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Fighting Tooth and Nail: Raising the Standard for Justifying Limits on Rights

Submitted for the LLB (Honours) Degree

FACULTY OF LAW

2023

Abstract

This paper assesses the complexities arising from the balance of the courts' duty to protect human rights and safeguard the realm of public disclosure and action, crucial for New Zealand's representative democracy. Specifically, the role of s 5 inquiries where a right has been limited. It discusses the relationship between the purpose of s 5 and its application, with the judicial history highlighting concerns with the current approach failing to uphold those purposes. Such concerns are furthered by comparison to jurisdictions with comparable limitation clauses, demonstrating a lower level of justification and judicial scrutiny in New Zealand. It is therefore argued the current approach to the s 5 analysis under the Bill of Rights Act is not adequate to allow for the principles of the NZBORA and the purposes of s 5 to be upheld. It is advocated that the imposition of a higher standard, namely beyond reasonable doubt, should be adopted by the courts to acknowledge the tension in the court's roles whilst requiring the State to produce great evidence in proving a limit is justified. Such an increase would respond to much of the critiques of the Canadian approach, analogous to New Zealand's current approach, furthering the culture of justification sought to be established by s 5.

Word length

The text of this paper (including substantive footnotes, excluding cover page, contents, footnotes and bibliography) consists of *8,000 words.*

Subjects and Topics

'culture of justification', 'section 5 NZBORA', 'justified', 'limit', '*New Health New Zealand Inc v South Taranaki District Council*'

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I. Introduction

"Rights are a construct through which the needs, interests, and values of human beings in society are expressed in moral, political, and legal terms depending on context."[1] Rights, and subsequently, limits on them, are fundamental. Section 5 of the New Zealand Bill of Rights Act (hereafter referred to as NZBORA) establishes a framework for balancing individual rights and freedoms with the need for certain limitations or restrictions imposed by law.[2] It ensures limitations, are not unjustifiably imposed, and are balanced by some greater societal purpose.

The incorporation of a rights theory and a corresponding limitation theory in the NZBORA is not explicitly evident. This ambiguity has presented a dilemma for judges. The issue arises whether the broad language used in defining rights, and the basis for their limitation in s 5, implies the legitimacy of multiple theories. Alternatively, whether the courts are expected to articulate a specific vision of rights and limitations and adopt it as the guiding framework for applying s 5.[3]

The issue lies in the interplay between the court's duty to protect human rights and their duty to safeguard the realm of public disclosure and action, which is crucial for our representative democracy. The courts are entrusted with the responsibility of serving as guardians of both aspects.[4] When conducting an analysis under s 5, the courts must balance these roles. The judiciary should acknowledge in supporting minimal restrictions or demanding a perfect system in the pursuit of safeguarding human rights, they inherently curtail legislative supremacy and freedom of decision-making.[5]

The tension becomes most apparent when assessing the standard and role of evidence in justifying limitations on rights. The complexities have arguably impaired the judiciary's ability to review the integrity of legislative decision regarding limitations imposed under s 5. Palmer addressed this trend, noting the use of the NZBORA since Sir Robin Cooke's time as President of the Court of Appeal has been marked by considerable caution in the courts.[6]

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[1] Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537 at 555.

[2] New Zealand Bill of Rights Act 1990, s 5.

[3] Butler, above n 1, at 556.

[4] At 558.

[5] At 558.

[6] Geoffrey Palmer "What the New Zealand Bill of Rights Act Aimed to Do, Why It Did Not Succeed And How It Can be Repaired" (2016) 14 NZJPIL 169 at 175.

This trend has continued with recent judicial reasoning demonstrating a reluctancy to interpret contentious evidence. Most notably was that of the courts in *New Health v South Taranaki District Board*.[7] The courts placed different emphasis on the evidence before the Supreme Court finally accepted water fluoridation is a justified limit on s 11. This conclusion was despite their recognition of the contentious nature of the evidence,[8] there being no settled view regarding the benefits of water fluoridation even 80 years since its conception.

The scrutiny required under s 5 needs to be approached with careful consideration. The purpose of s 5 necessitates an interpretation and application where the courts place significance on the role and standard of evidence presented. Judicial history implies the current standard of proof, the balance of probabilities, has not ensured the courts scrutinize limits to that degree. Thus, the current standard does not adequately promote transparency, integrity, and accountability of Government's actions, providing a basis for advocating a heightened standard of beyond reasonable doubt. This would align more closely with the purposes of the NZBORA, and s 5, requiring the Crown to produce stronger evidence and the courts to apply greater scrutiny.

In Part II this essay will examine the purposes of s 5. In ascertaining the purpose of s 5, the courts will be able to interpret and apply s 5 in a manner best supporting and promoting a culture of justification.

Part III will address the interrelationship between the purpose of s 5 and its interpretation and application, concluding a purposive interpretation favours an ad hoc balancing approach. Furthermore, being a general provision, the framework of the Act itself supports a two-step process. These considerations combined with Canadian influence have seen the establishment of the *Hansen* approach.[9]

Part IV looks to judicial history, where there has been variation in the courts attitude to the role of evidence, furthering concerns the balance of probabilities standard is practically insufficient in New Zealand. Similarities and differences with comparable jurisdictions, Canada and South Africa, are then recognised in Part V where New Zealand courts have the advantage of drawing and learning from international experience.

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[7] *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

[8] At [121].

[9] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

Recommendations to explore increasing the standard to beyond reasonable doubt will be made in Part VI. Departure from the use of the balance of probabilities would further support the culture of justification, increasing the role of evidence, improving transparency and accountability, whilst retaining flexibility.

II. Purpose of Section 5

Section 6 states wherever an enactment can be given a meaning consistent with the rights and freedoms contained in the NZBORA, that meaning shall be preferred to any other interpretation.[10] To ensure the interpretation and application of s 5 is itself NZBORA consistent it is essential to first consider the purposes of the Act, and s 5. Such understanding will inform the interpretation, application, and assessment of whether a limit is justified under s 5. This avoids the principal flaw of the decision in *Moonen v Film and Literature Board of Review*, where the Court of Appeal failed to consider the purpose and language of s 5. [11]

The primary purpose of s 5 is to establish a framework for balancing individual rights and freedoms with the need for certain limitations to be imposed by law. It recognises whilst individuals possess rights and freedoms, there may be circumstances where they can be reasonably limited by the government in a free and democratic society. Section 5 sets the standard for limitations, stating they must be prescribed by law and reasonable. Moreover, limitations must be capable of justification in a free and democratic society. The government must demonstrate limitations are necessary and proportionate to achieving a legitimate objective.

