THE NEW ZEALAND BILL OF RIGHTS ACT 1990

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The Legal Research Foundation is pleased to revisit the subject of the New Zealand Bill of Rights. In 1985 the Foundation held a successful seminar in Auckland on the White Paper proposal for an entrenched Bill of Rights. That proposal did not proceed. Instead, the Bill of Rights was enacted in 1990 as an ordinary statute and not as “higher law”. The precise implications of the “ordinary statute” Bill of Rights Act were not clear at first. Much of the debate to that point had focused on whether entrenchment was a good or a bad thing, with little attention being paid to the practical operation of specific rights. It was assumed that an ordinary statute Bill of Rights could not control Parliament’s power to legislate. On the other hand, it cast a new obligation upon the judiciary (to interpret statutes consistently with the Bill) and imposed a detailed set of obligations on the executive branch and those wielding public power (to observe the rights in the Bill). In these two respects, the Bill of Rights Act 1990 was not too different from its Canadian and American equivalents.

By the end of 1991 some of the implications of the Bill of Rights, at least in criminal procedure, were becoming apparent. A series of significant Court of Appeal decisions interpreted the right to a lawyer generously, and granted remedies for its infringement. In that particular area of law, it appeared that the New Zealand Bill of Rights had become the functional equivalent of the Canadian Charter of Rights and Freedoms and the United States Bill of Rights. This important development warrants a careful examination of the parameters of the Bill of Rights in criminal procedure, and what may be in store having regard to Canadian and American jurisprudence. Professor Paciocco is a recognized authority on the Canadian Charter and is well placed to make this analysis. Mr Justice Thomas provides the perspective of a New Zealand High Court judge.

The remaining two papers concentrate on the non-criminal area. Janet McLean, Paul Rishworth and Michael Taggart explore the potential impact of the Bill of Rights on the interpretation and exercise of statutory powers of decision. The Solicitor-General’s paper addresses the impact of the Bill on the legislative process, in particular the operation of s 7 of the Bill.
The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable

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Introduction

The New Zealand Bill of Rights Act 19901 was crafted from a rib taken from the Canadian Charter of Rights and Freedoms.2 Unlike the Charter, however, the Bill was not the product of major constitutional reform3 Indeed, its entry onto the legal scene was so uneventful as to be almost surreptitious. And when it was discovered it was declared by most to have been still-born, a lifeless carcase testament to a non-elected Prime Minister. That body has been claimed by criminal lawyers, and they have breathed life into it.4

It was obvious to everyone that forces had been at work to disembowel the Bill. To some, its heart seemed to have been removed when it was deprived of constitutional status and its rights and freedoms made subject to ordinary legislation.5 Its remedies clause was also excised,6 raising the prospect that it was to be no more than another canon for interpreting legislation.7 Moreover, the substantive rights it conferred were, in places, restated in an apparent attempt to avoid what were evidently perceived to be the more blatant excesses of Canadian jurisprudence.8 Because of all of this it appeared to many that, like the Canadian Bill of Rights (1960),9 the worth of the Bill would be measured only by the floridity of its prose - impressive sounding but empty words embossed on yellowing parchment, hanging on the walls of stately public buildings, rarely if ever to be uttered in court.

After less than two years it can be said with some confidence that those who counted on this being so were wrong. At the first available opportunity the Court of Appeal endorsed

1 Herein, the “Bill”.
2 Part I of the Constitution Act 1982, as enacted by the Canada Act 1982 (UK), proclaimed 17 April 1982 (herein the “Charter”).
5 Section 4 of the Bill deprives courts of the power to use it to render any enactment invalid or ineffective or to decline to apply any provision.
6 The 1985 draft Bill had contained a provision identical, mutatis mutandis, to s 24(1) of the Charter.
7 Section 6 is the only provision addressing the use that is to be made of the Bill by courts, and it specifies that the Bill is to be used in interpreting legislation.
8 Examples include:

(1) the decision to have a freedom from discrimination provision rather than a general equality provision like that in the Charter;
(2) the paring down of s 8, the “principles of fundamental justice” provision, (in Canada the equivalent provision, s 7 of the Charter, extends to deprivations of liberty and security of the person) and;
(3) the insertion of the curious phrase “under any enactment” to limit those situations of detention where subss 23(1) and (4) will apply.
9 The Canadian Bill of Rights (1960) is distinct from the Charter. It was passed as an ordinary statute and quickly fell into disuse after it became apparent that it would be narrowly construed, and would lead in almost all cases to no real remedy.
the Bill by approving the technique of the purposive interpretation and by accepting the importance of interpreting the Bill in a manner that will give the full measure of protection to the rights and freedoms it contains, even if this marks a departure from more familiar techniques of statutory construction.\textsuperscript{10} It then swept aside any suggestion that the absence of a remedies clause would neuter the Bill, adopting first a prima facie exclusionary remedy for violations of the Bill\textsuperscript{11} and then claiming a broad jurisdiction in courts to remedy violations.\textsuperscript{12} It made great efforts to overcome the curious limitation that only persons who have been detained “under an enactment” or arrested will receive the benefit of subs 23(1) and (4), by interpreting “arrest” more broadly than its common law meaning would allow.\textsuperscript{13} It then dashed the hopes of the nay-sayers in \textit{Ministry of Transport v Noort},\textsuperscript{14} a bold decision with enormous practical consequences. Those who drink and drive, a class of persons increasingly viewed with contempt by the public, were accorded the right to consult a lawyer and the right to be advised of that right, prior to providing evidential breath or blood samples. The Bill is also enhancing protection against testimonial self-incrimination as confessional evidence obtained in violation of the Bill is being excluded more readily than before, and there is every indication that powers of search will be confined strictly under the Bill.\textsuperscript{15}

Despite these impressive endorsements, it would be naive to believe that the Bill has been roundly embraced. Much of the Bill of Rights authority in this country is hesitant. Notwithstanding the presence of s 4, which would allow the passage of unreasonable legislation to remove the protection of the Bill in any case where Parliament saw fit, there is apparent concern on the part of at least some courts that the principles enshrined in the Bill have the potential to harm the primary mission of criminal law, the protection of the public. That concern is shared by at least some politicians and undoubtedly by members of the public. The fact that it has found a home in the criminal law has, politically, made the Bill a pariah; passed to affirm and promote human rights and fundamental freedoms and to express New Zealand’s commitment to the International Covenant on Civil and Political Rights,\textsuperscript{16} it has become, in the eyes of some, a rogues’ charter. This appears to be having the effect of needlessly delaying the maturation of the Bill.\textsuperscript{17}


\textsuperscript{11} \textit{R v Kirifi} [1992] 2 NZLR 8 and \textit{Butcher}, ibid.

\textsuperscript{12} See \textit{Noort}, note 10 above, per Cooke P (p 20):

\begin{quote}
[The New Zealand Act contains no express provision about remedies or the exclusion of evidence. We have no counterpart of article 24(1) and (2) of the Canadian Charter, which deal expressly with those matters. This difference is probably of much consequence. Subject to ss.4 and 5, the rights and freedoms in Part II have been affirmed as part of the fabric of New Zealand law. The ordinary range of remedies will be available for their enforcement and protection. This is a bold statement, for there are a number of impediments that could have inhibited access to remedies. I discuss these in detail in “Remedies for Violations of the New Zealand Bill of Rights Act 1990”, \textit{Essays on The New Zealand Bill of Rights Act 1990}, (Legal Research Foundation, Publication No 32, 1992) 40.]
\end{quote}

\textsuperscript{13} See the discussion below at Part III, \textbf{Purposive interpretation}: “arrest” and “detention under any enactment”.

\textsuperscript{14} Note 10 above.

\textsuperscript{15} See \textit{R v Watt} (1992) 8 CRNZ 180 and see the discussion of search and seizure in \textit{Adams Criminal Law}, “The New Zealand Bill of Rights Act 1990: Commentary”.

\textsuperscript{16} See the preamble to the Bill.

\textsuperscript{17} The problem feeds on itself. The more that the political stature of the Bill is diminished because of its
It is an unfortunate reality that domestic charters tend to become the playthings of criminal lawyers. This almost universal experience is paradoxical; it is far more acceptable politically to recognize human rights in order to protect those who are victimized by society than it is to give rights to those who victimize society. At the same time, established concepts about government have made it easier and more natural for courts to be vigilant in protecting rogues than in policing those excesses of Parliament and its ministries that touch the lives of the weak, the disenfranchised, and the dispossessed. The criminal law provisions of bills and charters tend, therefore, to be their most potent.

In Canada these realities have caused the Canadian Charter of Rights and Freedoms to play its largest role in the context of the criminal law. The overwhelming majority of cases deal with matters of criminal procedure, and it is in this sphere that rights have been most effectively protected. As in New Zealand, this, of course, has caused public relations problems. The Charter, like the Bill, reduces the power of the state by protecting the rights of individuals and private groups. And it is, of course, the state that prosecutes crime. Those sections of the Charter that are relevant to the criminal law therefore reduce the power of the state to prosecute successfully, this at a time when the public is clamouring with good reason for more rather than less effective prosecutions.

This tension has been played out in dramatic fashion in Canada in recent months. The Supreme Court of Canada struck down as unconstitutional the rape shield provisions of the Criminal Code, which prevented accused persons from asking some questions or leading some evidence about the sexual experiences of complainants. The Court reasoned that the prohibition was unduly broad, preventing accused persons from having access in some cases to evidence that could be critically important in determining what happened. The death of the section was met with a deafening outcry from feminist lobbyists and
criminal law orientation, the less likely it is that the non-criminal human rights and fundamental freedoms provisions will take hold.

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18 There are two general reasons for this that will be explored in more depth in the body of this paper. The first is the commitment to parliamentary sovereignty so deeply entrenched in Westminster democratic theory. The second, to some degree a corollary of the first, is that courts are far more comfortable working in the familiar surrounding of criminal procedure than they are in matters more directly economic and political. They are better equipped to vindicate fundamental criminal law rights than they are to preserve democratic and civil rights, or minority rights.

19 The structure of the New Zealand Bill of Rights Act 1990 exacerbates this problem. The common law has done little to confer democratic, civil and minority rights. With the notable exception of the law of crimes prior to 1893, its preoccupation historically has been with private law and procedure. Legislation is the primary legal technique for touching democratic, civil, and minority rights. Yet the New Zealand Bill of Rights Act is, by Parliamentary decree, subject to legislation; it cannot be used to strike down, modify, or to refrain from applying legislation. Its contribution to matters of democratic, civil, and minority rights is therefore limited. It is a canon for interpreting legislation and for reviewing the discretionary actions of state agents. In non-legislated matters of criminal procedure, however, there is little in the Bill to prevent its effective application.

20 In Canada crime is on the increase for a variety of complex reasons. There is a law and order mentality that is widely expressed. There are frequent demands for more protection for woman and child victims (which is affecting profoundly the law of evidence in Canada), anti-drinking and driving campaigns receive considerable attention and support, and there is a general hostility to the regime for the prosecution of young offenders, fuelled by the growing number of youth gangs and the faithful reporting of any brutal crime committed by a young person.


22 It was replaced by a more flexible regime developed by the Court using its common law power.
victims’ rights groups which prompted the government to respond quickly. It has since passed sweeping amendments to the sexual assault provisions of the Criminal Code in Bill C-49 designed to make the prosecution of sexual offences more effective. 23

Judges, of course, are not to behave like politicians. They are to perform their function courageously, even when their decisions are unpopular. In the Canadian case of Collins v R 24 Lamer J was dealing with a provision that expressly requires judges to assess the impact of their decisions on the repute of the administration of justice. His Lordship spoke sceptically about the sensitivity of members of the public to the importance of protecting the kinds of rights and freedoms contained in the Charter, noting that “the public generally becomes conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system”. 25 He noted that on such matters: 26

‘The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion.’ The Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority.

This is not to suggest that courts must disregard the concerns of the public about law and order. Courts must respond, though, not because there is lobbying about society’s law and order problems but rather because society does have law and order problems to lobby about. While courts must be principled they need not be absurd. So long as they do so in a restrained and principled way, they can apply fundamental principles in a sober fashion that will not cripple effective law enforcement; the Bill did not mandate civil libertarian zealotry. The task of courts is to use the Bill to preserve basic criminal law principles, while at the same time being pragmatic about it. Courts should give full measure to the rights and freedoms contained in the Bill, but only where those rights and freedoms are relevant, and where the effect of doing so is not disproportionately harmful to the public interest in the effective prosecution of crime.

This paper is divided into three parts. In part I, I will examine why domestic bills of rights tend to become “rogues’ charters”, and I will attempt to explain why this is not such a bad thing. I will suggest that the structure of the New Zealand Bill of Rights Act allows for the measured application of fundamental rights and freedoms, and I will claim that it is possible for courts to apply appropriate techniques to keep the use of fundamental principle relevant and proportional. In part II of the paper I will suggest particular

23 These amendments purport to define “relevance” for the purpose of proving past sexual conduct, and they establish a firm presumption against admissibility. They also go further and affect the substantive definitions of sexual offences by redefining “consent” in strict terms, and by harnessing the defence of belief in consent. The win in Seaboyer by those who opposed the rape shield protection of the Code had the effect therefore of inspiring a backlash that not only removed their victory, but also cut deeply into the principle of fault. Until then, that principle had been holding its own against lobbying designed to redefine sexual offences according to the perception of the complainant rather than the state of mind of the accused. Many of the provisions of Bill C-49 will be dragged again before the Supreme Court of Canada and, unless it backs down, the entire drama will be replayed.


26 Ibid.
strategies for controlling fundamental principle. I will draw a fairly obvious distinction between the imposition of general limits on the reach of the rights and freedoms contained in the Bill, and the use of particular limits in individual cases. I will suggest that the techniques of purposive interpretation and purposive application of rights can be used to provide general limits on the rights and freedoms contained in the Bill, as can an appreciation of context. I will also suggest that the principled use of remedies is an appropriate technique for ensuring that the application of rights and freedoms is relevant and proportional. In part III of the paper I will examine briefly the law of arrest and detention in New Zealand. I will do so because it is an area of the law where, in my respectful opinion, the enjoyment of that right has been inappropriately curtailed by pragmatic considerations and by the failure to apply the purposive interpretation faithfully.

PART I

THE MAKING OF A ROGUES’ CHARTER

The making of a “rogues’ charter”: parliamentary sovereignty, the courts, and criminal procedure

There are many who challenge the integrity of Bills of Rights, particularly when they have been constitutionalized, for where they have been made constitutional they allow courts to overturn the decisions of elected officials. To make matters worse, the text of a Bill is necessarily vague and malleable. Many deny the existence of established principles that will aid in construction. They urge, frequently with incontrovertible reason, that curial decisions reflect the politics and prejudices of the judge rather than the dictates of law. Such concerns were no doubt central in influencing the design of the New Zealand Bill of Rights Act, most notably in s 4, which prevents courts from overriding legislation, even where it conflicts with the Bill. Yet as criticisms they have much less force in the area of criminal procedure than elsewhere. The contest of authority in matters of criminal procedure tends not to involve Parliament or its ministers. Most frequently, alleged violations of bills of rights in criminal cases are not challenges to legislation but rather relate to the actions of police, prosecutors, and courts themselves. While they are undoubtedly arms of the state, lay persons tend not to consider the police, prosecutors, and the courts to be “government”. Even for the more politically astute, the function they perform, their non-elected status, and their independence from the rest of government, makes the judicial control of these institutions unobjectionable; parliamentary sovereignty and the integrity of the will of the people is sufficiently removed to be of little relevance. Section 4 has not, therefore, removed as much of the Bill’s potential in criminal cases as it has in other areas of the law. Nor for the reasons stated do concerns about the desirability of activist courts have the same impact in the area of criminal procedure that they do in other areas. Moreover, criminal procedure emerged from judge-made law; courts have always been its progenitors and its guardians. Rules of criminal procedure are the product of, and the epitome of, the common law method. As one American commentator observed in the context of the American Bill of Rights, “[i]t took no violent
stretches of democratic theory to suppose an expectation on the part of the people that, in employing criminal sanction, the political branches would abide the judge's sense of what was mete and decent in the way of procedure''.

Fundamental criminal law rights do not suffer from the same problems of definition that plague most of the other rights and freedoms affirmed in the Bill. For this reason, as well, their growth and application is less likely to be inhibited by concerns about the desirability of judicial activism. More so than in any other area of the law, the accusatorial system employed in the prosecution of offences is structured and maintained through a network of familiar concepts available to guide the criminal lawyer. This has become evident in the text of the Bill itself. Its criminal procedure sections tend to be precisely tailored statutory provisions that differ in kind from the loose and aspirational wording employed for more elusive concepts such as fundamental freedoms, democratic rights, non-discrimination protections, or even the principles of natural justice. Even where the criminal law provisions are expressed in a vague fashion, they conjure up familiar images, seen before in the reasoning of common law judgments. Simply put, courts are more dexterous with familiar criminal law tools than they are with the newer implements of fundamental freedoms, democratic rights, and equality. They are therefore more apt to reach for those criminal law tools, and to work well with them.

This, of course, leads to the regrettable reality that the protection of bills of rights is infinitely more accessible in criminal than in non-criminal cases. Typically proclaimed in the name of oppressed minorities and the politically weak, it is therefore the invariable experience with domestic bills and charters that they come to serve primarily a less sympathetic clientele: the criminal accused, the overwhelming majority of whom, experience has shown, are guilty in fact. In the eyes of many, bills of rights are therefore undesirable because they become "rogues' charters"; the hands that clutch and wave bills of rights in the name of decency are often sullied with the blood of crime.

