJ 400.

Nadja Tollemache "The Proposed Bill of Rights" (A discussion and resource paper prepared for the Human Rights Commission, March 1985).

Forbes, Bridget Catherine

The New Zealand Bill of Rights Act 1990