According to Butler, the framework established under s 5 serves multiple purposes, all of which must be considered in its proper interpretation and application.[12] Firstly, it reaffirms the fundamental principle that rights are not absolute, aligning with Sir Ivor Jennings' recognition that individual freedoms are naturally limited by societal membership.[13] Secondly, it establishes a two-stage process; the first stage determining the scope and

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[10] New Zealand Bill of Rights Act, s 6.

[11] Grant Huscroft "Reasonable Limitations on Rights and Freedoms" in Grant Huscroft, Scott Optican, and Paul Rishworth *The Bill of Rights – Getting the Basics Right* (NZLS, Wellington 2001) 65.

[12] Butler, above n 1, at 540.

[13] Rt Hon Sir Ivor Richardson "Rights Jurisprudence – Justice for All" in P Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 61 at 61.

purpose of the rights, while the second stage involves assessing the reasonableness of the limitations. Thirdly, it assigns the burden of proof. Fourthly, it emphasises the Act's aim to cultivate a culture of justification.

III. Interpretation and application of s 5

A The Hansen approach

Section 5 is contained within Part 1 of the Act, which encompasses general provisions. This supports a two-step process, where the consideration of limiting rights should be addressed separately from the initial examination of the relevant scope and meaning of the right and freedom outlined in Part 2.[14] This ensures a clearer and more transparent analysis, particularly in cases involving complex social policy issues.[15]

The Supreme Court of Canada in *R v Oakes* identified two standards of justification in applying s 1 of the Charter, identical to s 5 of the NZBORA. [16] The first standard was normative, the second was methodological with a two-stage test for determining whether a limit is justified. [17] This test was adopted by the New Zealand Supreme Court in *R v Hansen*. The s 5 inquiry is approached as follows:[18]

1. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
2. If so, then:
    a. Is the limit rationally connected with the objective?
    b. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    c. Is the limit in due proportion to the importance of the objective?

[14] Butler, above n 1, at 542.

[15] Butler, above n 1, at 543; Rt Hon Sir Ivor Richardson "The Role of Judges as Policy Makers" (1985) 15 VUWLR 46 at 52.

[16] Canadian Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act 1982.

[17] Leon E. Trakman, William Cole-Hamilton, Sean Gatien "R. v. Oakes 1986-1997: Back to the Drawing Board" (1998) 36 OHLJ 83 at 83.

[18] *R v Hansen*, above n 9, at [104].

B Ad hoc balancing

A purposive interpretation of the NZBORA favours an hoc balancing approach to a s 5 inquiry.[19] This involves the careful evaluation and weighing of conflicting interests or rights on a circumstantial basis. Consistent with the use of ad hoc balancing to encourage flexibility, the application of the s 5 inquiry should not be approached mechanically. [20] Rather than relying solely on the explicit language in the law. This approach takes into consideration various factors, including contextual circumstances, policy goals, and underlying principles of the legislation. The courts engage in a balancing exercise, assessing the degree of impact on rights or interests and determining if the limitation is reasonable and justifiable given the circumstances. The focus is on reaching a reasonable and fair resolution. The ad hoc balancing approach allows for flexibility, recognizing the dynamic nature of societal values, acknowledging that the interpretation and application of the law can vary based on specific factual scenarios and evolving societal needs. This flexibility is also necessary due to s 5's application to all the rights contained in Part 2, which are fundamentally different from one another.

C Onus of proof

The language of s 5 being that a limitation must be "demonstrably justified" combined with the two-stage process unequivocally demonstrates the onus of proof. The plaintiff must first prove a prima facie interference with a right or freedom has occurred before the onus shifts to the State to demonstrably justify the limits in the second stage.[21]

D Standard of proof

The continued application of the *Hansen* approach by the courts, and in NZBORA compliance reports, demonstrates the approach to be taken when s 5 is engaged has been well established. The *Hansen* approach, upholding the purposes of the Act, clearly places the onus of proof on the State to prove that the limit is justifiable. However, there remains a lack of clarity regarding the evidential burden, that is the standard to which the State must prove the limit is justified and the role of evidence within the analysis. In an attempt to preserve the flexibility of s 5, given the range of rights and freedoms contained within the

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[19] Butler, above n 1, at 542.

[20] Canada – Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17, at 100. South Africa – *Christian Education South Africa v Minister of Education* (2000) 9 BHRC 53, 68 (SACC); *State v Zuma* 1995 (2) SA 642, 660 (SACC); *State v Makwanyane* 1995 (6) BCLR 665, 711 (SACC).

[21] *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [163]; Butler, above n 1, at 543.

act, the State has only been required to show the limit is justified on the balance of probabilities.[22] Under this standard varying levels of scrutiny have been adopted by the courts, with arguably little regard given to evidence.[23] The resulting unpredictability and inconsistency in s 5 analyses has arisen from failure of the courts to rigorously apply the balance of probabilities standard, instead using it as a way of concluding limits as justified, even where there is a lack of relevant evidence or the evidence is contentious, with common sense being capable of discharging the evidential burden.[24] The seemingly arbitrary findings of limits being justified because of the inconsistent scrutiny of reasoning and evidence by the court has given rise to the issue of whether the current standard is sufficient to promote the purposes of s 5.

E Role of evidence

Demonstrably justified connotes a high standard of evidence is required with the role of evidence in a s 5 inquiry being significant.[25] The issue of insufficient evidentiary support in litigation involving NZBORA, especially when pertaining to s 5, has received much attention. Sir Ivor commented whilst general statements hold importance, they must be underpinned by specific evidential support. In particular instances, a thorough empirical examination becomes imperative to scrutinize propositions, deliberate on well-informed policy alternatives, and base decisions on rationality rather than intuition.[26] The inconsistent role of evidence further speaks to the issue of whether the balance of probabilities standard can support the purposes of s 5. It is expected the role of evidence will have some variance, required given the broad application of s 5 to numerous rights.[27] However, the role of evidence should be prominent, with the State having to produce evidence in support of their argument that the limit is justified. Where rights are concerned it should not be sufficient to base limit justifications on purely logical rationale.