**Defending the existence of a rogues' charter**

Those of us who are criminal lawyers tend not to be overly distressed by this. The presumption of innocence is a legal concept that is reflexively incanted in answer to such criticism, but as hackneyed as that phrase is, it does express ample justification for the English tradition of conferring substantial rights on those accused of crime. There are persons who are wrongly charged. If freedom means anything, it is the right of the innocent not to be wrongly punished and not to be subjected without sound justification to arrest, search, or interrogation. Moreover, the very realization that most persons charged are indeed rogues speaks volumes about the need to develop safeguards for the decent treatment of such persons. If as a class they are held in contempt, their ill treatment is almost assured, and that ill treatment will engender little sympathy. The conundrum this places us in is that despite our immediate inclinations, our dispassionate values suggest that as persons they are to be treated with dignity and humanity. It is the function of a Bill to ensure this humane treatment out of respect for its basic values, for that humane treatment will not happen out of respect for accused persons themselves. It is done as a matter of principle.

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27 Bickel, "The Supreme Court and the Idea of Progress" (1978) 32.
The cost of being principled

The kind of majestic dialogue that goes on about fundamental rights had the Crown in *Noort* cautioning “that the New Zealand Courts should not adopt what they called ‘the rhetoric’ of some Canadian Supreme Court judgments”. In fairness to those of us who poeticize when describing fundamental principles, notions about justice, fairness, and morality are the stuff of verse. They are the stuff of anthems, literature, and eulogy. They puff the chest and wet the eye. When society grants rights to persons who have flouted its most basic rules, it is done in a spirit of generosity. This engenders pride, perhaps even a feeling of self-righteousness. It expresses the dignity of turning the other cheek. It is the kindness of the good Samaritan. It is the embrace of the prodigal son. And therein lies the kernel of wisdom in the Crown’s caution in *Noort*; it is possible for courts to get flush with the enterprise, and to lose sight of the costs engendered by the mission. The price of observing principle is the restriction on investigative techniques, the exclusion of evidence, and even, in some cases, the staying of proceedings. More bluntly put, the cost is the prevention of the successful prosecutions of some persons who are guilty. And if there is value in convicting the factually guilty, as there is generally believed to be, that price can be considerable.

To say that we pay that price as a matter of principle may be the noble affirmation that we are prepared to accept the costs associated with protecting our integrity. On the other hand, the phrase “it was done as a matter of principle” is sometimes used as the defiant justification provided by the actor whose conduct is self-destructive. There comes a point where, pragmatically, it is too expensive to adhere to principle. Where this is so it may be appropriate to compromise that principle. It has always been the nature of legal principles to allow for this, and it is a reality that is accommodated by the structure and nature of the New Zealand Bill of Rights Act.

What the Bill gives to “rogues”: the juridical nature of its rights

Legal philosophers have toiled in their efforts to distinguish rights from freedoms and rules from principles. This is because the nature and function of various categories of legal concepts differ, and it is helpful in the orderly development of law to identify these differences. For example, the concept of a right normally suggests the existence of a correlative duty. The concept of a freedom, on the other hand, connotes the ability to act without interference but suggests no entitlement to positive assistance in the enjoyment of that freedom. The concept of a freedom, on the other hand, connotes the ability to act without interference but suggests no entitlement to positive assistance in the enjoyment of that freedom. The concepts of rules and principles also differ. Rules are generally conceived to be mandatory. Where a rule exists, it must be applied. As such, it is impossible for conflicting rules to exist within a legal system. Principles, on the other hand, are not mandatory. They are notions of justice, morality, or fairness recognized as worthy of protection by a legal system. As mere values, they can conflict with one another. The function they serve is to assist in the generation and application of rules. Rules can therefore be developed to give effect to the values inherent in a principle. Moreover, principles can guide the exercise of discretion where a rule permits a range of choices to be made. In other words, principles are part of the raw material consulted in the selection

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28 Above, note 10, at 122-123 of the decision of Cooke P.
29 Exceptions to rules are themselves rules. They do not conflict with the rules to which they are exceptions because they have an independent, exclusive sphere of operation.
and application of rules but they do not, themselves, have the force of law. Unlike rules, principles cannot be invoked directly by persons claiming legal rights.

Lawyers have always been lax in employing the language of rights, freedoms, rules, and principles. This is because the definitions for the concepts are not universally valid. They break down in some contexts. By their very nature, bills of rights tend to challenge the integrity of these definitions. They take freedoms and, in some respects, convert them into rights. More importantly for present purposes, the rights and freedoms stipulated in bills of rights tend to be a hybrid between rules and principles. They are generally expressed as principles would be, in vague and aspirational terms conjuring up general notions about fairness, justice, or morality. Yet, unlike pure principles, they can be enforced directly by persons with standing. In simplistic terms, bills of rights take basic principles and give them the function of rules. Of course, they tend to lack the usual definitional precision of rules because of the diverse and timeless roles they are meant to play. Moreover, unlike simple rules, the rights and freedoms expressed in the Bill are not absolute. They are prima facie rights and freedoms, subject to limitations. Some of those limits will be internal, imposed as a matter of construction. Other limits will be external, engrafted through the operation of ss 4 and 5 of the Bill. The rights and freedoms affirmed in the Bill are therefore contingent rights, converted into rules only after they have run the gauntlet of parliamentary sovereignty and have been distilled in a restrained and careful manner through the lens of pragmatism.

All of this is quite unsatisfying for the legal positivist since it plays havoc with the primacy of certainty. If public policy is an unruly horse, pragmatism is a bronco with a burr under its saddle. The fact has to be faced, however, that the "general [international] recognition that some human rights are fundamental and anterior to any municipal law", which helped carry the passage of the Bill of Rights Act, is itself a rejection of pure positivism and certainty.

By the same token, endorsement for the qualification of fundamental rights and freedoms in the name of pragmatism dissatisfies the civil libertarian or the ardent natural lawyer. They urge, with reason, that pragmatism is hardly an appropriate basis for sacrificing fundamental rights and freedoms. They point out that it will sustain the subjugation of those rights and freedoms in the hard cases, where they are most needed and can render those rights almost meaningless. As the structure of the Bill reveals, however, the day has been carried by the ethical pragmatist: rights and freedoms are recognized as fundamental and will be preserved, where it is not unreasonably costly to do so.

The central tension in criminal Bill of Rights jurisprudence, then, is to ensure that the

31 The rights and freedoms contained in the Bill perform several functions. They are canons of interpretation under s 6, principles to be consulted in the development of legislation (s 7), standards to be used to challenge common law rules, and rights that can sustain remedies where there has been non-compliance by state agents exercising discretionary or non-statutory powers.
32 Notions about justice, fairness, and morality adapt over time. If the Bill is to form the basis for the protection of principles of justice, fairness, and morality, its provisions must be left open to remain relevant. See the words of Dickson CJC in Hunter v Southam Inc [1984] 2 SCR 145, 155-56, 11 DLR (4th) 641, 14 CCC (3d) 97.
33 Ministry of Transport v Noort, above, note 10, p 24, per Cooke P.
search for principle is not conducted in a self-destructive manner while at the same time ensuring that the allure of convicting the factually guilty does not devalue fundamental principles unduly. As Canadians have discovered, this is an impossible task to perform perfectly. It is even a difficult task to perform well. It is a task that can be aided, however, by the development and application of appropriate legal technique.

PART II
GUIDES FOR RECONCILING PRINCIPLE AND PRAGMATISM

Relevance and proportionality
Two objectives, more than any other, define the pragmatic application of principle. The first is the desire to keep the application of principle relevant. Society gains nothing where rights and freedoms are applied in cases where the principles they affirm are not advanced through their application. In criminal cases, where the application of those rights and freedoms prevents the trial of charges on their merits or on all available, probative evidence, society loses a great deal. The first pragmatic objective in the application of fundamental principle should therefore be the pursuit of relevance. The second objective is that of proportionality. Ideally, the vindication of fundamental rights and freedoms should not produce costs that are greater than the benefits to be gained. Pragmatic limitations on rights and freedoms contained in the Bill should therefore be directed at ensuring the relevant and proportional application of fundamental rights.

General and specific limitations on the application of principle
Relevance and proportionality can be enhanced through the development of appropriate limitations on the operation of fundamental principle. In some cases general limitations can be imposed on the reach of rights and freedoms. This can be done through the use of ss 4 and 5 of the Bill, or alternatively through the definition of rights and freedoms themselves. The application of rights or freedoms can also be kept proportional and relevant in particular cases, under appropriate circumstances. This can be done through the principled application of remedies.

General limitations upon rights and freedoms

1. **External limitations: the non-contribution of s 4 and the relative non-contribution of s 5**

The most potent technique for limiting the application of fundamental rights and freedoms is the external limitation that exists in s 4 of the Bill. This section has nothing to do, however, with ensuring that the rights and freedoms contained in the Bill are applied pragmatically, with relevance and proportion. It is too unwieldy to perform that function; it is more cleaver than scalpel. Any enactment, no matter how unreasonable, draconian, or excessive, will predominate where it is inconsistent with the rights and freedoms contained in the Bill, not because this represents sound policy in a particular case but rather because the commitment to the values contained in the Bill is, in the end, less than the general commitment to parliamentary sovereignty. The extent to which it ultimately contributes to keeping the operation of fundamental principles relevant and proportional
is dependent not on legal technique but rather on the choices made by politicians. For this reason it will not be analysed further in this paper. Suffice it to say that the existence of s 4 should be enough to embolden courts in the interpretation and application of principle. Their decisions can be unceremoniously overturned by legislative amendment if those courts are perceived to overshoot the mark.

Section 5, on the other hand, if read in isolation, appears to be a tool for keeping the operation of principle appropriate, relevant and proportional. Like s 1 of the Charter, it purports to make fundamental rights and freedoms subject to limitations that are demonstrably justifiable in a free and democratic society. In Canada s 1 has resulted in the development of criteria for judging when a limitation on a right or freedom will be appropriate, relevant and proportional. The promise of s 5 of the Bill has been largely dashed, however, by the passage of s 4. Although the relationship between the two sections is yet to be finally settled, some Court of Appeal judges have taken the view that s 5 is of relevance only in cases where the limitation on a right or freedom is prescribed by common law; where statutory limitations are offered to justify the non-application of fundamental rights, only s 4 need be considered since any statutory limit, reasonable or not, will predominate. Other judges of the Court of Appeal have taken the preferable view that s 5 should be used to analyse alleged statutory limitations before s 4 is considered. If the statutory limitation is reasonable and only qualifies but does not completely contradict the right or freedom, then that right or freedom can exist in its qualified form and there is no need to examine s 4. Moreover, where an implicit statutory limit is presented to justify a contravention of a prima facie right or freedom, it has been urged that s 5 should be used to confine such implied limitations to those that are reasonable and demonstrably justifiable. Under either view, s 5 will rarely be

34 The Oakes test, developed in the case of R v Oakes [1986] 1 SCR 103, 26 DLR (4th) 200, 50 CR (3d) 1, is applied in deciding whether a limitation satisfies s 1. I describe the test in "The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill" [1990] NZ Recent Law Review 353. It purports on its face to be a rigid, legalistic test with specific criteria, although some judges treat it as a test that can vary depending on the circumstances: see R v Edwards Books (1986) 55 CR (3d) 193 (SCC); R v Wholesale Travel Group Inc (1992) 8 CR (4th) 145, 84 DLR (4th) 161, [1991] SCR 154; R v Butler (unreported, 27 February 1992) (SCC) and R v Downey (unreported, May 1992) (SCC). The Supreme Court of Canada has been criticized for applying the test inconsistently, most recently and trenchantly in Stuart, Charter Justice In Canadian Criminal Law (1991) 8-20. The part of the test most likely to break down is its "minimal impairment" criteria. At times the Court seems to insist that to be justifiable, a legislated limitation must interfere with the right as little as possible: see, eg, R v Seaboyer (1992) 7 CR (4th) 117 (SCC). More frequently, the Court acknowledges that the legislature can choose a statutory scheme that most effectively accomplishes the objective of the statute, even though there might be more minimal but less effective techniques available: see, eg, R v Chaulk (1991) 2 CR (4th) 1 (SCC). The Court has become more cognizant over time of the fact that "the business of government is a practical one": per La Forest J in Edwards Books (p 259).

35 It is worth noting that the Supreme Court of Canada has indicated that s 1 of the Charter will be applied strictly and rigorously when the limitation prescribed by law is based in common law rather than statute. R v Swan (1991) 63 CCC (3d) 481, 514 (SCC).

36 This is the view taken by Gault J, and provisionally by Cooke P, in Ministry of Transport v Noort, above, note 10.

37 Richardson J, McKay J concurring in Noort, ibid. Hardie Boys J felt that ss 4 and 5 could be considered together.

38 In Noort, note 10 above, the Transport Act limited the right contained in subs 23(1)(b) only to the extent that it was reasonable to confine detainees to telephone, rather than personal, consultation.

definitive where legislation is being considered.\footnote{It is difficult to imagine that the competing views as to the role of s 5 will make a difference in many cases. This is because s 5 can salvage rights and freedoms by confining statutory limitations to those that are reasonable solely where the statutory limit can be given such a meaning under s 6. Where it cannot, s 4 applies and even unreasonable limits will be given effect to.} The contribution that it can make to keeping the application of principle reasonable and proportional where it is allowed to operate has already been well documented.\footnote{Including the fact that the general language employed in a bill or charter will typically yield no precise answer if interpreted as statutes normally are.} It will not therefore be analysed further in this paper.

2 Using interpretation of prima facie rights to keep the application of principle effective and relevant

There is obvious danger in using the process of interpretation of the prima facie rights and freedoms contained in the Bill to prevent it from producing an unattractive result in a particular case. The dynamics of stare decisis can mean that, in the long run, the interpretation given to legislated words will prove to be of more significance than the words themselves. Expedient and clever interpretation to respond to unattractive applications of the Bill may well render the Bill incapable in future cases of fulfilling its function, even though in such cases its protection is not only proportional and relevant, but also necessary to preserving fundamental principle.

Fortunately, the legitimacy of interpreting the provisions of the Bill in a narrow fashion in order to confine their application has already been denied. The first thing settled about the Bill is that its provisions are to be interpreted to give full effect to the interests that the Bill is meant to protect. Narrow, technical interpretations are to be avoided.\footnote{See the \textit{Oakes} cases referred to above, \textit{Adams Criminal Law}, "The New Zealand Bill of Rights Act 1990: Commentary", ch 10, as well as the numerous Canadian articles on the topic, including Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986) 24 Osgoode Hall LJ 867; Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall LJ 123; Elliot, "The Supreme Court of Canada and Section 1 - The Erosion of the Common Front" (1987) 12 Queen's LJ 277; Kerans, "The Future of Section 1 of the Charter" (1989) 23 UBC L Rev 567; Siebrasse, "The \textit{Oakes} Test in the Supreme Court: An Old Ghost Impeding Bold New Initiatives" (1991) 23 Ottawa L Rev.} This does not mean, however, that the process of interpretation cannot contribute to the pragmatic application of fundamental principle. Indeed, properly applied, a purposive interpretation can enhance the prospect that the rights and freedoms affirmed in the Bill will be applied solely where there is sound reason for it. It can enhance the objective of relevance, even by narrowing appropriately the reach of the provisions of the Bill.

(a) The limiting effect of the purposive interpretation

The technique of purposive interpretation is to attempt to identify the underlying purpose for the relevant right and freedom and then to use it to assist in defining the content of that right or freedom. In the language of the Supreme Court of Canada, "[t]he meaning of a right or freedom ... [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect".\footnote{\textit{Flickinger v Crown Colony of Hong Kong} [1991] 1 NZLR 439; \textit{R v Butcher} [1992] 2 NZLR 257; \textit{Ministry of Transport v Noort}, note 10 above.} The purposive interpretation is justified for several reasons,\footnote{\textit{R v Big M Drug Mart} [1985] 1 SCR 295, 344; \textit{Mills v R} [1986] 1 SCR 863, 917.} although the
most frequently stated one is the need to keep ordinary techniques of interpretation from narrowing the principles of a bill or charter, thereby denying persons "the full measure of the fundamental rights and freedoms referred to".\textsuperscript{45} Not surprisingly, this has created a tendency to think of purposive interpretations as being expansive. While this is generally so, it is not invariably the case. There is a distinction to be drawn between a "generous" interpretation and a "purposive" one, since a purposive interpretation need not be the most generous interpretation.\textsuperscript{46} The primary function of the purposive interpretation is to ensure that the interpreted section applies in those cases where the mischief it was created to ameliorate actually exists. In this sense, it helps focus provisions, reducing the prospect that they will be applied gratuitously where the mischief they are directed at has not occurred. For example, like the New Zealand Bill of Rights, the Charter provides protection against "unreasonable search or seizure".\textsuperscript{47} A generous interpretation of "search" might include any case where a state agent looks for incriminating information or material. A purposive interpretation, on the other hand, reflects the fact that the section exists to protect claims of privacy that are reasonably held by the claimant. It therefore results in the prima facie right being violated only where the person subject to the search has a reasonable expectation of privacy in the place or thing searched.\textsuperscript{48} There is therefore no unreasonable search where a state agent finds incriminating material that was kept in plain view by the subject\textsuperscript{49} or where the subject does not have a privacy interest in the place of search.\textsuperscript{50}

A purposive interpretation can even produce a right that is narrower than ordinary rules of interpretation would produce. Section 13 of the Charter provides an apt illustration. In Canada, the right of witnesses other than the accused to refuse to testify on the grounds that their answers might incriminate them has been abolished statutorily and replaced with a use immunity.\textsuperscript{51} Witnesses must answer self-incriminatory questions, but the answers provided cannot be used to incriminate them in subsequent proceedings. Section 13 constitutionalizes this regime. It provides two express exceptions, however. Prior testimony can be used to incriminate the witness "in a prosecution for perjury" or in a prosecution "for the giving of contradictory evidence".\textsuperscript{52} Classic interpretation would ensure that these were the sole exceptions to the protection of s 13 since they are the exclusive expressed exceptions. Canadian authority, however, has judged that the purpose behind s 13 does not extend to protecting persons from prosecution for giving
false evidence or attempting to mislead a court. Despite the limited reach of the expressed exceptions, s 13 is therefore construed as not applying in any case where the testimony of a witness is the actus reus of an offence.\textsuperscript{53} The purposive interpretation therefore assists in providing only relevant relief.