IV. Judicial History

The level of scrutiny required during a s 5 assessment needs to be approached with careful consideration. International practice indicates most Bill of Rights litigation revolves around

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[22] *R v Oakes* [1986] 1 SCR 103 at 105.

[23] Notably *New Health New Zealand Inc v South Taranaki District Council*, above n 7, at [121].

[24] *Ministry of Health v Atkinson*, above n 21, at [166].

[25] Government of Canada "Section 1 – Reasonable Limits" (29 June 2023) Charterpedia <www.justice.gc.ca>

[26] Rt Hon Sir Ivor Richardson, above n 13, at 74.

[27] Butler, above n 1, at 561.

assessing the reasonableness of imposed limitations. However, in 2002, 11 years following the enactment of the NZBORA, s 5 had only been cited in 95 out of 1674 judgments. [28] The insufficient recognition of s 5 has resulted in limited direction in its implementation.

NZBORA litigation reveals substantial irregularities in the evidence presented by the State in proving a limit was justified, as well as how the courts have inconsistently examined and scrutinized evidence during proceedings relating to s 5. It demonstrates the inherent flexibility allowed for and required by s 5, however it has resulted in seemingly arbitrary findings of limits being justified.

A New Health New Zealand Inc v South Taranaki District Council

1 Factual background

The fluoridation of public drinking water supplies is an ongoing topic of discussion. Despite support for fluoridation from the Ministry of Health and the New Zealand Dental Association, the practice remains controversial. This is particularly true given the explicit recognition of the right to decline medical treatment.[29] In 2012, the South Taranaki District Council implemented water fluoridation in Patea and Waverley, aiming to enhance oral health in those regions. However, New Health NZ, an organisation opposing water fluoridation, initiated a judicial review of the council's decision. Their argument was water fluoridation essentially amounts to mandatory medical treatment, thereby infringing upon s 11 of the NZBORA.[30]

2 High Court and Court of Appeal

The case underwent hearings in the High Court, Court of Appeal, and the Supreme Court, each according varying degrees of consideration to the evidence presented. In the High Court, Hansen J provided only a brief assessment of the arguments and evidence, highlighting that individuals could find ways to avoid fluoride ingestion. The Judge's stance was fluoridation constituted a proportionate response to dental decay, and the authority to implement fluoridation was a justified limitation.[31] The Court of Appeal

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[28] Butler, above n 1, at 537.

[29] Holly Hedley "Public drinking-water fluoridation and the right to refuse medical treatment – the Supreme Court wades in" (2018) 922 Lawtalk 24 at 24.

[30] *New Health New Zealand Inc v South Taranaki District Council*, above n 7, at 948.

[31] *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834 at [96]-[111].

conducted a more thorough examination of expert evidence, carefully reviewing ten separate pieces of expert evidence and reports. Their ultimate conclusion was even if fluoridation did encroach upon s 11, there exists a substantial and satisfactory body of evidence to support the assertion that such encroachment represents a justifiable and rational limitation under s 5. [32]

3 Supreme Court

New Health challenged the finding that there was sufficient evidence to validate the notion that the benefits of fluoridation outweighed potential risks. Scholtens, counsel for New Health, contended a thorough assessment of the collective evidence should have led the court to a more tentative conclusion.[33] However, Scholtens did not specify the exact criteria that should be met. Notably, O'Regan and Ellen France JJ acknowledged the contentious nature of the evidence surrounding fluoridation, stating:[34]

> It is obvious that the scientific evidence relating to fluoridation is contentious, in the sense that even apparently authoritative studies as to the benefits and detriments of fluoridation are called into question in other studies, in many cases on the grounds that the writers are biased.

Nevertheless, they asserted it was not within the court's scope to definitively adjudicate on the scientific and political dimensions.[35] Rather, the court's role was to conduct a comprehensive appraisal to determine whether the evidence presented formed a legitimate basis for concluding the restriction on the right to decline medical treatment was justified. New Health further submitted there were less intrusive methods available feasible to achieve the goal of enhancing dental well-being, such as promoting fluoridated toothpaste or incorporating fluoridated options into fast food and sugary beverages.

The Supreme Court, without comprehensively reviewing the evidence, concluded despite engaging s 11, a power to fluoridate drinking water supplies was justified.[36] Justices

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[32] *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 at [165].

[33] *New Health New Zealand Inc v South Taranaki District Council*, above n 7, at [116].

[34] At [121]; Hon Justice Geoffrey Venning "From Toupee to Tooth Decay: Recent Bill of Rights cases in New Zealand" (Supreme and Federal Courts Judges' Conference, Hobart 2019) at [65].

[35] *New Health New Zealand Inc v South Taranaki District Council,* above n 7, at [122]; Also *New Health New Zealand Inc v South Taranaki District Council,* above n 31, at [111]; Hon Justice Geoffrey Venning, above n 34, at [65].

[36] *New Health New Zealand Inc v South Taranaki District Council*, above n 7, at [144]; Holly Hedley, above n 29, at 25.

O'Regan and Ellen France held water fluoridation did not infringe upon the right to decline medical treatment. They determined, in the context of s 5, the provisions permitting water fluoridation restricted the right stated in s 11 only to an extent proven justified within a free and democratic society. The practice of water fluoridation was not an undue limitation on the right, it was regarded as reasonably necessary and proportional to the goal of preventing and lessening tooth decay, which was considered of significant importance.[37] The Court acknowledged alternative measures would be less effective in achieving the intended outcome.[38] Ultimately, water fluoridation was seen as a reasonable approach, given its effectiveness.

4 Is fluoridation actually effective?

The Ministry of Health, The NZ Medical Association, and the NZ Dental Association support fluoridation as a secure approach to addressing tooth decay. This practice is also endorsed by the World Health Organisation. As a result, around half of New Zealand's population receives fluoridated water. Nonetheless, ethical concerns persist about water fluoridation and its safety. Consequently, global trends reveal a decline in water fluoridation.[39]

The ongoing discussion surrounding water fluoridation has prompted extensive research into whether the perceived advantages of enhancing dental health through this method hold true. The 2015 NZ School Dental Statistics indicate minimal disparities in decay rates between regions with fluoridated and non-fluoridated drinking water across New Zealand.[40] Moreover, research conducted by John Colquhoun, recognised that the 1981 statistics from various locations in New Zealand suggest tooth decay rates were seemingly unrelated to fluoridation. Little distinction could be observed in tooth decay percentages between fluoridated and non-fluoridated regions among children within the same group. Colquhoun also revealed non-fluoridated districts exhibited a higher percentage of children not needing oral treatment, even when comparing similar socio-economic regions. Additionally, he highlighted the occurrence of dental fluorosis in fluoridated areas, with 40% of New Zealand children already receiving excessive fluoride exposure.[41]

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[37] At [143].