In this sense, a purposive interpretation is a pragmatic interpretation. It is not as bound by the imprecision of language as more common techniques of interpretation are. It focuses on the problem to be addressed, and ensures the application of the provision in cases where it is truly needed.

(b) Harkening to the purpose in the application and refinement of doctrine

The failure to harken back to the purpose of a particular provision of the Bill when applying previous authority dealing with that provision, or when refining doctrine associated with a section, can cause the protection of a right or freedom to be misplaced. This can result in the application of those rights in circumstances where the mischief to be addressed by the right in question does not exist. Two examples from Canadian jurisprudence illustrate how the failure to harken back to the purpose behind a provision can give a right or freedom inappropriate breadth.

(i) \textit{R v Brydges}

Experience in Canada in the early years of the Charter proved that some detainees chose not to call a lawyer because they could not afford one and were unaware of the availability of legal aid. In \textit{R v Brydges}\textsuperscript{54} the Supreme Court of Canada, applying an enlightened and thoroughly defensible purposive interpretation, held that police officers would have to provide detainees with information as to the availability of legal aid. In this way, the right to counsel would not be forgone because of poverty and ignorance.

After \textit{Brydges} was decided, each police force had their Charter warning cards reprinted to add advice as to the availability of legal aid. The Attorney General's office in Ontario chose wording that is admittedly technical, and which may not be understood by some lay persons. Although the matter is yet to be settled, an increasing number of trial courts in Ontario have held that the wording is inadequate and they have therefore found that the Charter is violated where the cards are used. At least dozens of people have been acquitted of alcohol driving offences as a result, typically without any inquiry into whether the detainee in the case had any difficulty understanding the warning, or any financial impediment to contacting counsel. The net effect is that \textit{Brydges}, a case intended to ensure that the poorer members of society do not lose the opportunity to consult counsel because of their poverty, has become a decision relied upon by persons who can afford the best lawyers, in order to avoid accountability.

The reason this is wrong is that the purpose of the decision in \textit{Brydges} was not to require the police to add a series of words to the incantation they perform after detaining persons. Its purpose was to ensure meaningful access to counsel. Where the incantation is irrelevant to the enjoyment of that right for a particular complainant, the failure to perform

\textsuperscript{53} See \textit{R v Staranchuk} (1983) 36 CR (3d) 285 (Sask CA), affirmed [1985] 1 SCR 439; \textit{R v Stegmaier} (unreported, 19 September 1985) (BC Co Ct) per Selbie Co Ct J.

\textsuperscript{54} (1990) 53 CCC (3d) 330 (SCC).
it in no way attracts the mischief of subs 10(b), the right to counsel provision. If courts interpreting *Brydges* had regard to the purpose behind the right to counsel it would have been made clear to them that subs 10(b) is violated only when persons who cannot afford counsel choose not to do so out of ignorance as to the availability of legal aid. To find an automatic breach where others do not hear words that are irrelevant to them, is to apply principle in a thoroughly unpragmatic, self-destructive fashion.  

(ii) Pretrial delay and waiver

The determination in Canada of whether there has been a violation of the right to be tried within a reasonable time is a complex exercise. Delay happens for all kinds of reasons, including delay that is caused, contributed to, or consented to by the accused. The purpose behind subs 11(b) is in no way advanced by allowing an accused who is responsible for delay to rely upon it as a basis for a claim that the trial has not been held within a reasonable time. Yet Canadian authority allows some such delay to be considered in quantifying the pretrial period to be tested against the standard of "unreasonableness". This curiosity is the unfortunate result of the non-purposive application of the strict concept of "waiver" culled from other Charter provisions.

Waiver is an important concept in right to counsel cases, for no-one can be made to consult a lawyer if they choose not to. No Charter violation occurs, therefore, where a detainee waives the right to counsel. To ensure that waivers of the right to counsel have integrity Canadian courts have come to apply a stringent standard. The Crown must establish a valid waiver, and in doing so it must prove that the detainee understood the existence of the right, the nature of the right, and voluntarily chose to forgo that right. These are sage requirements in right to counsel cases, and perhaps even in search and seizure cases, but have little relevance in deciding whether the state has violated the right of a person charged to be tried within a reasonable time. The sole inquiry in quantifying the period of delay to be tested against subs 11(b) should simply be, who is responsible for the delay? If it is the Crown or the state, the accused can rely upon it. If the accused caused, contributed to, or consented to the delay, he or she cannot. Despite this, the Supreme Court of Canada in the unreasonable delay case of *R v Askov* applied right to counsel waiver authority, concluding that before a period of delay can be removed from consideration:

> [T]here must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused understood that he or she had [the relevant] guarantee, understood its nature and has waived the right provided by the guarantee.

Unfortunately, the requirements of that formula bear no precise reference to the purpose underlying subs 11(b), which is the amelioration of prejudice caused by state-engendered delay.

55 The consequences of a *Brydges* breach will typically be exclusion because of the fair trial dichotomy. See the discussion below at part II, Limitations on rights and freedoms ... 2(b) The fair trial dichotomy.


57 *R v Wills* (unreported, 20 February 1992) (Ont CA).

When the problem was ultimately discovered by the Supreme Court of Canada, the Court did not correct it by rejecting the waiver test. Instead it held that actions by the accused or counsel for the defence falling short of waiver but which cause or contribute to delay will not remove any periods of delay from consideration on behalf of the accused, but may be relevant in assessing whether a remedy should be granted. With respect, brief reflection on the purpose of subs 11(b) would have revealed how needlessly complex and undirected this approach is. It has the potential to provide relief in cases where the principles underlying the right are simply not relevant.

(c) Contextual interpretations

Canadian courts defining the application of procedural protections under the Charter have come to the realization that fundamental criminal law principles are contextual. In one setting they can require precise fidelity, while in another context they can be readily compromised. In this way they seek to ensure proportionality. As La Forest J said in R v Lyons, “the requirements of fundamental justice are not immutable: rather, they vary according to the context in which they are invoked. Thus, certain procedural protections might be constitutionally mandated in one context but not in another.”

Where fundamental principles are constrained in one area while being given full measure in another area, it is ultimately for pragmatic reasons having to do with proportion and relevance. Typically this occurs where it is apparent that to apply the principle in an unqualified fashion would have the disproportionate effect of threatening the efficacy of investigative techniques, or the enforcement of law, while at the same time providing relief that is not necessary to the protection of fundamental principle.

(i) Using the context of a right within a charter or bill as a limiting principle

The Supreme Court of Canada decision in R v Hebert illustrates that the focus and nature of related rights can assist in justifying the pragmatic limitation of particular principles. In that case the Court used such considerations to limit the effective operation of the fundamental right to pre-trial silence to situations of detention.

The Charter does not provide expressly for a right to pre-trial silence. Its express self-incrimination content is limited to the non-compellability of accused persons as witnesses at their trial and the protection of witnesses against having their testimony used to incriminate them in subsequent proceedings. The right to silence is not otherwise provided obvious protection. On the other hand, subs 10(b) of the Charter, the right to counsel provision, is recognized as being concerned in large measure with ensuring that detained persons know that they are free to refuse to answer questions. Indeed, the

59 Sharma v R (unreported, 26 March 92) (SCC).
61 (1990) 57 CCC (3d) 1.
62 Subsection 11(c).
63 Section 13.
64 Under the Bill the additional protection of subss 23(4) (the right of certain detained persons to refrain from making statements and to be advised of that right) and 25(d) (the right not to be compelled to confess) are available.
entitlement to know about the freedom not to incriminate oneself is considered to be so important that state agents are to suspend the questioning of detained suspects until a reasonable opportunity to consult counsel has been provided. Once a detainee has had the opportunity to consult counsel, however, there is nothing in the Charter to prevent questioning. The reality, of course, is that detainees who have consulted counsel will be told not to speak to persons in authority, and they will often take such advice. In Canada it therefore became common for the police to seek to obtain admissions through the subterfuge of posing as fellow prisoners and provoking conversation about the offence under investigation. To many this seemed wrong. It allowed persons who sought to enjoy their right not to speak to persons in authority to be deprived unwittingly of that right.

In Hebert the Court held that there is a pre-trial right to remain silent contained in s 7 of the Charter, as a principle of fundamental justice. It is violated by state agents who hide their identity as state agents and then cause suspects to make incriminating statements. The Court drew a pragmatic line, however. The principle was held to be confined to those accused persons who are detained or in custody. There is therefore nothing in s 7 or elsewhere in the Charter to prevent undercover investigations of non-detained suspects, or to prevent the police from using such techniques to secure self-incriminating admissions.

The Supreme Court of Canada was open about the fact that it was involved in a line-drawing exercise based upon concerns for the efficiency of criminal investigation. McLachlin J, for the majority, spoke of the importance of “the state’s legitimate interest in law enforcement [which cannot] be frustrated without proper justification”. She felt it was appropriate to confine the application of the principle against pre-trial self-incrimination to cases of detention because the Charter gives special consideration to situations of detention. Moreover, detention is relevant to the enjoyment of the protection against pre-trial self-incrimination. Persons who are detained are in a distressing, inherently coercive atmosphere. Their associations are subject to the control of state authorities, and they are deprived of the freedom to have immediate access to the support of others, including ongoing contact with counsel. While some of the Court’s reasoning can be criticized, the essence of the decision is that the principle of fundamental justice

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66 R v Manninen [1987] 1 SCR 1233. There is good reason to believe that similar protection is developing in New Zealand. In R v Butcher [1992] 2 NZLR 257, 266 (CA) Cooke P noted that once one of the detainees had “showed that he wished to wait for legal advice by his remarks in the police car[,] [h]e should not have been interrogated thereafter”. See the discussion in Adams Criminal Law, “The New Zealand Bill of Rights Act 1990: Commentary”.

67 It may be that subs 23(4) will apply in New Zealand to prevent this from happening.

68 Section 7 does, however, apply in cases of “entrapment” where such techniques go beyond acceptable limits. See R v Mack (1988) 44 CCC (3d) 513 (SCC).

69 Note 61 above, p 38.

70 Sections 9 and 10 rights are premised upon the fact of detention. Inexplicably, her Ladyship went further, indicating that ss 7-14 exist to preserve the rights of detained individuals. This is a curious overstatement since ss 8, 11, 12, 13, and 14 are not associated with detention. The included observation that the legal rights provisions give special status to detention cannot be denied, however.

71 Some would argue that the Court should not have developed internal limitations on the pre-trial right to silence; it would have been more appropriate to require limits to be imposed, if at all, under s 1. The fact is, however, that there is no legislation dealing with the problem and it would be unrealistic to expect legislation. More importantly, a blanket limitation seemed appropriate as a matter of principle, in the definition of the right.
protecting pre-trial self-incrimination requires more complete protection for detained than non-detained persons. Moreover, the Charter itself identifies detention as a discrete event that can, as a matter of principle, define the onset of fundamental rights. The context of the right to pre-trial silence within the Charter therefore provides a principled basis for confining the protection of that right to cases where it was perceived to be truly necessary, and where it will not interfere unduly with important investigative techniques.

(ii) Using the declining consequences to the accused as a limiting principle

It has long been recognized that criminal law principles apply with less rigour where the consequences of conviction to a person charged decline in significance. The paradigm example is with the classification of offences, as illustrated by the leading Canadian case, \textit{R v City of Sault Ste Marie}.\footnote{72} That case established that for mere regulatory offences, the common law countenances material compromise on the principle of fault and on the presumption of innocence, in the interest of effective enforcement.

A similar principle is being used in Canada to confine the application of fundamental rights, where to allow those rights unbridled application would be too costly. Where the consequences of conviction are significant enough, the principles must be allowed to operate. Where those consequences are sufficiently reduced, the principles can be confined as their protection is of reduced relevance to the accused.

(1) Minimum mens rea

The Charter has been used to create certain minimum mens rea requirements. Unless the prescribed level of moral culpability accompanies the actus reus, a particular offence will be unconstitutional.\footnote{73} The leading case is \textit{R v Vaillancourt}.\footnote{74} The Supreme Court of Canada held that the principles of fundamental justice can be offended by the conviction and punishment of persons for an offence that does not require objective foresight of the consequence prohibited by that offence.\footnote{75} The Court stopped short of holding, however, that this principle was of general application. The Court was cognizant that if objective foreseeability of consequences was to be recognized as a generally imposed mens rea

\footnote{72} (1978) 85 DLR (3d) 161 (SCC). For true crimes there is to be a presumption of mens rea. Regulatory offences are presumed to be strict liability offences, wherein guilt is presumed upon proof by the Crown of the actus reus, subject to rebuttal by the defendant through the establishment of due diligence. Alternatively, regulatory offences are absolute liability offences, subject to no defence of due diligence.

\footnote{73} In the first such case, \textit{Reference re s 94(2) of Motor Vehicle Act} (1985) 23 CCC (3d) 289, 24 DLR (4th) 536, [1985] SCR 486, it was held that absolute liability offences are prima facie unconstitutional where the liberty of the accused is in peril, as it will be where the accused can be imprisoned if found guilty. At a minimum, s 7 of the Charter requires that defendants be able to avoid conviction by establishing due diligence.


\footnote{75} In \textit{R v Martineau} (1990), 79 CR (3d) 129 (SCC) this principle was made more rigid. It now requires that subjective foresight of death is required for murder convictions; mere objective foresight will not be enough.
requirement it would tear a path through the Criminal Code and other statutory offences. A line was therefore drawn, albeit an obscure one. The Court held that the principle would be honoured solely where the offence was of such a character that conviction would carry with it a "special stigma". Murder convictions are, of course, seriously stigmatizing, as are convictions for theft, since they involve proof of dishonesty. The corollary of this, of course, is that, absent special stigma arising from conviction, the fundamental principle that guilt should not rest on anything less than objective foresight will not operate. In qualifying the reach of the principle, the Court therefore signalled that it was legitimate to limit fundamental principles, depending upon the seriousness of the consequences of their non-observance to the accused, and depending upon the practical consequences that their application would have on the effectiveness of prosecutions.

The concept of "stigma" has become central under the Charter. Section 7 protects the "security of persons", which has been interpreted to protect persons against the stigmatization associated with criminal prosecution. Moreover, s 7 has been recognized as the basic legal rights provision, colouring the interpretation and application of the balance of the criminal procedure sections. Stigma has therefore played an important role in defining the purpose underlying subs II(b), the right to be tried within a reasonable time. It is not surprising, then, that increased stigmatization has been used as a principled basis for delimiting the operation of fundamental principle under the Charter. The unsatisfying challenge for Canadian courts in applying the constitutionalized principle of fault, however, lies in identifying which offences are stigmatizing and which offences are not.