[38] At [134].

[39] Dr Durgeshree Devi Raman "Fluoridation of drinking water" (2019) NZLJ 79 at 79.

[40] At 82.

[41] At 82.

International trends indicate a departure from the practice of water fluoridation. Merely 5% of the global population consumes artificially fluoridated water. The majority of developed nations abstain from fluoridating their drinking water. Indeed, only 11 countries worldwide have over half of their population drinking fluoridated water. Also noteworthy is that among the 48 European nations, only four endorse national-scale water fluoridation. The United Kingdom and Spain provide fluoridated water to around 10% of their citizens. Conversely, 98% of Western Europeans consume non-fluoridated water. Other notable jurisdictions such as Germany, which ceased water fluoridation in the 1970s have resisted reintroducing it due to concerns about mandated medication.[42] Furthermore, France has never initiated such a practice due to similar concerns. While many supporters of fluoridation highlight Europe widely uses fluoridated salt as an optional supplement, critics of fluoridation argue that introducing fluoride to tape water is morally questionable as informed consent is a fundamental principle for all medical treatments. This ethical concern is a primary factor influencing the majority of European nations refusing to fluoridate water.[43]

Colquhoun's research, coupled with international trends opposing water fluoridation, raises doubts about the legitimacy of using fluoridation and whether it is a justified limit of s 11. There is also evidence supporting the notion that the level of fluoridation in water might be excessive, implying this degree of fluoridation is unreasonable and lacks justification. The Drinking Water Standards established by the Ministry of Health for New Zealand specify a maximum acceptable fluoride level of 1.5mg/L. However, the Ministry suggests that, for "oral health reasons", the fluoride concentration in drinking water should ideally fall between 0.7mg/L to 1.0mg/L.[44] Moreover, it has been acknowledged fluoride primarily operates topically, meaning it has a direct impact when applied to tooth surfaces rather than a systemic effect as was previously assumed.[45] Consequently, the minimal exposure to fluoridated water topically is unlikely to have a significant impact on dental health, as supported by the evidence from Dr Litras in the Court of Appeal.[46]

This highlights the issue with the current standard. Based on the evidently contentious research it seems unlikely that fluoridation of water would be considered a justified limit,

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[42] At 82.

[43] At 87.

[44] At 79.

[45] At 79; *New Health Inc v South Taranaki District Council*, above n 7, at [129].

[46] Dr Durgeshree Devi Raman, above n 39, at 79; *New Health Inc v South Taranaki District Council*, above n 7, at [130].

even on the balance of probabilities. Following the *Hansen* approach, assuming the objective of improving dental health is sufficiently important, the limit is not rationally connected with the objective as fluoride works topically. The limit impairs the right more than is reasonably necessary for sufficient achievement of the objective. There are a range of alternative less intrusive means of improving dental health, and the maximum acceptable level of fluoridation exceeds the optimal fluoride level. It cannot therefore be said the limit is in due proportion to the importance of the objective. This evidence should have led O'Regan and France JJ to conclude the Crown had not proven the limitation was justified on the balance of probabilities.

Overall, evidence suggests water fluoridation is not effective. However, despite this, and the availability of less intrusive alternatives to achieve the desired outcome, the Supreme Court concluded there was no violation of s 11.[47] The Court determined the limitation on the right to refuse medical treatment was justified because of its effectiveness. However recent research concerning the fluoridation of water proves this to be extremely contentious, as O'Regan and Ellen France JJ emphasised prior to their analysis under s 5.[48] This decision highlights the inconsistencies arising from application of the balance of probabilities standard in determining whether the State has justified a limitation, indicating a higher evidentiary burden should be imposed on the State when proving their limit is justified to improve State accountability and transparency. It also demonstrates Palmer's opinion that the courts are not bold enough in applying the NZBORA. Contradicting Venning's suggestion recent decisions show the courts are not shying away from addressing fundamental and challenging questions posed by the NZBORA. [49]

B Quilter v Attorney-General

New Health v South Taranaki District Council is merely an example of NZBORA litigation that has been marked by reluctancy of the courts to impose stricter evidential standards and willingness to scrutinize contentious evidence. In *Quilter v Attorney-General* no sociological or other evidence was produced about the impact, negative or otherwise, on homosexuals of their exclusion from marriage.[50] Despite such lack of relevant evidence, the Court of Appeal held the discrimination was lawful because the Marriage Act forbids

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[47] *New Health New Zealand Inc v South Taranaki District Council*, above n 7, at [144].

[48] At [121].

[49] Hon Justice Geoffrey Venning, n 34, at [7].

[50] Butler, above n 1, at 551.

same-sex marriages and was the current will of the people.[51] The majority as expressed by Tipping J, concluded NZBORA was not intended to alter the traditional concept of marriage upon which the Marriage Act was based, and therefore considered commenting on whether the limit was justified was a matter of political policy, outside the bounds of legal inquiry.[52] Similar to *New Health*, *Quilter* demonstrates that a cursory evaluation under s 5, reflecting general concepts, has been adequate for the courts to decide a limitation is justified. This contradicts the intended culture of justification and ensuring cogency that section 5 seeks to impose.

C Bennett v Attorney-General

Contrarily, in other cases, extensive affidavit evidence was presented about the operation of the prison visiting system in defending a claim for beach of NZBORA arising out of a shortening of visitor hours.[53] Even though substantial evidence was submitted, the Rotorua High Court dismissed the claim, stating there was insufficient proof to show the prisoner's or visitor's needs were disregarded. Instead, the Court viewed the matter as an administrative decision that fell within the bounds of the statutory framework and was not clearly unsupported.[54]

Precedent clearly shows that when s 5 has been invoked, there has been a noticeable inconsistency in evidential matters. Evidence appears to have been important in dismissing the State's claims of a limit being justified. Alternatively, and arguably more frequently and profoundly, in many cases a superficial examination of s 5, relying on broad and abstract statements, has been sufficient in the State proving a limit being justified.[55] The standard of proof required to show that a limit is justified, and the role of evidence in the State rendering account to the courts, has been inconsistent under the balance of probabilities standard, beyond that variance expected from the flexibility and generality of s 5.

V. Comparable Jurisdictions

Due to the inherent flexibility of s 5 of the Act, New Zealand courts have the advantage of drawing from international experience in a s 5 inquiry. This enables the establishment of a

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[51] *Quilter v Attorney-General* [1998] 1 NZLR 523 at 576.

[52] At 542.

[53] Butler, above n 1, at 551.

[54] *Bennett v Attorney-General* [2001] BCL 884.

[55] Butler, above n 1, at 551.

sophisticated framework of considerations that should be taken into careful account when determining whether a limitation on a right is justified.

A Canadian Charter of Rights and Freedoms, s 1

Canada serves as a relevant comparative constitutional model. Section 1 of the Canadian Charter of Rights and Freedoms (hereafter referred to as the Charter) is essentially identical to s 5 of the New Zealand Act given s 5 is based on s 1 of the Charter.[56] A purposive interpretation of s 1 of the Charter favours an ad hoc balancing approach to a s 1 inquiry, with the approach of the Supreme Court in *R v Oakes*, in determining whether a limit is justified, being the model of which the *Hansen* approach was born.[57]
The standard of proof, like New Zealand, is the civil standard or balance of probabilities.[58] However, while the interpretation and analysis framework adopted by Canadian courts is for all intents and purposes identical to that approach taken in New Zealand under the *Hansen* approach, the presentation of evidence by the State and the treatment of that evidence within the Canadian courts has historically been marked by higher levels of quality and scrutiny.

Demonstrably justified connotes a strong evidentiary foundation.[59] Consequently, Canadian courts have held that cogent and persuasive evidence is generally required, placing greater emphasis on the relationship between the nature of the right seeking to be limited and the role and standard of evidence required to prove the limit is justified.[60] Where scientific or social science evidence is available, it will be required. Historically, the State was required to adduce evidence as to why less intrusive and equally effective measures were not chosen. Evidence of consultation with affected parties may further establish a range of options was explored.[61] This view of evidence necessitates thorough documentation and preparation of policy development in a form appropriate for potentially introduction as evidence in court.[62]

However, the courts have recently considered that where such evidence is inconclusive, or does not exist and could not be developed, reason and logic may suffice. In some contexts, where the scope of the Charter infringement is minimal, social science evidence may not

[56] Canadian Charter of Rights and Freedoms, s 1, Part 1 of the Constitution Act 1982.
[57] *R v Oakes*, above n 22, at 105-106.
[58] *R v Oakes*, above n 22, at 105.
[59] Government of Canada, above n 25.
[60] *R v Oakes,* above n 22, at 138.
[61] *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at [160].
[62] Government of Canada, above n 25.

be necessary for a s 1 justification.[63] In *R v Butler*[64] and *R v Sharpe*,[65] in response to concerns of uncertainty and inconsistencies in s 1 inquiries, the Canadian Supreme Court held that in some fields, for example obscenity and child pornography, a reasoned apprehension of a harm based standard, as opposed to scientific proof based on concrete evidence suffices in making policy choices and evaluating their reasonableness. In that regard, the Court has been quick to accept the Crown cannot be required to adduce a higher level of proof than the subject matter admits of.[66]

The initial requirement that a restrictive measure must impose the least limitation possible came to be seen as excessively strict and demanding. The Canadian Supreme Court acknowledged this critique and revised the "least possible limitation" aspect. Chief Justice Dickson, in *Edwards Books*, articulated that the assessment under s 1 should focus on whether the law or action in question encroached upon a "protected right as minimally as can be reasonably expected".[67] This change in emphasis has been affirmed in subsequent cases. Chief Justice Lamber in *R v Chaulk* noted that "recent judgments of this Court indicate that Parliament is not required to search for and to adopt the absolutely least intrusive means of obtaining its objective".[68] Consequently, as long as the legislative or executive branch selects an option from a reasonable range of alternatives, s 1 will remain unviolated.

In *Ministry of Health v Atkinson*, the Court acknowledged there has been considerable debate in Canada over the impact in an evidential sense of the test used by the Supreme Court of Canada to determine whether a right is justified.[69] Section 1 inquiries have been fraught by the same evidential difficulties as s 5 inquiries in New Zealand, especially in cases where it is difficult to provide empirical evidence to show the proportionality between the objective and the legislation or policy. Professor Choudhry's passage in *Ministry of Health* emphasises that public policy often relies on approximations, extrapolations from available evidence, inferences from comparative data, and sometimes even "educated guesses". Given the absence of large-scale policy experiments, this is

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[63] *RJR-MacDonald Inc v Canada*, above n 60, at [67].

[64] *R v Butler* [1992] 1 SCR 452, 504.

[65] *R v Sharpe* [2001] 1 SCR 43, at [88] and [198].

[66] Butler, above n 1, at 572.

[67] *R v Edwards Books and Art Limited* [1986] 2 SCR 713, 772.

[68] Butler, above n 1, at 570.

[69] *Ministry of Health v* Atkinson, above n 21, at [164].

typically the extent of the available evidence. [70] Justice La Forest aptly observed that decisions in such matters unavoidably involve a combination of conjecture, limited knowledge, general experience, and an understanding of the needs, aspirations, and resources of society.[71]

The court, until recently avoided the normative standard, rather applying the Oakes test mechanically.[72] In *RJR-MacDonald Inc v Canada (A-G)* this shift away from the *Oakes* test was notable in McLachlin and La Forest JJ's approach. McLachlin J, whilst concurring with La Forest J, expressed that scientific-level proof is not required, nor is proof beyond a reasonable doubt, stated that while context is important in determining legislative objectives and proportionality, it should not be taken to the extreme of treating the challenged law as a unique socio-economic phenomenon solely judged by Parliament.[73] The modified analysis arguably does not enhance the culture of justification required by the limitation clause; greater scrutiny would have necessarily required greater evidence to show that the least limitation possible was adopted. The resort to a normative analysis in *RJR-MacDonald* has been criticised as indeterminate and unpredictable.[74] This different application of the normative analysis either reduces the overall burden of proof borne by the government prior to applying the *Oakes* test, or it lowers the level of scrutiny in relation to a specific component of the *Oakes* test.[75] *RJR-MacDonald* revealed that despite attempts to reinvigorate Dickson CJ's "ultimate standard" in *Oakes*, the Supreme Court has failed to provide a clear normative framework with which to arrive at an acceptable level of deference.[76] Thus failing to uphold the culture of justification, inconsistently integrating normative reasoning into the Court's construction of s 1.