(2) Search and seizure

In Thomson Newspapers v Canada the Supreme Court of Canada confirmed that "the application of a less strenuous and more flexible standard in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s 8". The Court then upheld a regulatory seizure regime that contravened each of the requirements for a reasonable search and seizure adopted in the leading case of Hunter v Southam Inc. In justifying this departure from the strict requirements of

76 Note 74 above, p 134. Manslaughter convictions, on the other hand, do not have a special stigma because of the absence of intention.
77 Unlike its analogue, s 8 of the Bill, which protects only the right to life.
78 See below at part II, Limitations on rights and freedoms ..., 2(a) "The right to trial within a reasonable time and the stay of proceedings".
79 In R v Wholesale Travel Group Inc (1992) 8 CR (4th) 145 (SCC) the defendant urged that the offence of false advertizing had the same special stigma as theft because it also involved dishonesty. The Court denied this was so because the offence of false advertizing could be committed inadvertently, allowing for the conviction of honest persons. See R v Peters (1991) 11 CR (4th) 49 (BCCA), where arson was held not to be a seriously stigmatizing offence.
81 [1984] 2 SCR 145, (1984) 11 DLR (4th) 641, 14 CCC (3d) 97. Under the section challenged in Thomson, the Director of the Combined Investigation Branch could require the production of documentation for inspection without reasonable and probable cause to believe that an offence had been committed and that the production would produce evidence. Production could be required by an investigator without the prior approval of a neutral third party, and without any indication that the materials sought to be produced would be strictly relevant to the offence under investigation. Each of these short-comings violate the minimum standards for reasonable searches and seizures developed in Hunter.
Hunter, La Forest J adopted an analysis much like that used in Vaillancourt to limit the reach of the fundamental principle recognized in that case. His Lordship said:

[T]he relevance of the regulatory character of the offences defined in the Act is that conviction for their violation does not really entail ... the kind of moral reprimand and stigma that undoubtedly accompanies conviction for the traditional “real” or “true” crimes. It follows that investigation for purposes of the Act does not cause the kind of suspicion that can affect one’s standing in the community and that ... entitles the citizen to a relatively high degree of respect for his or her privacy on the part of investigating authorities.82

The lessened expectation of privacy is also supported by pragmatic considerations. With respect to the regulation of fair competition policies, His Lordship observed that:

... because of the nature of the conduct regulated ... there will in many cases be no way of determining whether proscribed conduct has been engaged in, short of studying the process by which a suspected corporation or business has made and implemented its decisions .... To limit [the] use [of the power to order the production of documents] to situations in which the Director or a Commission member can show reasonable and probable grounds to believe that a specific offence has been committed would frustrate the process of investigation at its very inception.”83

La Forest J therefore concluded for the majority that:

[the impugned provision] does not, having regard to the low expectation of privacy which those subject to its operation can be said to have in regard to the documents that fall within its scope and the important and difficult task of law enforcement in which it assists, countenance the making of unreasonable seizures within the meaning of s 8 of the Charter.84

In R v McKinlay Transport Ltd this approach was affirmed when Wilson J articulated “a distinction between seizures in the criminal or quasi-criminal context within which the full rigours of the Hunter criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review”.85

(3) Reverse onus provisions

The presumption of innocence is recognized in Canada as requiring the Crown to prove the guilt of the accused beyond a reasonable doubt. Reverse onus provisions frequently challenge this most basic principle. By reversing the burden of proof on a matter in issue, these provisions can cause the conviction of accused persons who fail to discharge that onus, even though there may be reasonable doubt as to their guilt. Where this occurs, the presumption of innocence is contravened.86 It is becoming increasingly clear, however, that even the presumption of innocence will have reduced operation in cases where the consequences of conviction are seen to be more modest for the accused, and where the

82 Note 80 above, 227 (DLR (4th)).
83 Ibid, p 234.
85 (1990) 68 DLR (4th) 568, 582.
86 See R v Oakes, note 34 above.
The efficacy of a prosecutorial regime would be reduced by the unbridled application of that principle.

*R v Wholesale Travel Group Inc*⁸⁷ is the leading case. It involved a challenge to the false or misleading advertising sections of the Competition Act RSC 1970 c.C-23. Those provisions were challenged, in part, because they reversed the onus of proof on the question of mens rea for the offence; persons charged with the offence are required to establish on the balance of probabilities that they have acted with due diligence if they hope to exculpate themselves.

It is clear that placing this onus on accused persons allows for the successful prosecution of persons who may well have used due diligence, but who cannot prove positively that they have done so. Despite this, a divided Supreme Court of Canada upheld the section. Two justices found that the reversal of a persuasive burden on the issue of due diligence did not violate the presumption of innocence while the balance of the majority held that a reversal of the persuasive burden could be justified under s 1 of the Charter as a reasonable limitation on the presumption of innocence. The important feature is that all five of those judges justified their position through reasoning identical to that applied in the search and seizure cases.

Mr Justice Cory, for himself and L’Heureux-Dube J, held that the reverse onus provision did not contravene the presumption of innocence. His decision was based squarely on the distinction between regulatory and criminal offences. In particular, His Lordship justified the lower concern for principle in the regulatory context on what he termed the “licensing justification” and “the vulnerability justification”. The “licensing justification” is a kind of social contract. In return for carrying on a regulated activity, those engaging in that activity must recognize that they have placed themselves in a position of responsibility to the public. The “vulnerability justification” rests on the pragmatic consideration that effective “regulatory legislation is essential to the operation of a complex industrial society [and] plays a legitimate and vital role in protecting those who are most vulnerable and least able to protect themselves”.⁸⁸ Together these considerations enable the presumption of innocence to have a different content in the regulatory sphere than in the case of criminal prosecutions. Insistence on proof by the defendant of due diligence, to a balance of probabilities, satisfies the presumption of innocence as it operates in the context of regulatory offences.⁸⁹

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⁸⁸ *Ibid*, 217 (CR (4th)).
⁸⁹ Iacobucci J (Gonthier and Stevenson JJ concurring) disagreed with this analysis, holding that the imposition of a reverse onus in which the defendant had to prove due diligence was prima facie unconstitutional because it did, in fact, violate the presumption of innocence. His Lordship upheld the section as a reasonable limitation on the presumption of innocence, however, noting that “what is ultimately involved in the appeal is the ability of the federal and provincial governments to pursue social ends through the enactment and enforcement of public welfare legislation.” (p 234) Unlike Lamer CJC, who felt that the regulatory scheme could be sufficiently effective with an evidentiary burden, Iacobucci J considered that, as a practical matter, a full reversal of the persuasive burden was the necessary compromise on the presumption of innocence. In *R v Ellis-Don Ltd* (1992) 61 CCC (3d) 423 (SCC) the Court signalled in effect that, absent exceptional circumstances, all regulatory offences containing reverse persuasive onus provisions would be saved under s.1
The decision of Cory J has been harshly criticized. The primary basis for that criticism is that it reduces access to fundamental principle based upon the suspect technique of classification involved in distinguishing regulatory offences from true crimes. As Stuart points out, "[m]any commentators [including] the Law Reform Commission of Ontario have pointed to the difficulty of making a valid distinction based on the intrinsic nature of the acts prohibited as crimes, and those punished as regulatory offences".

The general criticism that there is imprecision in drawing lines applies with equal force to the determination that search and seizure guarantees are lessened for regulatory offences, and to the concept of stigma as a basis for delimiting principles. Classification, though, is the enterprise of lawyers; it is what we do. That we cannot do it with perfection is regrettable, and we should always strive to improve. Wherever the lines are to be drawn, however, it seems inevitable and appropriate that we should reduce the vigilance with which we guard fundamental principle where the availability of those principles is of reduced importance to the person charged, and the practical consequences of insisting on their full application is disproportionate.

Limitations on rights and freedoms in particular cases: the use of remedies to keep the application of principle relevant and proportional

1 Basic remedial principles

It has frequently been pointed out that without a remedy, there is no effective right. The simplest way to prevent the application of fundamental rights and freedoms is simply to deny a remedy. In relative terms it is a safe technique because, by using the remedy to adjust the impact of the right, the definition of the right remains unaffected.

The fact that this technique indirectly deprives the right of its substance in a given case does not violate established principles. There is ample precedent for it. Equity has always insisted that its complainants come forward with clean hands, and the availability of its remedies is a matter of discretion. Courts in New Zealand have claimed a common law discretion to decide whether to exclude illegally or unfairly obtained evidence. The decision to stay proceedings for abuse of process at common law is discretionary, as is the application under s 347. Even under the Charter, where the requirements of subs 24(2) are not satisfied, complainants whose rights have been violated are routinely left without remedy. So it must be with the Bill. In some cases the breach will not warrant a remedy because it is trifiing, because the complainant contributed to the violation,
or because it would be disproportionate in the public interest to grant a remedy. None of this is new and none of it offensive.

The legitimacy of denying a remedy despite the existence of a violation of the Bill has already been recognized as acceptable practice by the Court of Appeal in *R v Grant*. *Grant* was arrested and interviewed. He admitted to two burglaries during the course of his interrogation, prior to being advised of his right to a lawyer. He was subsequently informed of that right, declined it and continued to confess to other burglaries. The Court of Appeal held that it was appropriate to admit even the first confessions into evidence because it was apparent that, even if he had been advised of his right to a lawyer in a timely manner, it would not have made a difference.

Often, the question will not be whether to provide a remedy, but rather which remedy should be provided. The decision as to how to remedy a given violation need not involve the unprincipled selection of a response from the remedial menu. Rational and useful guidelines readily suggest themselves. In particular, a remedy should relate to the wrong done, the effective remedy that is least disruptive of the public interest in trying the case on its merits should be selected, and the remedy should be proportional to the violation.

The importance of these principles was driven home in the Canadian case of *R v D'Amico*. *D'Amico* was charged with robbery. The issue at the trial was to have been identification. The Crown had available a photograph of the robber taken during the robbery by a security camera. The photograph showed the robber to be wearing sunglasses as well as a distinctive cap sold only during a two week summer fair. He had a bandage on his nose and an obvious mark on his running shoe. The Crown had available an expert who had removed the sunglasses from the photograph using a computer, and who had drawn eyes onto the photograph using the facial bone structure to assist in determining their appropriate shape. Evidence was available to prove that at the time of the robbery the accused had an injury on his nose where the bandage appeared on the robber. Moreover, he owned a cap identical to that worn by the robber, and shoes were found on his possession which contained a paint splatter precisely where the security photo showed a mark on the shoe of the robber. The simulated eyes prepared by the computer artist were all but identical to D'Amico's eyes even though the artist had never seen a photograph of him or met him in person.

During the course of the investigation, an over-zealous officer showed potential witnesses a photo line-up. For those who could identify the accused, he confirmed that they had picked out the right man. For those who could not, he showed a more recent photograph of the accused that was not part of the photo line-up, which they then identified. Defence counsel brought a motion to stay the proceeding on the basis that the identification procedures of the officer prejudiced his client's right to a fair trial, contrary to subs 11(d) of the Charter. The judge agreed and the charges were stayed.

98 See, eg, *R v Wise*, note 95 above. In cases where the proposed remedy is the termination of the prosecution, an assessment is made as to whether the public interest is better served by allowing the case to proceed than by dealing with the breach. I discuss this fully in “The Stay of Proceedings in Criminal Cases: Abusing the Abuse of Process Concept” (1991) 15 Crim LJ 315.


100 (Ont Ct of J (Gen Div), 15 June 1992, Flanagan J).
With respect, a stay was not the appropriate remedy. Granted, the fairness of the trial was threatened by the prejudicial use of the photo line-up. That prejudice could have been removed, however, thereby restoring the prospect of a fair trial by simply excluding the tainted evidence. A stay was not the least intrusive remedy available and did not address the mischief caused to D’Amico as precisely as exclusion would have. The remedy was disproportionate given the public interest in having the case tried on its merits.

2 The Supreme Court of Canada and remedial principles

As the D’Amico case illustrates, appropriate remedial principles are easy to lose sight of. This has been true in the Supreme Court of Canada where even the paramount importance of remedial discretion has been forgotten. In two separate but important areas the Supreme Court of Canada has tied the hands of lower courts, who have found themselves granting inappropriate relief as a result.

(a) The right to trial within a reasonable time and the stay of proceedings

In Canada, a stay of proceedings is the mandatory remedy for violations of “the right to be tried within a reasonable time”. The Supreme Court of Canada allowed this to happen because of its needless fidelity to the particular language employed by the drafters of subs 11(b). The Court reasoned that, ex hypothesi, where subs 11(b) has been violated, there has not been “a trial within a reasonable time”. Any trial after a subs 11(b) breach would therefore be outside of the constitutionally mandated reasonable time, and any court conducting such a trial would therefore be violating the Charter. A stay is the only available remedy that can prevent a continuing Charter violation.

The reasoning of the Court has an undeniable logic. That reasoning derives, however, from a literal rather than a purposive interpretation of the section. As a result, the remedy is not gauged to accomplishing the purpose behind the provision and is far more than is required to provide effective restitution in many cases. This is because subs 11(b) serves two different objectives. The first is to ensure that delay does not prejudice the prospects that an accused person will receive a fair trial. The section also protects against over-long exposure to the stresses and loss of liberty associated with pending criminal charges. Where prejudice is of the first kind such that a fair trial can no longer be held because of delay, a stay is unquestionably a relevant and proportionate remedy. Where prejudice is in the form of stress, or the loss of some liberty pending trial as the result of bail conditions, a stay may be totally unnecessary to accomplish the purpose of ameliorating that prejudice. An order expediting trial, monetary relief, or even the amelioration of sentence if found guilty may, in the circumstances, be far more relevant and proportional to the damage suffered.

The inappropriateness of the rigid remedial regime for subs 11(b) violations was driven

102 Rahey, ibid, 306 CR (3d). The wording of subs 25(b) should save courts in New Zealand from imposing this rigid regime in this country. It protects against “undue delay”. It seems that “undue delay” can arise before the stage is reached where it is no longer reasonable to conduct a trial. If so, it should be possible to tailor the remedy to the mischief that is present.
104 R v Rahey, note 101 above, pp 299-300.
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home dramatically with the decision in Askov v R.\textsuperscript{105} There the Supreme Court of Canada held that systemic delay caused by inadequate resources would violate subs 11(b), and that appropriate periods of systemic delay could be identified by finding comparable Canadian jurisdictions and selecting as the constitutional standard the best record among those jurisdictions for getting trials on. In the helter skelter of Canadian federalism and demographics the results were catastrophic. Over 60,000 criminal charges were halted without trial on their merits in Ontario alone, thousands because the cases had taken only a few days or a few weeks longer than the ideal period to get before the courts. The cost was grossly disproportionate to the violations and caused untold damage to the repute of the administration of justice.

Askov has since been effectively reversed by the Supreme Court of Canada, but they have clung to the theory of the mandatory stay.\textsuperscript{106} The current result of this excessive rigidity, coupled with the backlash from Askov, is that the prediction of those who opposed the mandatory stay when it was first proposed is being realized. Section 11(b) violations are rarely found now, in no small measure because of fear for the costs of doing so. As a result, litigants are left entirely without remedy where sufficient time has passed for less draconian forms of relief to be relevant and proportional.

(b) The fair trial dichotomy

Equally regrettable is the position taken by the Supreme Court of Canada on the operation of subs 24(2), the exclusionary remedy section of the Charter. The Court has held that the most important factor in deciding whether to exclude the evidence has nothing to do with the degree or kind of misconduct by the officer. Rather, it has to do with the character of the evidence that has been obtained. The Court has therefore created two categories of evidence. Evidence falling into the first category, known as the "unfair trial" category, is all but automatically excluded. The fate of evidence not falling into that category (therefore falling into the other of the two categories) is to be determined on the basis of a complex weighing of competing factors.\textsuperscript{107} In practice, this form of evidence is generally admitted, despite the fact that it is unconstitutionally obtained.

The Supreme Court of Canada drove itself to this position by equating the participation of the accused in the pre-trial investigation of offences, with the calling of the accused as a witness at trial. A trial in which an accused is forced to testify against himself would, of course, be unfair. By analogy, reasoned the Supreme Court, a trial in which the unconstitutionally obtained pre-trial statements of the accused were admitted would also be unfair, for the accused is equally, albeit less formally, providing testimonial information against himself. Over the next few cases the doctrine spread to encompass ultimately any unconstitutionally obtained evidence, whether testimonial or not, that emanated physically from the accused,\textsuperscript{108} or that became available because of the participation of

\textsuperscript{105} (1990) 74 DLR (4th) 355, 2 SCR 1199, 79 CR (3d) 273.
\textsuperscript{106} Morin v R (1992) 71 CCC (3d) 1 (SCC).
\textsuperscript{107} The "fair trial dichotomy" was developed in the case of Collins v R [1987] 1 SCR 265, 56 CR (3d) 193, 38 DLR (4th) 508 (SCC).
\textsuperscript{108} R v Therens (1985), 18 CCC (3d) 481, 45 CR (3d) 97 (SCC) (breath sample, explained in Collins on the basis of the fair trial dichotomy); R v Pohoretsky (1987) 33 CCC (3d) 398, 58 CR (3d) 113 (blood sample); R v Dyment (1988) 45 CCC (3d) 244, 66 CR (3d) 348 (SCC) (blood sample).
the accused in the investigation against him.\textsuperscript{109} In each such case the Court held that to admit the evidence would render the trial unfair. This was so not because of the nature of breach, but because of the nature of the evidence. Indeed, the Court has said that the seriousness of the breach\textsuperscript{110} or the good faith of the police\textsuperscript{111} cannot support the admission of evidence falling into the fair trial category.

The fair trial dichotomy is far too rigid to serve sensibly the rational application of Charter relief. There is, to be sure, stronger reason for excluding a good deal of the evidence caught by the Supreme Court’s fair trial concept than evidence which falls outside the fair trial category. Statements obtained unconstitutionally will frequently represent the creation of a source of information that would not have existed but for the Charter breach, unlike real evidence which is already in existence. Statements are also more prone to inaccuracy than real evidence.\textsuperscript{112} Moreover, the obtainment of physical samples from the accused will normally represent more intrusive state conduct than the search of one’s home or car. The broad range of circumstances encountered, however, make the “unfair trial” characterization ring hollow in many cases, and remove the effective flexibility courts require to produce proportional and relevant remedies. To take an extreme example, there have been cases where evidence of breath samples has been excluded where the subjects have been lawyers, simply because they have not been advised of their right to counsel.\textsuperscript{113}

Equally regrettable is that the bold line this doctrine has drawn based upon the kind of evidence obtained has led to the development in some courts of an informal, unarticulated presumption that evidence not falling into the fair trial category is prima facie admissible. The question of remedy is largely prejudged against the accused.