The judicial history of s 1 Canadian Charter litigation, like that of New Zealand, has been marked with difficulties and criticisms, demonstrating that whilst the test may be well established there are still concerns regarding the efficacy and determinative nature of the test. The *Oakes* approach has rarely resulted in a finding of a Charter breach, surprising

[70] At [165]; Sujit Choudhry "So What is the Real Legacy of *Oakes*? Two decades of Proportionality Analysis under the Canadian Charter's Section 1" (2006) 34 SCLR (2d) 501.
[71] Choudhry, above n 70, at 524.
[72] Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17, at 83.
[73] *RJR-MacDonald Inc v Canada*, above n 56, at [134].
[74] Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17, at 88.
[75] At 116.
[76] At 117.

considering the term "pressing and substantial" implies a high threshold to be met.[77] The State easily satisfying this threshold suggests that the test is largely ineffective, serving as no real obstacle. The utilisation of the *Oakes*-Plus approach, integrating normative and methodical assessments has led to unexplained variability in the Court's analysis.[78] This has led to unpredictability, as judges frequently turn to normative analysis to establish the deference level before employing the *Oakes* test, or engage in normative analysis during its application. There certainly remains questions of whether the approach adopted by the courts in s 1 inquiries is effective in enhancing the culture of justification to the extent required by s 1 of the Charter.

B South African Constitution, s 36

South Africa's limitation clause differs from New Zealand and Canada's. It states:

> Rights can only be limited to an extent reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including[79]
>
> a) The nature of the right
> b) The importance of the purpose of the limitation
> c) The nature and extent of the limitation
> d) The relation between the limitation and its purpose; and
> e) Less restrictive means to achieve the purpose

It is similar in that the burden of proving the right has been limited falls to the plaintiff and the evidential burden that the limitation is justified under s 36 is on the State. The application of s 36 entails a balancing of conflicting principles, making a judgment grounded in proportionality.[80] Different rights have different implications and accordingly there is no one standard which can be laid down for determining reasonableness. *S v Bhulwana* in 1996 stated "the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification for the infringing legislation must be".[81]

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[77] Butler, above n 1, at 569; Peter Hogg *Constitutional Law of Canada* (4 ed, looseleaf, Carswell, Toronto, 1997) para 35.9(b).

[78] Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17, at 120.

[79] Constitution of South Africa 1996, s 36.

[80] Richard Stacey "Proportionality Analysis by the South African Constitutional Court" in Proportionality in Action Comparative and Empirical Perspectives on the Judicial Practice (2020, Vol. 22) 193 at 194.

[81] At 215; *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC) at [18].

However, the Court has avoided employing tests in a rigid manner and has refrained from adopting a sequential approach akin to the *Oakes/Hansen* approach.[82] The considerations contained in s 36 are analogous to factors in the *Oakes* test, but the Court in *S v Manamela* was clear a balancing exercise must be adopted, arriving at a "global judgment on proportionality and not adhering mechanically to a sequential check".[83] This is different to the *Oakes* test which sets out a sequential, cumulative approach to the proportionality assessment, indicating that a failure at any stage of the analysis would be enough to hold that a limit is unjustifiable. In South Africa, the Constitutional Court has affirmed it is the quest for an "open and democratic society based on human dignity, equality and freedom that drives the proportionality assessment, rather than the outcome of each individual stage of that analysis".[84]

The judicial history relating to s 36 is also significantly different from that in New Zealand. Richard Stacey took a sample of 101 decisions over the 22 years between 1995 and 2017.[85] This sample represented nearly all decisions where the court found some government conduct limited constitutional rights and went on to consider whether the limitation was justifiable under s 36. Of the 101, 83 of the limitations were not justifiable and were consequently struck down. In 78 of those cases where the limited was found unjustifiable the court engaged a proportionality analysis to determine whether or not that limitation was justifiable.[86] This is a stark contrast to the judicial history of New Zealand, where the courts have only made declaration of inconsistencies three times; *Taylor v Attorney-General, Make It 16 Inc v Attorney-General* and *Chisnall v Chief Executive Department of Corrections* (currently being appealed to the Supreme Court).

It is also noteworthy that in 62% of cases where the court found the objective sought to be inconsistent with constitutional values, it struck down the limitation without considering any other elements of the proportionality analysis.[87] This is the highest 'termination rate', significantly greater than any other inquiry in the analysis.[88] It shows that the level of scrutiny applied by the South African courts is greater than Canada, where it has been suggested that the structure of the *Oakes* test itself is to blame for the courts failure in

[82] Richard Stacey, above n 80, at 269.
[83] *S v Manamela & Another* 2000 (3) SA 1 (CC) at [32].
[84] Richard Stacey, above n 80, at 269.
[85] At 195.
[86] At 196.
[87] At 223.
[88] At 223.

implementing Dickson CJ's ultimate standard of justification.[89] This is because a broad characterization of the government's objective can skew the proportional effects analysis: a broad objective is likely to be of greater importance than most all but the most grievous effects of limitations. Furthermore, if the government's objective is unduly magnified at the first stage of the *Oakes* analysis, the balancing of values during the proportional analysis is likely to be rendered dysfunctional.[90]

VI. Proposed standard

Despite utilizing largely the same approach and standard as comparable jurisdictions, such as Canada, the lack of evidence in NZBORA cases contrasts the experience of those jurisdictions. In *R v Oakes*, the Canadian Supreme Court was clear evidence would generally be required to be put before it in order for the State to prove the elements of a s 1 inquiry, though later cases have accepted that this may be "supplemented by common sense and inferential reasoning".[91] However, this more "common sense" approach has been criticized on concerns regarding the efficacy and determinative nature of the test.[92] Similarly, the South African Constitutional Court has stated that "to the extent that justification rests on factual and policy considerations, the party contending for justification must put such material before the court".[93] The courts in South Africa also scrutinise evidence to greater extent, deeming significantly more limits unjustified than both Canada and New Zealand.[94]

In Canada and South Africa, the increased significance of evidence has resulted in Bill of Rights litigation commonly requiring the compilation of comprehensive evidentiary records. This includes the submission of affidavits from experts, officials, and Ministers, the inclusion of relevant Parliamentary Debates, the submission of reports and memoranda from government departments, excerpts from scientific literature, and similar materials.[95] In the case of South Africa the greater scrutiny and role of evidence has led to a significantly greater number of limits being found unjustifiable.