3 Providing remedies to promote compliance

Not all of the remedial principles relevant to the Bill relate specifically to the case before the court. The decision to stay proceedings or to exclude evidence may be prompted less by restitutionary concerns relevant to the complainant, and more by systemic considerations. In particular, courts may grant remedies in the interests of encouraging compliance by the authorities in future cases or to preserve the integrity of the administration of justice. Each of these concerns was central in the celebrated passage from Richardson J’s judgment in \textit{Moevao v Department of Labour}:\textsuperscript{114}

There are two related aspects of the public interest .... The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court’s processes are used fairly by the State and citizen alike. And the due

\textsuperscript{109} \textit{R v Ross} (1989) 46 CCC (3d) 129, 67 CR (3d) 219 (SCC), (participation in a physical line-up).

\textsuperscript{110} \textit{Collins}, note 107 above, 286 (SCR).

\textsuperscript{111} \textit{R v Elshaw} (1991) 7 CR (4th) 333 (SCC).

\textsuperscript{112} This is because for statements, triers of fact must resolve the issues of existence and inference, whereas with real evidence, only authenticity and inference are in issue.

\textsuperscript{113} In New Zealand the robust view that a failure to advise of the right to counsel will not lead to a remedy where there is reason to believe that the person arrested is already aware of that right would tend to prevent a similar result in this country. See, eg, \textit{R v Chase} (HC Hamilton, T 48/91, 26 September 1992, Jamieson J); \textit{R v Thompson} (HC Hamilton, T 72/91, 13 December 1991, Jamieson J), and see \textit{R v Y D} (HC Auckland, T 146/91, 16 October 1991, Temm J).

\textsuperscript{114} [1989] 1 NZLR 464, 481 (CA).
administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice.

These are important considerations and it is surely proper and in some cases necessary for courts to have regard to the larger picture. On the other hand, it must be appreciated that where the motivation for the remedy is general rather than specific to the accused, the accused receives a windfall, and the public is deprived of a trial on its merits or on all available evidence. It is suggested, therefore, that pragmatically, if not as a matter of principle, remedies should be granted for systemic reasons solely where those systemic interests cannot otherwise be protected. The most significant example in practical terms pertains to alcohol driving offences. Restitutionary analysis would lead to the admission of breath or blood samples in all but the most extreme cases where the complaint has to do with a failure to advise a detainee of the right to a lawyer; typically counsel can do nothing other than advise the client that they must provide a sample. It is clear, therefore, that if the sole remedial focus was restitutionary, it would “afford a precedent for breach in each case”. General considerations therefore predominate. Contrast this, however, with the case of the suspect who happens to be a lawyer and is fully aware of his or her rights. Is it really necessary to exclude the results of those tests in order to reinforce the message that the police must comply with the requirements of the Bill? Courts have ample opportunity to address those systemic interests in cases where the mischief intended to be addressed by the section has actually befallen the complainant.

In sum, the determination of remedy is an appropriate time to be pragmatic with fundamental principle. It leaves the construction of the right undisturbed, and enables courts to focus on whether the violation warrants a remedy in all of the circumstances. Moreover, it calls for an assessment of the mischief of the section in assessing what remedy is needed to address the breach, thereby keeping the ultimate disposition relevant and proportional to the violation. In those cases where systemic interests cannot otherwise be protected adequately, it may well be appropriate to grant remedies that are disproportionate to the mischief that has befallen a complainant as the result of a breach of the Bill.

PART II
ARREST AND DETENTION: PRAGMATISM OVER PRINCIPLE?

Purposive interpretation: “arrest” and “detention under any enactment”

The rights contained in subs 23(1) and (4) are available only to persons who have been “arrested” or “detained under any enactment”. The effect of the phrase “under any enactment” suggests that those who are detained without legislative authority, but who are not arrested, are not entitled under the Bill to the comfort of the right to a lawyer. Those persons do not appear to be entitled to be informed of the reason for their detention, or to be informed of the right to refrain from making a statement. What makes this important

is that the police in New Zealand appear commonly to detain suspects where there are insufficient grounds for arrest, in order to question them as part of the investigation. There is no lawful authority for such detentions, and therefore they are not “detentions under any enactment”. It is nonetheless a simple matter to observe that persons detained in such circumstances require access to legal advice, as much, if not more so, than those who are detained with legislative authority. Any purposive interpretation of the Bill would strive to extend the protection of subss 23(1) and (4) to such persons. Equally, it would strive to include persons who are not subject to actual detention but who have reason to believe that they are not free to leave, persons who in Canada would be said to be subject to “psychological detention”.

The Court of Appeal has been cognizant of the problem. The majority of the Court has done an admirable job in its efforts to overcome it. It has cast off the narrow definition of arrest extant at common law in order to make up for the qualified definition of “detention” in subs 23(1). While common law arrest will suffice, the Court of Appeal has extended the definition of “arrest” in s 23 to include “de facto arrest”. In particular, it has held that:

De facto detention in police custody with intention or contemplation that the subject will be formally charged is arrest within the meaning of the New Zealand Bill of Rights Act.

There therefore appear to be two requirements to this form of arrest, “de facto detention” and “intention or contemplation [by the authorities] that the subject will be formally charged”. This last criterion is problematic.

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117 As Cooke P noted in R v Butcher [1992] 2 NZLR 257, 264 (CA), “[t]o be informed of a right to consult a lawyer without delay is, if anything, more valuable in the case of an unlawful arrest than in the case of a lawful one”.

118 In fairness to courts in New Zealand, the insertion of the words “under any enactment” in those subsections of the Bill presents a serious impediment. What I am suggesting courts do is to use the purpose behind those subsections to avoid giving any meaning to that unfortunate phrase. Even though there is precedent for doing this in Canada, it may be asking too much. For that precedent, see R v Dubois [1985] 2 SCR 350, 364, where the term “incriminating evidence” was read out of s 13 of the Charter so that it would not impose a requirement that testimony would have to be incriminating when given, before a witness could be protected against its use by the prosecutor in a subsequent proceeding. It is noteworthy that, like the phrase “under any enactment”, this term was added to the section late in the day, suggesting it was to have some significance. Exigencies of the purposive interpretation overrode this, however.


Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

120 The common law definition expressed by Hillyer J in R v Edwards [1991] 3 NZLR 463 at 466 was cited with approval by the Court of Appeal in R v Kirifi [1992] 2 NZLR 8 and in R v Edwards (1991) 7 CRNZ 528:

[A]n arrest can occur only where there has been physical touching of the person with a view to his detention (a mere touch will suffice, but presumably the intent must be made clear to the arrestee by words or otherwise) or the utterance of words of arrest, coupled with acquiescence or submission on the part of the arrestee.


122 In R v Butcher, ibid, Cooke P said (p 264) that “[b]y de facto detention I mean ... a situation in which the subject is not free to go ...”. 
The requirement of an "intention or contemplation of formal charge" does nothing to service the purpose behind the rights contained in subss 23(1) and (4). Indeed, it appears to interfere with the attainment of that purpose. As Gallen J pointed out in *R v Cowie*, the Bill must be directed at the effect of detention on the person who is subject to it and the need for safeguards in such circumstances. Given that, how can the subjective intention of those carrying out the detention matter? Persons ignorant of their legal entitlements who are subject to de facto detention need to have access to legal advice whether or not a decision to charge them has crystallized in the mind of their captor to the point where it qualifies as the "contemplation of a charge". It seems evident that the requirement of a contemplation of a charge is a hangover from the traditional concept of arrest, which required a manifestation of the intention of the arrestor to detain the subject; it does not arise at all from a purposive interpretation of the term as applied in s 23.

Because it is not a purposively developed criterion, it is not surprising that the "contemplation of a charge" requirement actually prevents the fulfilment of the purpose behind the right to counsel and the right to be advised of the entitlement not to speak. There may well be no crystallized contemplation of charges against those who are subject to de facto detention without lawful authority, leaving such persons without access to the protection of the Bill. To make matters worse, this is more likely to be so where there is little evidence against the detainee at the time of the detention, creating the curiosity that the more arbitrary a detention is, the less likely rights to counsel will arise. The "contemplation of charge" requirement also frustrates the application of subss 23(1) and (4) to cases of psychological detention. Where there is a contemplation of charge, there is more likely to be full arrest. The concept of psychological detention tends to do most of its work in Canada in cases where there is no crystallized contemplation of a charge.

Fortunately, the Court of Appeal has yet to commit itself on whether the "contemplation of charge" requirement will endure. Cooke P in *Butcher* left the matter open. He predicted that the definition of de facto arrest would ultimately extend to cases of psychological detention, an extension that would be largely moot if the contemplation of charge requirement persists. More importantly, after providing the provisional definition of de facto arrest he said:

> There would appear to be no room for doubt that if the true position in fact is that...

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124 The same is true of the view expressed in *R v Rose* (HC Auckland, T 142/91, 16 September 1991, Henry J) that there must be some positive action taken before an arrest can be said to have resulted.
125 Alternatively, it is a concession to Parliament, who inserted the phrase "under any enactment". To read arrest as imposing only the "de facto" detention requirement would render the term "under any enactment" meaningless, since all detentions would be arrests.
126 It is not yet clear how crystallized the contemplation of a charge must be to satisfy the requirement. There are decisions which imply that more than a mere hope that the investigation will produce sufficient evidence to charge a suspect is required. In these cases courts have held that there was no contemplation of charge because the police had little or no evidence to sustain a charge at the outset of the interview. See *R v Cowie* (HC Wanganui, T 7/91, 25 November 1991, Gallen J); *R v Goodwin* (HC Hamilton, T 56/91, 29 November 1991, Jamieson J), and see the discussion below in which I suggest these decisions are unduly restrictive.
127 Note 117, above, p 415.
the suspect is not being treated as free to go, that constitutes arrest for the purposes of this Act.\textsuperscript{128}

It may prove significant that there is no reference here to the "contemplation of a charge" requirement.

**Purpose and pragmatism in the application of the right to counsel**

Nowhere is the tension between pragmatism and principle more fully played out in this country than in the law relating to the right to counsel. I am mindful that I am judging the authority from a Canadian perspective, where detention is interpreted differently, and I am no doubt influenced by the fact that in some New Zealand cases where no arrest or detention has been found, arguments against arrest or detention that have prevailed would have been rejected in Canada as unarguable. Even putting the competing definitions of arrest and detention aside, however, much of the case-law in New Zealand strikes me as unwelcoming to the fundamental right to retain and instruct a lawyer. Indeed, there are a number of cases where this is evident in the overt comments of judges, including some of those of the Court of Appeal.

In *R v Edwards*, in the course of discussing the concept of detention, Casey J made a point that is incontestable. He cautioned:

> In situations of this kind,\textsuperscript{129} it is important not to lose sight of the fact that the police have a duty to investigate and prosecute crime. The fact that they are interviewing a suspect at a police station does not mean that he or she must inevitably be regarded as being detained.\textsuperscript{130}

A similar point was made by Thomas J in *R v Waddel*. In rejecting the suggestion that a detention had occurred before the formal charge he said:

> I decline to proceed on the basis that the interview of a person who may be suspected of an offence is not a legitimate part of Police investigation. More often than not, studies and research have shown, Police interrogation of suspects is the dominant method of solving crime. Provided, therefore, that the rights of the person being interviewed are protected and the interview is conducted fairly, it is unnecessary and undesirable to bring forward the point of time when a person properly can be said to be under arrest.\textsuperscript{131}

No-one can argue with the legitimacy or importance of questioning suspects. These comments, however, do not bode well for the fundamental right to counsel, or for the right to silence affirmed in the Bill. They reveal a concern that access to those rights may inappropriately interfere with the pressing business of police investigation. Those rights, however, have been recognized as fundamental. It is important to bear in mind that they do not illegitimize interrogation after detention. Their function is simply to ensure that those who are effectively being denied their freedom are aware of their rights so that they can insist on them if they so choose. Certainly persons provided with the right to counsel

\textsuperscript{128} Ibid.

\textsuperscript{129} The suspect was picked up in the early morning hours, brought to the station, and interviewed during the night for two hours.

\textsuperscript{130} (CA 83/91, 27 September 1991).

\textsuperscript{131} (HC Auckland, T 119/91, 25 November 1991).
will be less inclined to speak. It is incontrovertible, therefore, that confessions will be lost. But consider whose confessions those are. They are the confessions of those who required access to legal advice to appreciate fully their fundamental rights so that those rights are not squandered out of ignorance, fear, or resignation after marathon interrogation that the law would have allowed them to refuse to engage in, had they known better. Cautioning about the need to bear in mind the requirements of effective investigation while defining the triggering event for the right to counsel stands as an indictment of the right to silence. Such comments contain indirectly the same message provided by Holland J in *R v Butcher* when he noted that “there is urgent need for consideration to be given to whether the right to silence should not be qualified [and] whether there should not be a limited power to detain for inquiries”.  

It is somewhat difficult to urge in the face of this that the provisions of the Bill should not only be interpreted purposively but also applied purposively. After all, these and similar comments are directed at an application that is consistent not with the purpose behind the fundamental right, but rather with the needs of law enforcement. It would seem as a matter of principle, however, that a purposive interpretation of rights should be accompanied by a purposive application. After all, there is no point in interpreting a provision in a fashion meant to secure the effective protection of the right if the tests produced by that process are applied in a narrow, legalistic fashion. In other words, in deciding whether a particular set of facts fits within a test or standard stipulated by the Bill, it would seem appropriate to ask whether or not the purpose behind the provision in question would be advanced by its application to those facts. Some of the case-law dealing with the right to counsel fails to do so, denying the application of the right to counsel in cases where it would appear to be required. This is occurring, in my opinion, on a number of fronts, including in the determination of whether there is a contemplation of a charge, one of the prerequisites to the extended definition of “arrest”.

The language in *R v Butcher* does not ask whether there is a fixed intention to charge the subject; it inquires whether there is an “intention or contemplation that the suspect will or may be formally charged”. Despite this, the case-law seems to insist upon a more or less crystallized intention to charge. In *R v Goodwin*, for example, the Court concluded that there was no contemplation that the accused would be charged at the time he admitted to having violently shaken his daughter. At the point where that admission was made, an autopsy had already revealed that his seven week old daughter had died of a cerebral hemorrhage caused by “trauma”, the wife of the accused had advised the police that he had previously threatened to throw the child out of a window, and he had been cautioned and told that he could not leave after a six and a half hour interview. I have to concede the obvious point that the police did not have enough evidence actually to charge him prior to this admission. On the other hand, they clearly regarded him as a potential suspect and no doubt hoped that if he was the offender he would incriminate

133 Ibid, p 415 (CA).  
135 (HC Hamilton, T 56/91, 29 November 1991, Jamieson J)
himself. It would have been an appropriate factual characterization for the court to have held that the prospect that Goodwin might be charged, depending on the results of the interview, was foremost in the minds of the investigators. Looking at the question purposively, it is obvious that Goodwin needed legal advice; he asked on several occasions when he could leave and it is evident he did not wish to be there. It is apparent, at least in reading the report of the case, that he did not know he could leave and felt obliged to stay and answer questions. The decision shows little sensitivity to the purpose behind the right to counsel.

In *R v Waddel* the requirements of “de facto detention” were applied in rigorous fashion, thereby avoiding a finding of detention. The Court conceded that at the time he entered the police vehicle, Waddel may have felt that he would be taken to the station whether he liked it or not, but ruled that his subjective belief that he was being detained was not enough to make his decision to accompany the police involuntary. There had been no actual compulsion, and the matter had to be viewed objectively. Justice Thomas then acknowledged that if Waddel had tried to leave, he would have probably been restrained. Because Waddel did not attempt to leave, however, the resolve of the officer to detain him was never put to the test. No actual detention occurred, therefore. With the greatest of respect, the concept of detention suffers if a person’s subjective belief in his detention saves the police from actually detaining him, thereby sustaining the conclusion that he is not under de facto detention at all. The law should not arrive at the conclusion that a person’s rights increase if he has the temerity to assert himself against the police by attempting to leave.

The decisions in *Goodwin* and *Waddel* do not stand alone. There appears, in general, to be a high level of tolerance for the practice of interviewing suspects at the police station, often for long periods of time, without formal arrest, under circumstances that hover close to the line of de facto detention. It is worth noting that, save in those cases where the detention is considered arbitrary, a purposive interpretation of the Bill would not prevent the practice. What it seeks to do is to ensure that this pragmatic exercise is carried on under circumstances where detainees are apprised of their fundamental rights. Even where there have been violations, control over remedy for those violations that are occurring is available to ensure that the goals of relevance and proportionality are respected.

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136 (HC Auckland, T 119/91, 25 October 1991, Thomas J). The decision can be supported on grounds other than those criticized here. Waddel proved to be an unsatisfactory witness, and the Court found that he was aware of his entitlement to speak to counsel, was presented with the opportunity to do so, and declined.

137 This was effectively the position under the Canadian Bill of Rights (1960) on the concept of detention: *Chromiak v R* [1980] 1 SCR 417. This decision is rejected by the Supreme Court of Canada in *R v Therens* (1985) 18 CCC (3d) 481 and has become the stock example of a narrow, technical interpretation unfitting to an instrument designed to secure fundamental rights.

Conclusion

The New Zealand Bill of Rights Act 1990 is of primary use to those accused of crime. In this sense, it is a "rogues’ charter". To a degree, at least, it is bound to hinder the enforcement of law. Its impact on the public interest in the prosecution of offenders is not unrestrained, however. The fundamental rights and freedoms it recognizes are subject to limitations. The most potent limitations are in the hands of legislators. Courts nonetheless play a pivotal role in ensuring that the Bill does not take on exaggerated importance. They can maintain a sense of pragmatism by invoking the techniques of purposive and contextual interpretation, as well as purposive application, to assist in keeping the operation of fundamental principles proportional and relevant. Moreover, they can use their remedial power in a principled fashion to assist in imposing appropriate limitations on the reach of the rights and freedoms affirmed in the Bill. Where pragmatic considerations related to effective law enforcement are allowed to qualify the operation of rights and freedoms through rigid factual characterization or by replacing purposive interpretation, however, fundamental principles suffers. They are rendered incapable of operating effectively in those areas where their contribution is not only proportional and relevant, but also demonstrably required. Keeping a rogues’ charter respectable requires respecting the rights of rogues, even when we do not respect the rogues themselves.
Criminal Procedure and the Bill of Rights:  
A View from the Bench  

by the Hon Mr Justice E W Thomas*  

The bitter change  
Of fierce extremes, extremes by change more fierce.  

— Paradise Lost; John Milton (1608-1674)  

“A View from the Bench”  

Apart from an important qualification, Professor David Paciocco and I have been given  
the same topic at this Seminar; “Criminal Procedure and the Bill of Rights”. The  
qualification in my case has been expressed by the programme organisers in the form of  
a simple caveat — “A View from the Bench”. So it shall be. I am content to leave the  
authoritative exposition of the provisions of the Bill of Rights to the good Professor1  
and other outstanding commentators such as Antony Shaw and Andrew Butler,2 Paul  
Rishworth,3 Jerome Elkind4 and Tim McBride,5 and present a purely personal view.  

Because it is a personal view, what I have to say does not, or does not necessarily,  
represent the views of other Judges. So often have I sounded this caveat since becoming  
a Judge; in my article on the so-called right to silence; in my commentary relating to the  
liability of nominee directors and their appointors; in my paper purportedly outlining a  
coherent theory of constructive trusts, and in my upcoming monograph on legal  
reasoning,6 that I am contemplating automatically adding this personal rider to my  
judgments!  

In this paper I first review the basic purpose of the criminal process and reiterate that it  
is to secure the conviction of the guilty, although not at the expense of convicting those  
who are innocent. I then examine the law which was considered effective to secure the  

* A Judge of the High Court of New Zealand. Prepared under a time constraint for reasons peculiar to  
the author, the paper is submitted E & OE.  

1 See also, “The New Zealand Bill of Rights Act 1990: Curial Cures for a Debilitated Bill” [1990] NZ  
Recent Law Review 353; “Remedies for Violation of the New Zealand Bill of Rights Act 1990” in  
3 “Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and  
The First Fifteen Months” in Essays on the New Zealand Bill of Rights Act 1990 (Legal Research  
Foundation, 1992) 7; “How does the Bill of Rights Work?” (A comment on Ministry of Transport v  
4 “Interpreting the Bill of Rights” [1991] NZLJ 15; “The Optional Protocol and Covenant on Civil and  
6 “The So-Called Right to Silence” (1991) 14 NZULR (No.4) 299; “He Who Pays the Piper Calls the  
the course of publication); and “A Return to Principle in Legal Reasoning and An Acclamation of  
Judicial Autonomy” (1992) VUWLR (in the course of publication).
fundamental rights of persons involved in the criminal process before the enactment of the Bill of Rights. The overriding precept of fairness which then prevailed is referred to with approval. Similarly lauded is the consequential approach, in which the Courts in their discretion provided a remedy, such as excluding the improperly obtained evidence, where the accused was prejudiced or a fair trial would be significantly impaired. It is suggested that this approach represented a mature regime in which the interests of the accused in obtaining a fair trial and preserving his rights was balanced against the public interest in securing the detection and conviction of the guilty.

The approach based on fairness is contrasted with the more rights-oriented approach which is the inevitable outcome of the enactment of the Bill of Rights. The implications of this approach are examined in relation to the provisions of the Bill of Rights relating to the criminal process, with special attention being given to s 23(1)(b). Such an examination also provides the prelude to the final section of the paper relating to remedies. It is there suggested that the previous approach based on fairness should be carried forward as far as is consistent with the protection and promotion of the fundamental rights affirmed in the Bill of Rights. The desirability of legislative clarification is discussed.

The aim of the criminal process restated

As this paper represents a personal perspective, I feel at liberty to reiterate my basic perception of the criminal process, of which the criminal trial is an integral part. To my mind, the central aim of the criminal process must be to secure the conviction of the guilty. I adhere to the Benthamite notion that its essential function, beginning with the police investigation and concluding with the trial itself, is to obtain an accurate determination of the accused’s guilt or innocence. We should freely and unashamedly admit that this is so, but at the same time acknowledge and accept that such a goal cannot be achieved at the expense of convicting those who are innocent. Criminal procedure can be then directed to that end, and those rules which do not serve that purpose can be modified or dispensed with.

I have referred elsewhere to the primary factor which intrudes upon this simple perception. It is the notion that the rules of procedure and evidence in a criminal trial must be dominated by the prescription that no innocent person is able to be convicted. No-one, of course, is prepared to brook that iniquity. Human frailty and the inevitable imperfection of procedures combine to make the conviction of an innocent person an ever-present risk. But the truly innocent can be protected without adopting procedural rules designed to ensure that nine guilty people go free before an innocent person is convicted. An accused can be assured of a fair trial without his “guilt” or “innocence” being determined in terms of rules which, when pressed to their hilt, convert the criminal trial to a game. As Lord Porter has said:

[A] criminal inquiry should not be treated as a game hidebound by rules of fair play to give the criminal a sporting chance without considering whether it is for the benefit of the community or not.8

To those imbued with this sentiment, a number of reforms to the criminal process have commended themselves for consideration. Two, in particular, impressed me as desirable changes which would promote the objective of securing the conviction of the guilty without increasing the risk of convicting the innocent. The first was the modification or abandonment of the so-called right to silence, and the second was the imposition of a duty upon accused persons to disclose in advance to the prosecution the nature of any affirmative defence and any documents and technical or scientific material proposed to be relied upon at the trial. This disclosure was originally recommended by the Criminal Law Reform Committee in 1986.9

I remain unshaken in my view that the so-called right to silence has long outlived its usefulness. It is properly to be perceived as a bogus right providing only illusory protection for those subject to an investigation by a law enforcement agency or involved in the courtroom confrontation of the criminal trial. It is recognised that, by its very nature, it helps the guilty and seldom assists the innocent. Small wonder that jurists, academics and commentators who have condemned this "right" comprise a formidable list.10 I joined with them in concluding that it should be discarded and attention focused on identifying and securing those aspects of procedural fairness which would ensure a fair trial for guilty and innocent alike. Eventually, I anticipated, the moral and social duty to assist the police, which has been acknowledged by the Courts, would inform the law itself, and the right to silence could be displaced with concepts of cooperation, personal accountability and community responsibility.11

The case for the second major area of reform, the mandatory disclosure of certain features of the defence case, was cogently argued in the Report of the Criminal Law Reform Committee. Since that time the enactment of official information legislation12 has resulted in the Crown making extensive pre-trial disclosure. This discovery has been prompted by the Courts.13 But the advance has not been met by any corresponding development requiring pre-trial disclosure by the defence (other than when the defence of alibi is to be raised) in appropriate cases. If anything, as I suggested in R v Harvey and Tamaki City Council,14 the subject of pre-trial disclosure by the defence requires legislative examination.

But neither of these reforms has eventuated. Instead, in 1990, the Legislature enacted the Bill of Rights Act seeking to protect and promote human rights and fundamental freedoms in New Zealand. Its provisions included an affirmation of the citizen's fundamental rights relating to search and seizure, the rights of persons arrested or detained and then charged, and it set the minimum standards of criminal procedure.15

10 Eg, Professor Glanville Williams, Professor Z Cowen, Professor Rupert Cross, A A S Zuckerman, Criminal Law Revision Committee 11th Report, 1972, American National Commission on Law Observance (Report of 1931).
11 Above, note 7, pp 314-318.
14 (HC Auckland, M 1734/89, 18 October 1990).
15 Sections 21-25.
No-one can cavil with the objective of protecting and promoting the individual's fundamental rights. It is a self-evidently laudable goal. The key question is whether this goal can be achieved within the framework of a criminal process which retains the aim of securing the conviction of the guilty. The answer to that question depends on how these rights are construed and applied by the Courts. All too easily, I fear, the task entrusted to the Courts of protecting and promoting these basic constitutional rights may mean that the primary objective of the criminal process is further remitted.

The problem was inevitable, but apparently unforeseen. Handed a statute purporting to prescribe the citizen's fundamental rights, the Courts could not do other than seek to give effect to those rights. That objective, however, cannot be achieved without the imposition of sanctions for a breach of those rights, and this process gives rise to its own set of procedural and evidential rules. These rules have the inbuilt propensity to be directed towards the vindication of the rights as distinct from the assurance of a fair trial for the accused. Consequently, just as occurred with the so-called right to silence, their enforcement may impede the ascertainment of the actual guilt or innocence of the accused. The difference is that the rules with which we are now concerned have been given constitutional status. Notwithstanding that status, however, it is still important to ask whether these procedures, as shaped and formulated by the Courts, are for the benefit of the community.

**Fairness v rights**

To answer this broad question the dramatic shift in our criminal law following the enactment of the Bill of Rights needs to be fully appreciated. Prior to its enactment the admissibility of evidence obtained illegally, or in breach of the Judges' Rules, or contrary to a recognised common law right, was determined by the application of the criteria of fairness. Fairness had been extended to encompass not only circumstances which rendered the use of the evidence unfair to the accused but also circumstances where the quality of the conduct of those who obtained the evidence gave rise to public policy grounds for exclusion. But essentially the acceptance was "simply one of fairness".

Thus, in *R v Webster* the common law right of access to a solicitor when sought by a person in police custody was recognised as a "fundamental right though not an absolute right". Bisson J described the Court's function in these terms:

... while the courts have a supervisory function over law enforcement officers, it is not a disciplinary body. The ends of justice must be the paramount consideration. Fairness to the person being interviewed is not to be assessed in a vacuum but in the light of all the circumstances of the particular case and having regard, too, to the public interest in the proper investigation of crime, prosecution of offenders and the protection of the public.

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18 *R v Webster* [1989] 2 NZLR 129.
19 *R v Dally* [1990] 2 NZLR 184, 185. See also *R v Convery* [1968] NZLR 426.
20 *R v Walters* [1989] 2 NZLR 33, 36. Cooke P. See also *R v Webster*, above, note 18, and the cases referred to therein.
21 Above, note 18.
22 Ibid, p 140.
23 Ibid.
I believe that this observation is as sage today as it was at that time.

In *R v Admore*,24 that felicitous judicial phrase, "it is all a question of fact and degree", was utilised by the Court of Appeal when considering the failure of the police to administer a caution. McMullin J said; "Questions of admissibility in such circumstances will generally depend on questions of fact and degree."25

Notwithstanding that the Courts adopted this flexible approach to the question of admissibility, the language of "rights" was customarily employed26 and those rights were often described as "fundamental rights".27 While the language of rights was used, however, the substantive law was framed in terms of duties which were imposed on the enforcement officers. Thus, police officers were under a duty to caution the suspect before taking a statement, an obligation incorporated in the Judges' Rules, not as a right, but as an injunction to the police.28 The police were also under a duty not to cross-examine the accused in recognition of the "right not to be cross-examined".29 Similarly, in order to protect the accused's right to a lawyer, once sought, the police were exhorted to comply with the requirement or run the risk that their conduct would be found an unfair and oppressive use of police power.30 Finally, the accused's "right" to be prosecuted without delay was seen in terms of an obligation resting upon the authorities to avoid unreasonable delay. The "fundamental and important right" of the accused did not preclude reference to the public interest and the principle of fairness.31

It is not inapt to say that in all such cases the right was the rhetoric and the substantive law was the duties cast upon the enforcement officers. It followed that the notion of a prima facie rule excluding evidence where there was a breach of that duty was expressly rejected.32 It also followed that the admissibility of improperly obtained evidence rested on the discretion of the Judge. "It is in our view", said the learned President in *R v Webster*, "preferable to leave the question of admissibility of evidence in this context, as it is in most other contexts, for the exercise of judicial discretion in all the circumstances of a particular case."33

In broad terms, with the enactment of the Bill of Rights, the rhetoric has become the substantive law. The requirements of the Bill are not phrased as duties on the enforcement officers - although they undoubtedly impose duties - but as rights attaching to the individual. This shift from rhetoric to substance provided the framework for the

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24 Above, note 17.
26 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (right to refuse to answer questions, per Cooke J, p 398; right to remain silent, per McMullin J, p 406); *R v Fatu* [1989] 3 NZLR 419, 431 (right of persons arrested not to be cross-examined).
27 *R v Webster* [1989] 2 NZLR 129, 140; *Police v Travis* [1989] 2 NZLR 122, 125 (right of access to a solicitor if sought); *R v Alexander* [1989] 3 NZLR 395, 400-403 (right of arrested person to be brought before the Court as soon as reasonably possible); *R v Admore* [1989] 2 NZLR 210, 213-214 (right not to be questioned oppressively).
28 Rule (2).
29 See, eg, *R v Fatu* above note 17.
30 *R v Webster* above note 18.
31 Eg *R v Fatu* above note 27.
32 *R v Webster*, above note 18, p 139.
33 Ibid.
introduction of remedies which will prima facie apply wherever the rights of the citizen are denied and foreshadowed a corresponding reduction in the scope for judicial discretion.

I admit to being comfortable with the previous regime. It struck a sound balance between the essential aim of the criminal process to secure the conviction of the guilty, the objective of providing a fair trial to all persons charged with an offence, and the important goal of protecting the individual’s recognised rights. Properly administered, neither the guilty nor the innocent could complain that they had not had a fair trial.

To my mind, therefore, the law or approach prior to the enactment of the Bill of Rights could be properly described as both mature and responsible. It can be called the approach based on the precept of fairness. Legalism was barely visible. The relevant interests and values could be balanced and weighed to achieve a result which was sensible and fair. It was this balancing process which instilled the system with its maturity. There is, I suggest, no better means for weighing the competing interests and values which distinguish the criminal process from start to finish.

The enactment of the Bill of Rights has meant that this approach has been supplanted by another. It is called the rights-oriented approach. Interests and values which were previously recognised at law have the status of constitutionally enjoyed rights and carry the expectation that they will be observed irrespective of the fact that any violation may not prejudice the accused nor affect his ability to obtain a fair trial. In the adjudication of the issues which arise these fundamental rights then obtain a weighting which they did not previously command, and the balance between the interests of the accused and the interests of the community are correspondingly amended.

It will be apparent from what I have said that I have little enthusiasm for the approach adopted to the Canadian Charter of Rights and Freedoms by the Supreme Court of Canada. While I customarily have the highest regard for the principled reasoning undertaken in the decisions of that Court, I am unable to accept the lack of flexibility and pragmatism in its extreme rights-driven approach. For example, I consider inexcusable the Court’s virtual elimination of any discretion in determining whether or not to exclude evidence for a breach of the Charter, notwithstanding the specific requirement that such evidence be excluded only if its admission would be prejudicial to the administration of justice. I also consider equally untenable the Court’s rejection of any causal link between the violation and the evidence in issue. Automatically excluding evidence which would have been ascertained, apart from and independently of the breach, seems to me to be quite disproportionate to the aim of vindicating fundamental rights. 34

I confess to being dismayed when I recently read that the Supreme Court had struck down as unconstitutional the statutory provisions of Canada’s Criminal Code which prevented the complainant’s previous sexual conduct or experiences being put in issue in a rape trial. 35 To my mind, a jurisdiction which prefers the “rights” of the accused in this manner, and is apparently unable to balance and weigh the competing values and interests

34 See below, text accompanying notes 85-91.
involved, is suffering from a bad dose of constitutional constipation.

One of the framers of the Charter, Eugene Ewaschuk, since elevated to the bench, has been scathing in his comments on the Court’s interpretation of the Charter. His judicial colleagues, he observed, have fallen into “the trap” of “the often all-consuming zeal of some jurists to rewrite the Charter according to their personal perceptions as to what Canadian society requires.” Conceivably, a more extreme approach is acceptable where the constitutional rights have been entrenched with the legislature’s concomitant delegation of extended authority to the third arm of government. But I doubt it. I particularly doubt that it is appropriate where Parliament, as in this country, has not seen fit to entrench those rights and has thus, by necessary implication, refrained from conferring such extended authority on the judiciary.

It may be observed that the enactment and implementation of the Bill of Rights will itself undoubtedly influence our traditional concept of fairness in criminal proceedings, whatever approach is adopted. It is one thing to ask whether the admission of evidence obtained in contravention of, say, the accused’s right to silence would be unfair to the accused in the sense that it would prejudice a fair trial. It is another thing to ask whether it would be unfair because it is a violation of the accused’s fundamental rights. In the latter case the unfairness lies in depriving the accused of the right, and the advantage of the right, which he or she enjoys in common with everyone. Without, therefore, resorting to the rights-oriented approach, the enactment of the Bill of Rights is likely to have the effect of reshaping the pre-Bill of Rights concept of fairness. Almost as a matter of course, relatively less weight will be placed on the question of whether there is any prejudice to the accused and greater weight on the denial of the right itself.