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[89] Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17, at 106.

[90] At 106.

[91] Butler, above n 1, at 552; *R v Sharpe*, above n 65, at 78.

[92] Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17.

[93] Richard Stacey, above n 80, at 256.

[94] At 195.

[95] Butler, above n 1, at 552.

The effectiveness of the *Hansen* approach in aligning with the purposes of s 5 is widely acknowledged, incorporating tad hoc balancing to maintain the required flexibility. However, critiques of the analogous evidentiary burden adopted by comparable jurisdictions combined with the judicial history of NZBORA litigation indicate the balance of probabilities standard is not necessarily leading to judicial decisions that are consistent with the purposes and principles of NZBORA.[96] On these premises, there is a plausible argument for raising the standard to necessitate the State to provide the justification for a limitation to beyond reasonable doubt, surpassing the existing balance of probabilities standard.

A Beyond reasonable doubt

Increasing the standard to beyond reasonable doubt would inevitably demand the State to present more substantial evidence to prove the justification of a limit. This, in turn, would result in the level of evidence introduced during NZBORA litigation being more comparable to the evidence typically provided in litigation related to Bill of Rights cases in Canada and South Africa.

The complexity arises from the reality that court rulings on human rights can impose substantial economic burdens on society. Simply asserting that human rights are exempt from cost-benefit analysis falls short of a satisfactory response. [97] Nevertheless, the role of evidence should not be dictated by the financial burdens it places on society. The pragmatic consequences of imposing a higher evidential requirement on the State should not be determinative in lowering the standard required. When considering the justification of limits on rights, the emphasis on administrative efficiency should not be given greater importance. Furthermore, taking the view of evidence as originally articulated in Canada, the view and requirement of greater evidence under a beyond reasonable doubt will mean the development of policy must be carefully documented and prepared in a form that will later be appropriate for introduction as evidence in court. This should be viewed as good administrative practices, arguably to be expected where limitations on rights are concerned.

According to Sir Ivor, courts are justified in demanding a comprehensive analysis of potential economic and societal repercussions stemming from the decisions under consideration. In this aspect, the courts share equivalent information demands as those

[96] Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17.

[97] Rt Hon Sir Ivor Richardson, above n 13, at 75.

involved in law reform, legislative process, and executive decision-making.[98] However, there are limitations to the extent that evidence can or should be utilized. The adversarial nature of New Zealand courts may not be well-suited for conducting comprehensive public interest inquiries. Therefore, it is important to develop techniques for obtaining briefs and statistical information from the government, as well as potentially affected industry and citizen groups. [99]

B Purposes of s 5

In *R v Oakes* the majority held:[100]

> The standard of proof under s 1 is a preponderance of probabilities. Proof beyond a reasonable doubt would be unduly onerous on the party seeking to limit the right because concepts such as "reasonableness", "justifiability", and "free and democratic society" are not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously.

However, this has not rung true. Canadian and New Zealand courts have not applied the civil standard rigorously, instead using it as a mean to hold limits as justified where the evidence is contentious. Palmer stating the NZBORA has "not made a sufficient difference to accomplish the vision that propelled it".[101] Thus, although beyond reasonable doubt was initially considered too onerous,[102] judicial history suggests to uphold the principles of the NZBORA and achieve the purposes of s 5 it is necessary for such a standard to be adopted. Raising the standard to beyond reasonable doubt would aim to maintain and safeguard the overall objectives of the NZBORA, and particularly the purposes of s 5 more effectively.

1 Protecting and upholding rights

"Beyond reasonable doubt" is the standard adopted in criminal proceedings. It recognises the vulnerability of individuals facing trial.[103] It also mirrors the importance placed on liberty, each person possesses inherent liberties, and only in exceptional instances should the State possess the authority to curtail an individual's liberty. Similar principles are in the objectives of the NZBORA. It safeguards the rights of New Zealand citizens, protecting

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[98] At 75.

[99] At 74.

[100] *R v Oakes*, above n 22, at 105.

[101] Geoffrey Palmer, above n 6, at 179.

[102] *R v Oakes*, above n 22, at 105.

[103] Martin Friedland "Searching for truth in the criminal justice system" (2014) Criminal Law Quarterly 60(4) Mar 2014: 487-521 , at 497.

the vulnerability of citizens from the State in a democracy with a constitutional principle of parliamentary supremacy.[104]

2 Culture of justification supporting rights and limits as fundamentals

The NZBORA emphasises both rights and limits are fundamental.[105] Section 5 supports the State's right and responsibility to limits rights and freedoms. Accordingly, Butler observes that the culture of justification established by s 5 seeks to create an environment wherein the significance and value of limitations on rights can be acknowledged and appreciated just as the rights themselves.[106] The concept of a culture of justification was introduced by Etienne Mureinik.[107] Mureinik is well-known for asserting that in relation to the South African 1993 Interim Constitution and its Bill of Rights, it should foster a culture where each exercise of authority is required to provide reasoning for its actions.[108] This implies that governmental leadership rests on the "cogency" of the case offered in defence of its decisions.[109] The standard of beyond reasonable doubt would better promote the purposes of s 5 creating a culture of justification according to Mureinik's articulation, requiring the State to produce greater evidence and more cogent arguments in convincing the court that the limit is justified beyond reasonable doubt.

3 Transparency and accountability

The standard of beyond reasonable doubt will also enhance governmental accountability and transparency. The dilution of the standard to balance of probabilities was in consideration of the varying expertise of judges and public officials.[110] Nevertheless, Butler expresses reservations about explicitly integrating this aspect into the reasonableness standard.[111] When a court exercises its supervisory jurisdiction to assess whether the State has reasonably imposed limitations on protected rights, it is appropriate for the court to acknowledge its limitations. However, the court's lack of expertise doesn't warrant a reduction in the standard demanded by s 5, as this can give rise to criticisms in

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[104] Ministry of Justice "The New Zealand Bill of Rights Act" (27 March 2023) justice.govt.nz <justice.govt.nz.>

[105] Butler, above n 1, at 557.

[106] At 540.

[107] At 554.

[108] Moshe Cohen-Eliya and Iddo Porat "Proportionality and the Culture of Justification" (2011) 59 The American Journal of Comparative Law 463 at 463.

[109] At 474.

[110] Rt Hon Sir Ivor Richardson, above n 13, at 74.

[111] Butler, above n 1, at 560.

judicial outcomes and create a risk of them appearing to be arriving at unpredictable and arbitrary results.[112]

4 Flexibility

Arguments in favour of the balance of probabilities standard have been maintained by the need for flexibility in a s 5 analysis. The strictness of the test must be balanced with flexibility for it to be equally applicable in regards to the different rights contained within NZBORA. However, a higher standard would not necessarily remove such flexibility, the proposed standard is not seeking to impose specific or mandatory evidential requirements. The flexibility required by s 5 has been built into the *Hansen* approach with considerations of the objective of the right and limit concerned being analysed when assessing the objective of the provision limiting the right with connection to the right engaged. Thus, the standard of beyond reasonable doubt applied to the *Hansen* approach would not influence the flexibility required by s 5, rather it would better balance flexibility with the strictness required in assessing whether a limit is justified. Context will continue to necessarily affect the type of evidence required to meet the standard of proof.

VII. Future applicability

The fundamental nature of rights, and limits on them, have long been recognised as crucial elements of society. The acknowledgement of these rights in the NZBORA, along with the expectation that courts remain cognizant of the importance of the Bill of Rights when interpreting legislation clearly shows Parliament's intentions in protecting and upholding the rights of citizens. The importance of rights, and their limits should be reflected in an interpretation and application of s 5 that promotes its purposes to the greatest extent possible. This holds particular significance, especially in considering the potential applicability of the NZBORA regarding contemporary issues. This was articulated by Palmer who stated:[113]

> There are serious challenges ahead for public policy in New Zealand. The global geopolitical situation raises many issues. Economic turmoil could occur and populist sentiments could product ugly outcomes. Preservation of the liberal democratic state seems important. It would be better to bed in something solid before adverse events occur.

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[112] Leon E. Trakman, William Cole-Hamilton, Sean Gatien, above n 17, at 107.

[113] Geoffrey Palmer, above n 6, at 199.

Climate change serves as a prime illustration of such a matter. The relationship between a nation's Bill of Rights and climate change can be intricate. The degree to which a Bill of Rights directly encompasses climate-related aspects, or their consequences may differ based on the phrasing and understanding of the specific rights outlined in the legislation, in addition to the legal and political context. Section 8 of the NZBORA contains the right not to be deprived of life.[114] The right of life is a fundamental human right contained in numerous Bill of Rights. Considering that climate change exposes human lives to risks through extreme weather events, rising sea levels, and other consequences, claimants could contend that governments have a duty to take action to mitigate those risks under the framework of protecting the right to life. Thus, claimants concerned about inadequate government action on climate change, or government actions that contribute to climate change, could use provisions in the Bill of Rights to bring legal action that compels governments to engage in environmentally conscious behaviour. When such actions are brought, it will be in the interests of society at large that the state is required to prove beyond reasonable doubt that their actions constitute a justified limitation on s 8.

VIII. Conclusion

In conclusion, the intricate balance between individual rights, societal needs, and the principles of justice lies in the purposes of the NZBORA, particularly within s 5. The challenge of balancing the protection of human rights with the demands of a productive and ever-evolving society has placed the judiciary in a pivotal role. The courts must navigate the complex landscape of rights interpretations and limitations, striving to preserve both the integrity of legislative supremacy and the transparency crucial for a representative democracy.

The complexities of s 5 inquiries demonstrate the delicate balance the courts must maintain between protecting individual rights and facilitating democratic governance. The need for equilibrium between these fundamental aspects requires an ongoing commitment to thoughtful interpretation, open dialogue, and the continuous evolution of standards. As New Zealand's judiciary seeks to protect rights and freedoms it must ensure that rights are honoured, limitations are justified, and the spirit of democratic representation remains.

The dual nature of the courts' responsibilities, safeguarding individual rights while respecting the democratic process, creates a tension that is reflected in the cautious and

[114] New Zealand Bill of Rights Act, s 8.

careful approach taken by the judiciary when analysing claims brough under s 5. The inherent broadness and flexibility of s 5, coupled with the evolving understanding of rights and limitations, has resulted in a judicial landscape that embraces both a broad spectrum of rights theories and a desire for a clear, well-established framework. This tension becomes most apparent when assessing the standard and role of evidence in justifying limitations on rights under s 5.

Attempting to resolve this tension, the courts have applied the balance of probabilities standard when performing a s 5 analysis. However, this has introduced uncertainty in the realm of NZBORA litigation with the courts inconsistently scrutinising evidence in determining whether a limit has been proven justified. Consequently, the role of evidence in the courts reasoning has also been inconsistent. *New Health v South Taranaki District Board* serves as an example of these complexities arising from the balance of probabilities standard. Despite there being no settled view regarding the benefits of water fluoridation, and O'Regan and Ellen France JJ of the Supreme Court acknowledging that the evidence was contentious, it was held that the limit was justified under s 5.

When the Canadian Supreme Court established the *Oakes* test, upon which the *Hansen* approach is modelled they emphasised that the balance of probabilities standard should be applied rigorously in s 5 inquiries. Neither the New Zealand courts, nor the Canadian, have done so, resulting in seemingly arbitrary conclusions that limitations are justified. More reliable anchors are needed to ensure human rights are protected.[115] To preserve the principles of the Act, and better promote the purposes of s 5 it is proposed the courts adopt the standard of beyond reasonable doubt. In order to prove that a limit is justified beyond reasonable doubt the State would be required to produce greater evidence in support of their arguments. It would also require the court to signify the role of evidence, both speaking to the culture of justification s 5 seeks to establish.

[115] Geoffrey Palmer, above n 6, at 169.

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