The adverse consequences of a rigid rights-oriented approach

Undue adherence to the rights-oriented approach will, I believe, have a number of adverse consequences. These will inure simply because the primary aim of ensuring the conviction of the guilty will not dissipate and disappear. It represents a legitimate interest of the community, and one which the Courts will inevitably seek, as they have in the past, to reflect in their decisions.

The first adverse consequence of a too rigid rights-oriented approach, therefore, will be the tendency in future cases to whittle down the full rigours of any seminal rule. Exceptions, some plainly illogical, will be carved out of the rule in an effort to balance the competing rights and interests. This has been the experience in the United States with Miranda. Post Miranda decisions have consistently resiled from the noble and lofty sentiments expressed in the original decision. For example, the Miranda rule has not been applied to a situation where, although the suspect was questioned in the police station, he was not technically under arrest; questions asked of a suspect in the police car on the way to the police station have been held to be something less than interrogation and the evidence therefore ruled admissible; evidence obtained in violation of the Miranda

37 Above, note 7, p 305.
rule will be admitted if the prosecution is able to show that it would have been discovered in any event; and while a confession obtained in breach of *Miranda* may not be given in evidence in chief, it may nevertheless be used in cross-examination for the purpose of impeaching the accused.

Further, *Miranda* does not apply to custodial statements which are initiated by the suspect as distinct from those made in response to questioning; incriminating answers given to questions from Probation Officers without a *Miranda* warning have been held admissible; the Court has declined to exclude the evidence of a suspect who, having initially declined to answer questions following a *Miranda* caution, was subsequently questioned by another officer who did not repeat the caution; and the incriminating comments of a suspect inspired by police officers deliberately discussing the case within earshot of him have been ruled admissible. The evidence of suspects questioned at the scene of the crime where public safety might be endangered are also admissible without a *Miranda* warning; the evidence of a suspect who has waived her right not to speak, incorrectly believing that her lawyer was not present because of the deliberate deception of the police officers, was not excluded; it has been held that the police may question a suspect about a more serious crime after he has waived his right to silence in respect of a lesser crime following a *Miranda* warning; and the police may use the verbal statement of a suspect who agrees to talk but declines to sign anything in writing until his lawyer is present.38

Perhaps the high-water mark in the Supreme Court's retreat from *Miranda* is its decision in 1985 which enables the police to ask a suspect to repeat a confession which is given without a *Miranda* warning, providing that the warning is then given before the suspect is invited to repeat the incriminating statement.39 Most suspects, of course, would believe the damage had been done. Unlike the police, they would be unaware that their first statement could not be used in evidence.

These decisions have, I suggest, effectively reduced *Miranda* to a mockery. The absolute character of the judicially-formulated rule has been clearly undermined so that the impact of any violation is in fact assessed in the particular case. Indeed, as early as 1974, the Supreme Court ruled that *Miranda* warnings are not constitutional requirements in themselves, but only prophylactic measures designed to safeguard Fifth Amendment rights.40 Decisions carving out further exceptions to the *Miranda* rule and holding that violations of a suspect's rights did not necessarily mean that his evidence would be held inadmissible were inevitable.

It is insufficient to dismiss these decisions as the "political" outcroppings of the American system of appointing Judges to its highest Court. The decisions are reasoned decisions falling well within the common law tradition. What they demonstrate, I suggest, is that an overly-dedicated or rigid approach to rights will not indefinitely suppress the primary aim of the criminal process to ensure the conviction of the guilty. Rooted in the

community, that aim creates a pressure which is eventually reflected in the decisions of the judiciary.

To my thinking, the pendulum has swung too far in one direction in the United States, just as it has more suddenly swung too far in Canada in the opposite direction. The extreme position in both jurisdictions is untenable. I do not doubt that the pendulum in both countries will return to a position of greater equilibrium in the fullness of time. The art for the New Zealand Courts, to my way of thinking, is to avoid the extremes of both jurisdictions and adopt an approach to the Bill of Rights which avoids the excesses of both and is more closely aligned with the precepts of justice.

The second detrimental feature of an approach which unduly restricts the trial judge’s discretion to admit evidence in the circumstances of a particular case is the effect it will have on the judicial process. Few Judges can view with equanimity the prospect of a guilty person escaping the consequences of his crime because it is seen to be necessary to vindicate his rights or discipline the police. Decisions of the post *Miranda* kind seeking to rationalize departures or exceptions to the rule are the likely outcome. Findings of fact which are, perhaps, strained and lead to an inconsistent application of the rule are another.

The third negative consequence relates to the effect on the police. I have elsewhere commented on this aspect in respect of the so-called right to silence. The police are placed in the position at the very outset of an interview of endeavouring to ensure that the suspect does not exercise his right to silence. They do so in the kindly shade of Court decisions which decline to crimp the police power of investigation. It is perverse that, in promoting the community’s demand to be protected from unlawful activity, the police should be constrained to try and frustrate the suspect’s lawful right to respond to their questions.

The same reasoning cannot, of course, be automatically applied to the accused’s right to consult a lawyer and to be informed of that right. Unlike the right to silence, this right assists the innocent as well as the guilty. Rather, in this instance, the adverse effect is the debilitating effect on the police force who, acting in good faith and with due competence, nevertheless fail to give the necessary advice or to give it at the appropriate time. The police officer who genuinely fails to apprehend that the suspect is being detained in a manner which the Courts will describe as a de facto arrest provides one example. On the rights-oriented view, the bona fide and due competence of the police officer is irrelevant because the citizen has been deprived of his constitutional right and in that regard, it is argued, he is in no different position from the suspect whose right is deliberately flouted.

Be that as it may, my point for present purposes is that it is reasonable to accept that the exclusion of an admission obtained, say, competently and in good faith, and in circumstances where the accused’s right to a fair trial cannot be said to be prejudiced, is likely to have a detrimental effect on the morale and performance of the police force. The debilitating impact on law enforcement officers who seek to bring a “villain” to justice only to find themselves on trial, as it were, can readily be imagined. Devices and practices

41 Above, note 7, p 306.
42 See Zuckerman, above, note 38, p 13.
to evade the effective implementation of the right, as has occurred with the so-called right to silence, could be the unfortunate result.

There is a view, which is widely held, that there is no good reason why the police should not comply with the requirements of the Bill of Rights in all cases or, certainly, almost all cases. The problems encountered to date, it is said, result from initial uncertainty as to the law and represent the inevitable “settling in” period as the police adjust to the new requirements.

Without doubt, the immediate post Bill of Rights situation will improve. But I do not share the optimistic view that violations of the Bill of Rights will disappear or, at least, dwindle to a tolerable level as the police accept and apply the new discipline. First, this has not been the experience in the United States. Nor, as I apprehend it, is it the experience in Canada. Moreover, the position does not seem to be noticeably “settling down” in New Zealand. Certainly, there has been and will continue to be an improvement, but cases in which the police are alleged to have failed to comply with s 23(1)(b) still continue unabated, notwithstanding that it is now nearly a year since R v Butcher was decided.

Secondly, the often expressed expectation that, other than in rare cases, the police could comply with the requirements of s 23(1)(b) if they really wanted to is, to my mind, unrealistic. Such a view ignores the myriads of situations and pressures which arise and confront police officers in real life, and assumes a degree of competence and capability in those situations and under that pressure which is unattainable. Enforcement officers, no less than judges and lawyers, suffer human frailties and deficiencies, the consequences of which can fall to be judged harshly with the benefit of hindsight.

Thirdly, the obligations which are imposed upon the police under the provisions of the Bill of Rights in order to give effect to the rights contained in it will not remain static. Those obligations cannot be exhaustively defined at any given time. The obligations will change as the Courts work out in successive factual situations what is required of the police to give full effect to the recognised rights. Some of the problems are anticipated below. Moreover, as the approach adopted towards the interpretation of s 23(1)(b) is applied to the other criminal law provisions, additional requirements will evolve and require compliance by the police. In all these circumstances, the Courts will be called upon to define and impose new duties on the police.

The final adverse feature threatened by a strict rights-oriented approach is the very fate of the Bill of Rights itself. It contains many splendid rights and freedoms. Some are omitted; the right to privacy and the right to one’s reputation are notable examples. Other rights could have been developed; the right of victims of crime could fall within this category. But overall, the civil rights and freedoms of the citizens of this country are resoundingly affirmed in a single constitutional document which will undoubtedly strengthen the community’s resolve and capacity to withstand their erosion.

Not unexpectedly, however, for it is also the experience in Canada, the focus has been on

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43 See text accompanying notes 66-84, below.
44 See text accompanying notes 71-84, below.
the provisions prescribing the rights, principles and procedures relating to the criminal law. If these provisions are applied in a manner which was not intended and the central aim of the criminal process to secure the conviction of the guilty is displaced, the Bill of Rights as a whole is put at risk. The cartoon in which a smirking masked burglar is pictured climbing through the householder’s window with a torch in one hand and a burglar’s kit in the other, and is seen to have a document in his hip pocket conspicuously marked “Bill of Rights”, is a depressing prospect.

Public disenchantment with the operation of the criminal principles and procedures of the Bill will all too easily spread to the document as a whole and surreptitiously infect the other rights and freedoms contained in it. All rights and freedoms are therefore put at risk if the operation of the criminal safeguards are perceived to favour the “criminal” at the expense of the community. To the extent that the Bill of Rights is a rallying point for public opinion in the face of a threatened invasion of any fundamental right or freedom, it is also irreparably weakened. In the sphere of basic rights and freedoms it is imperative that the constitutional document recording those rights and freedoms command the respect of the community and reflect the deepest will of the people.

Section 23(1)(b)

A number of the criminal law provisions of the Bill of Rights have been in issue in various cases. None, however, have come remotely close to capturing the Court’s time and attention to the extent of s 23(1)(b). This is to be expected, first, because the subsection enlarged the existing law and, secondly, because (apart from the question of detention for the purposes of breath and blood tests under the Transport Act 1962 and detention for the purpose of search under the Misuse of Drugs Act 1975) no question of inconsistency with other statutes arises. What is in issue in each case is the meaning of the provision and its application in the circumstances in which the police officers have purported to exercise—or not exercise—the power of arrest or detention. In short, the Court of Appeal has held that the right to a lawyer and to be informed of that right applies to de facto arrest as well as formal arrest. As at the time of writing, an authoritative ruling on the same issue is pending in the case of R v Goodwin.

Obviously, it would be preferable if any further examination of s 23(1)(b) could be deferred until the decision in R v Goodwin is delivered. Certainly, it is not my intention to predict the outcome in that case, and my examination of the subsection must necessarily be limited in its purpose. I therefore propose to undertake one task only. It is to suggest that there is a far better case to be made for interpreting s 23(1)(b) in such cases. I therefore propose to undertake one task only. It is to suggest that the best argument for adopting the more restricted interpretation to the subsection has not yet been advanced. The exercise may serve to emphasize the desirability, perhaps covertly, of adopting the approach recommended in this paper.

In suggesting that there is a far better case to be made for interpreting s 23(1)(b) in such

a way as to apply to formal arrest only, I am not to be taken to be necessarily endorsing that view. My opinion can await an appropriate case. It is important, however, that the less rights-oriented approach be fully stated and that the arguments, if not accepted, be raised and refuted. No doubt they will have been anticipated in *R v Goodwin*.

I have no quarrel with, and in fact wholly support, the broad purposive approach which has been adopted to the interpretation of the Bill of Rights. When dealing with statutorily affinned fundamental rights, I do not see how it could be otherwise. To be legalistic rather than generous, to cavil short of the full intendment necessary to secure the effective enjoyment of the rights, or to timidly shy away from the logical consequences of a given constitutional premise, would be to deny the Court’s constitutional mandate when interpreting fundamental human rights. In the New Zealand context, however, I consider that the resulting interpretation must nevertheless be circumscribed by the intention of Parliament where that intention can be fairly ascertained.

Consequently, I would frame the critical question in these terms; accepting that a purposive and generous interpretation of s 23(1)(b) may necessitate the construction that the word “arrest” includes de facto arrest, does that construction nevertheless accord with the ascertainable intention of Parliament? If it does not, I would suggest that the intention of Parliament must prevail.

I am aware that some scholars subscribe to the view that legislative intent is of secondary importance in the interpretation of a constitutional document proclaiming fundamental rights. As I apprehend it, such a view stems from the notion that the legislature has, in effect, delegated a function to the courts; the function of protecting and promoting the fundamental rights and freedoms, and it therefore falls to the courts to give meaning and force to those rights and freedoms. Whatever the validity of this perception may be where the constitutional document is entrenched, I do not consider it appropriate where the statute is not entrenched — and the legislative history makes it plain that it was deliberately not entrenched. The Bill of Rights is an ordinary statute with the extraordinary function of promoting and protecting fundamental rights, but the function belongs to the statute, not the Courts. To my mind, it can be persuasively argued that Parliament intended, in enacting the Bill as an ordinary statute, to ensure that this function would be proscribed by its will.

Having accepted that a broad purposive approach is desirable, but desirable within the limits of Parliament’s ascertained intention, I should clarify at the outset that the arguments to be advanced in favour of the narrower meaning of s 23(1)(b) do not embrace the principal reasons given by Gault J in reaching the same conclusion in *R v Butcher*. With due respect to that learned Judge, I do not consider that the word “arrest” should be interpreted in accordance with its common law meaning. The Act is not declaratory of the common law, and to utilize a meaning arrived at in other contexts, such as claims for wrongful arrest and habeas corpus proceedings, is to disregard the fact that in this instance the word “arrest” is used in an enactment guaranteeing fundamental rights. It also

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49 See Shaw & Butler, above note 2, pp 401-402 for a discussion of the principles of interpretation.
50 *R v Butcher*, above, note 47, pp 269-271.
51 See *R v Waddel*, above, note 46, pp 11-12.
effectively restricts the interpretation of a vital document to a point in time and deprives it of its capacity to be interpreted in accordance with the "evolving standards of decency that mark the progress of a maturing society".\textsuperscript{52}

Nor do I accept that the word "affirm" in the Long Title and in s 2 to the Act imports the existing law.\textsuperscript{53} With again due respect to the learned Judge, the word "affirm" is used in a different sense. It is not the pre-existing law which is affirmed so much as the fundamental human rights and freedoms which are perceived to exist apart from the law. In other words, it is the rights, and not the law, which are declared. The Bill of Rights is therefore an acknowledgment by Parliament that the citizens of New Zealand possess these rights. In that sense they are affirmed. Richardson J put it this way in \textit{R v Noort}:\textsuperscript{54}

\begin{quote}
... the deliberate reference to "affirm" in the long title and in s 2 which provides:

The rights and freedoms contained in this Bill of Rights are affirmed.

makes the very important point that the Act is declaratory of existing rights. It does not create new human rights. As basic human rights, the rights and freedoms referred to do not derive from the 1990 Act. In that respect it parallels the Bill of Rights Act 1689 which was declaratory of "the true, ancient and indubitable rights and liberties of the people" (s 6).
\end{quote}

The word "affirm" is also used in the Long Title to register New Zealand's commitment to the International Covenant on Civil and Political Rights. In this respect it is relevant to point out that the Covenant does not contain an express right to legal assistance as affirmed in s 23(1)(b), just as it omits any reference to a right to silence. Such rights form no part of the legal system of many of the signatories to the Covenant. This does not mean that Parliament cannot affirm that these rights are nevertheless fundamental to New Zealanders. It does suggest, however, that the Courts and commentators should be guarded in utilizing New Zealand's commitment to the Covenant to support an expansive interpretation of Parliament's intention when those rights are not themselves contained in that document.

Consequently, it can be properly asked which right has Parliament affirmed; the right to legal assistance and to be informed of that right when formally arrested or the right to such legal assistance and information when detained during the course of an investigation? The scope of the two "rights" are significantly different and it now remains to advance those arguments which support the former interpretation.

First, I refer to the legislative history. In this regard, specific reference is frequently made to the fact that the word "detained" is qualified by the words "under any enactment" in the New Zealand Bill of Rights, whereas the equivalent provision in the Canadian Charter on which the wording is clearly based does not include those words. In Canada it would not be necessary to expand the meaning of arrest to include de facto arrest as any such instances of detention would come within the word "detained". It has been suggested, therefore, that the insertion of the words "under any enactment" during the Committee
stages of the Bill indicates the Legislature’s intention to restrict the meaning of the word “detained” so as to exclude cases of de facto arrest. But I doubt the utility of focusing on a specific phrase in this way. The words may have been added for any number of reasons ranging from the draftsman’s whim to a desire to more adequately reflect the existing law relating to the police powers of arrest. For myself, such an approach generally represents a near-sighted approach to the question of legislative intent.

Rather, there is no reason why the Courts should not have regard to the known history of the Bill. Its grand beginning and humble ending then provides the background against which the question of interpretation can proceed. The knowledge that Parliament was reluctant to vest the judiciary with powers which would or might limit the concept of parliamentary supremacy is supported by provisions such as s 4. Parliament can be assumed to have wished its intent to be accorded equal supremacy. Reference to Hansard also reveals that no dissatisfaction of any kind was expressed about current criminal law procedures in this country. The so-called right to silence and right to consult and instruct a lawyer were not mentioned. On the contrary, a number of speakers were anxious to clarify that the Bill did not enlarge the rights of accused persons – somewhat loosely referred to as “criminals”.

It is acknowledged that legislative history must be approached cautiously. It can be vague and equivocal, and it can be misused. In this instance, however, it might reasonably be felt that the legislative background does not suggest that Parliament contemplated any dramatic changes to the criminal law.

Secondly, while acknowledging the need to adopt a purposive approach which could make the affirmed rights effective, it is important to observe that Parliament has not itself made the right to a lawyer effective. The need for a suspect to have access to legal assistance at the earliest point practicable is based on a number of concepts; the need to provide a counterbalance to the coercive power of the State at the point where the suspect comes into contact with it; providing access to knowledge as to “the suspect’s general legal position”;

55 Shaw & Butler, above, note 2, p 406.
57 Above, note 47, pp 8-11.
that everyone who is arrested or detained under any enactment shall have the right
to consult and instruct a lawyer without delay "and to be informed of that right".

One can agree with these sentiments but at the same time point out that, for the right to a lawyer to be effective in those terms, the advice should be given at the stage when the suspect is presently cautioned, that is, when the police officer has made up his or her mind to charge the suspect being questioned with a crime. Only then can all the advantages of the right be secured, particularly in respect of "advice" as distinct from "representation". For all practicable purposes the advantage of such advice cannot be limited to the time when the suspect's movement is restricted as is necessary to constitute an arrest, although in some situations the need for it may possibly be exacerbated at that point.

Consequently, in providing that the right is to be triggered upon "arrest", the Legislature has clearly restricted the right (as it has with the right to silence) to a point which may, and commonly is, later in time than that which is required to secure this advantage. Many suspects are questioned, and make incriminating statements, long before they are arrested or before any question of them being detained or under de facto arrest could arise. The fact that the Legislature has itself plainly not sought to make the right to a lawyer effective in the sense in which it is invoked to extend the meaning of the word "arrest" to include de facto arrest must, it could be suggested, weaken the force of that argument.

In the third place, it also emerges that an extended definition of the word "arrest" requires the Court's to attribute to Parliament the intention to enact in a constitutional charter of rights an improbable and unfair anomaly. Two hypothetical cases may be compared to illustrate the point. First, the "cooperative" model. The suspect is interviewed in circumstances in which no question of arrest arises. He is cautioned but voluntarily accompanies the police officer to the police station and is aware at all times that he may leave prior to his formal arrest. The occasion to advise the suspect of his right to a lawyer does not arise until then. The second case is that of the "uncooperative" model. The suspect is truculent and may even threaten to escape. He is arrested. At that point the police officer must advise him of his right to a lawyer. Comparing the two cases it can be seen that the first suspect is deprived of the right at the very time it is required to be effective. The second suspect, however, by virtue of the erratic or arbitrary point in time when he is arrested, enjoys the right and all its accrued advantages much earlier.

To broadly state this point in terms of saying that an intention to legislate a glaring and unfair anomaly must be attributed to Parliament if the right arises at the time a suspect is detained under circumstances which amount to de facto arrest is to understate its force. In the first place, the more critical the right to a lawyer is perceived to be, the worse the anomaly gets. For example, if the extension of the right is necessary to give effect to the "equality of arms" principle, then that equality is secured for some and not for others. Nor, in the second place, should the Bill of Rights be approached on the basis that it is about fundamental rights without reference to equally fundamental concepts of justice. Yet, if rights, with the advantages they confer, are secured to some but not others

59 Shaw & Butler, above, note 2, p 406.
depending, not on when the suspect’s need for a lawyer arises, but if and when the suspect is arrested, then citizens have been treated unequally. A constitutional document should be construed in such a way as to recognise the fundamental principle of distributive justice; equality before the law.

In the fourth place, reference may be made to the immediate previous paragraph, para (a), of s 23(1). It provides that a person who is arrested or detained under any enactment is to be informed at the time of the arrest or detention of the reason for it. The wording of this paragraph might be taken to provide an internal indication of Parliament’s meaning to s 23(1) as a whole. In short, the police officer often will not be in a position to inform the suspect of the reason for his arrest until he is formally charged. As long as the officer merely contemplates the possibility of a charge, he cannot in fact give a valid reason. To say to the suspect that he is under arrest simply so that he can be questioned as to whether or not he should be charged with a crime would run foul of the Court of Appeal’s clear injunction that the police have no power to detain persons for questioning in this country.60

It is therefore difficult to see how para (a) could sensibly apply at the time of a de facto arrest. Indeed, the officer may not be intending to arrest the suspect at all. The problem is manifest if de facto arrest is construed so as to include suspects who have a reasonable apprehension based on the conduct of the police officer that they are under arrest. In such circumstances the officer may not only be unaware that he is obliged at that time to inform the suspect of the reason for his arrest, but also he may not know or be able to formulate the reason which he is nevertheless required to give. Moreover, for s 23(1)(a) to be effective, one would expect that the reason given would need to be accurate. This is the position in Canada where misleading advice as to the reason for an arrest “can vitiate or infringe the Charter right to counsel”61. Parliament’s clear intention that para (a) should operate at the point of formal arrest can therefore be accepted. But once that conclusion is accepted it is difficult to see why the same controlling words in subs (1) can permit a different construction for para (b).

In the fifth place, it may be suggested that the question of interpreting s 23(1)(b) should be approached with reference to the collateral right contained in s 21(4). That subsection provides that everyone who is “arrested or detained under any enactment” for “any offence or suspected offence has the right to refrain from making any statement and to be informed of that right”. A quick glance at the subsection is sufficient to confirm that the right is narrower than the so-called right to silence recognised by the Judges’ Rules. Rule (2) states that:

> Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be.

In the discretion of the Judge, statements made before or without a caution may be held

inadmissible. Section 23(4) does not therefore "enshrine" or supplant the common law regarding the need for a caution to be administered when the officer has determined to charge the suspect with a crime. Having regard to the fact that this requirement is founded on the precept of fairness, it would be surprising if it did.

Consequently, fairness dictates that cautions continue to be given (subject to a possible modification in wording) in terms of the Judges’ Rules. No question of arrest or detention need arise. Later, at the time the suspect is arrested or detained under any enactment, the suspect will need to be advised of the right contained in subs (4). This must be so whether the term “arrest” includes de facto arrest or not.

Once, however, it is accepted that the existing procedure must continue to apply prior to an arrest under the Act, it should also be accepted that Parliament must have contemplated that situation. Prior to an arrest or detention under any enactment, ample scope for the operation of the common law still remains. The suspect will still be entitled to a caution or to a solicitor should he seek one in terms of the existing law before s 23(1) comes into operation, whatever its meaning. It would seem, therefore, that there is no compelling reason to interpret s 23(1)(b) as being applicable to de facto arrests any more than s 23(4) can be interpreted to apply at the stage a caution is required. Parliament can be assumed to have intended that the pre-arrest situation will continue to be governed by the existing common law, perhaps as modified by the Courts in the light of the Bill of Rights.

The foregoing reasons support the sixth point. It can be suggested that para (b) is part of a legislative pattern or scheme, and that the provision is to be construed accordingly. In dealing with the criminal procedure, the draftsman has begun with the individual’s right to be secure against unreasonable search or seizure. (s 21) Although not invariably the case, a search with any consequent seizure is often part of the investigative process. This section is followed by s 22 with its affirmation that everyone has the right not to be arbitrarily arrested or detained. This right is available at any time but will no doubt have its greatest application in cases of unlawful arrest or detention. The word “detained” in this section is not limited to being “detained under any enactment”. Together with habeas corpus, it provides a safeguard against the arbitrary exercise of police power resulting in the individual’s wrongful loss of liberty.

The draftsman has then moved to the point in time when the suspect is arrested or detained. Leaving to one side habeas corpus and such remedies as may be secured by ss 21 and 22, there are no specific provisions in the Bill of Rights following s 22 which secure the rights of the individual during the course of an investigation. As already mentioned, the need for a caution to be administered prior to arrest or detention is left to the Judges’ Rules and the right to a lawyer, if sought, is left to the common law and the dictates of fairness. Admittedly, the police investigation can extend beyond the point of an arrest or detention,

62 *R v Coombs* (1983) 1 CRNZ 116, 119; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 406. An example of a statement being excluded because a caution had not been given and where no question of arrest arose is *R v Murphy* (1988) 3 CRNZ 342, where the incriminating statements were made to the constable over the telephone.

63 See below, text accompanying notes 75-76.
but this does not obscure the fact that the Legislature has left a vital area where the rights of citizens could be jeopardized to be covered by the common law.

If this overall pattern is accepted, the rights of the individual during the investigatory phase of a criminal prosecution up to the time of arrest continue to be controlled by the common law (and ss 21 and 22); the rights of the person formally arrested are then dealt with under s 23; the rights of the person formally charged are dealt with in s 24; and the minimum standards which are to be observed at the resulting trial are then specified in s 25. One might be forgiven for speculating whether the draftsman is wondering what has happened to his neat progression of rights.

Finally, the argument would be incomplete without providing a rationalisation as to why Parliament might intend the more limited construction. The explanation lies in the nature of the matters which require attention following a formal arrest. An arrest and charge requires the accused to consider such matters as bail; it provides him with the first effective opportunity to challenge the lawfulness of the arrest in relation to the charge; and it sets the point at which the preparation of any defence can properly begin.

Such a basis departs from the perception that the right to a lawyer is necessarily founded on the need for legal advice and assistance to secure the suspect’s rights and focuses on the need for a lawyer to effectively secure a fair trial for the accused. In doing so it moves more closely to the United States Supreme Court’s perception of the basis of the rule in *Miranda*; the need to ensure fairness in the adjudicative process. A fair trial for the accused, it has been held, can be achieved by restricting the rule in *Miranda* to “custodial interrogation.” In the result, it is the State’s commitment to a criminal prosecution evidenced by the formal arrest which triggers the necessity to advise a suspect of his right to a lawyer in that jurisdiction. Parliament may have intended the same here.

And so how telling is the argument? Without doubt, it is a strong case which cannot be lightly dismissed. One suspects that, if it were possible to approach the statute as if it were an ordinary run-of-the-mill piece of legislation instead of an ordinary statute with an extraordinary constitutional function, the narrower interpretation would be readily accepted. But it is not an ordinary run-of-the-mill piece of legislation. The Bill of Rights is a constitutional document affirming the citizen’s fundamental rights, and it seems somehow niggardly not to extend the right as far as a reasonable interpretation, rationally argued, will permit. Notwithstanding that the suspect’s rights during investigation would continue to be governed by the pre-existing common law, both in respect of the need for a caution and the right to obtain a lawyer, it sticks in the judicial craw that any apparent limitation of fundamental rights should fall to be decreed by the judiciary rather than explicitly directed by the Legislature.

In these circumstances, and assuming the Court of Appeal in *R v Goodwin* confirm that the word “arrest” includes de facto arrest, I am not certain that it would not be prudent to invite the Legislature to clarify its intention. There would be nothing judicially remiss in doing this. As I have indicated elsewhere, I am an adherent of the Louis Jaffe school of

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thought which recognizes the potential for a "fruitful partnership" between the legislature and the courts as the two bodies in the law-making business together continuously at work on the legal fabric of society. But Parliament is the dominant partner, and there must be occasions when it can and should reverse the decisions, or the trend of the decisions, of the Courts. In this instance, Parliament's handicraft is poorly worded and it could properly be invited to make its meaning clear. In doing so it might well consider whether advice to a suspect of his or her right to a lawyer should be given at the time a caution is required under the Judges' Rules. At the same time Parliament might reflect that the previous law represented a balanced and mature approach to the task or reconciling the due administration of the individual's rights and the community's interest in "the proper investigation of crime, prosecution of offenders and the protection of the public".

A plentiful feast

Whatever the Court of Appeal decides in R v Goodwin, the full implications of s 23(1)(b) have yet to be explored. Some of the issues which will arise for resolution may be indicated. Then, it is inevitable that a number of the decisions reached will give rise to further issues which will in turn require determination. There is no reason, at present, to suspect that the experience of this country will be dissimilar to that of Canada where the courts have been deluged with proceedings challenging the validity of the procedures followed and the principles applied in the criminal process. A short reference to some of the issues will provide the background to my final submission seeking an approach to the question of remedies which is unreservedly flexible, and which admits scope for the Courts, in the exercise of their discretion, to adjust the remedy in accordance with the overall dictates of justice. The approach adopted to s 23(1)(b) can also usefully be extrapolated and applied to other principles and procedures laid down in this part of the Bill of Rights to provide some idea of the nature of the issues which will be required to be resolved and which confirms, I believe, the need for the more flexible approach to remedies which I will later endorse.

Having regard to the length of the treatment already accorded s 23(1)(b) in this paper, it will be sufficient to shortly list some of the questions which remain to be resolved. In approaching such an exercise, one must bear in mind the admonition of Hardie Boys J in R v Salmond:

The Bill of Rights Act holds an important place in the statute book and has a significant role to play in the formulation and the administration of the law. It is not well served when treated as a straw to be clutched when no other aid is at hand. It is demeaned and trivialized when resorted to indiscriminately or on tenuous grounds.

A number of decisions have since been given in which the observation has been made that the arguments advanced "trivialize" the Bill of Rights. Whether or not the following points will do so will largely depend on the factual situation in which they are raised and the sophistication with which they are advanced. The points may be listed as follows:

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66 (CA 1/92, 23 March 1992) 3.
The police must provide the suspect with a reasonable opportunity to exercise the right to a lawyer. While what is reasonable will be no doubt worked out over a number of cases, problems can be expected to arise whenever a lawyer, or the selected lawyer, is not available.

Will it be enough to inform the suspect of his right and provide him with a telephone, or will the police be expected to further facilitate the suspect's efforts to exercise his right?

Will the police be required to provide an interpreter where the suspect does not understand, or does not appear to understand, the advice as to his right to a lawyer? To what extent will the police be required to otherwise ascertain that a suspect understands, not only what is said, but the significance of the information conveyed? He may be suffering from drunkenness or shock and his ability to understand impaired. Will the police be required to wait for him to become sober or recover?

Will it suffice to hand the suspect a card containing a statement of his rights? Canadian cases suggest that it may not.

Will it be enough to tell the suspect that he can ring a lawyer or must the police convey the information in terms of a "right"? Smellie J has suggested that the language of a "right" should be used. 67

What is the position if the suspect cannot, or believes he cannot, afford a lawyer? Must the police advise him of the position relating to legal aid? Must they assist him apply for legal aid? If groups of lawyers or legal services are organised to be available in the event that the chosen lawyer is not, must the police advise the suspect of these groups?

To what extent will the suspect be allowed the lawyer of his choice? What are the consequences if that lawyer is not available but other lawyers are?

Must the police inform the suspect of his right to a lawyer "without delay"? Judicial opinion varies. In R v Grant, McKay J 68 held that the importance of the words "without delay" is to ensure that the person in custody is not delayed once he has requested access to a lawyer. On the basis that the subsection must be construed so as to make the right effective, Smellie and Anderson JJ have both suggested that advice of the right must be given without delay. 69

Once the suspect has been informed of his right to a lawyer, the police will no doubt be required to cease asking questions of the suspect until he has had the opportunity to exercise the right. But must the police also refrain from asking questions or otherwise eliciting evidence from the suspect until after the lawyer has arrived and had the opportunity to discuss the matter with his client? Although in practice the questioning has at times proceeded pending the arrival of the lawyer, the purposive approach would require that it cease.

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67 R v Dobler (HC Auckland, T 21/92, 8 July 1992) at p 15.
68 (CA 443/91, 19 March 1992) 5.
69 R v Dobler (HC Auckland, T 21/92, 8 July 1992, Smellie J); R v Tunui (HC Auckland, T 223/91, 10 March 1992, Anderson J).
* Will the police be required to reinform the suspect of his right to a lawyer where the charge, or the jeopardy in which the suspect is placed, changes?

* Will the right to be informed be regarded as effective if it is not proceeded by or made contemporaneously with the advice that the suspect may refrain from making a statement? Delaying the advice that the suspect may remain silent could in certain circumstances undermine the value of the suspect’s right to a lawyer.

* Where the police fail to give the necessary information and the suspect makes incriminating statements, will the police then be able to give the advice and ask the suspect to repeat what he has said? As has been seen, in certain circumstances the police can do this in the United States.\(^{70}\)

* Hard or tangible evidence which would have been discovered and adduced irrespective of the accused’s confession may be admitted; but should evidence acquired as a consequence of the accused’s confession invariably be excluded?\(^{71}\)

* Will incriminating statements obtained without the information being given be able to be used by the prosecution to impeach the accused in cross-examination as in the United States?

Many of the above questions, as with issues of causation and waiver, will turn on the facts. What becomes clear, I suggest, is that most of the questions should not be resolved without full regard being given to the question of whether the accused is prejudiced in obtaining a fair trial. There are and will be shades of violations; some will be significant, others peripheral. At times, perhaps, consideration of whether the accused has been prejudiced or his right to a fair trial significantly impaired, may be overwhelmed by the need to vindicate the Bill of Rights; yet at other times these considerations will and should predominate.

Much the same conclusions can be drawn from a brief survey of the issues which will arise for determination in respect of other criminal procedures and rights provided in the Bill of Rights. Not every provision, however, can be examined in this paper. I have already indicated the difficulties which will arise for the police in complying with the requirement of s 23(1)(a). Nor need I speculate upon the effect which s 24(a), which requires that everyone who is charged be informed promptly and in detail of the nature and cause of the charge, will have on existing procedures. The scope for argument centred on the words “promptly and in detail” are self-evident. The requirement in s 24(b) that the accused be released on reasonable terms and conditions unless there is “just cause for his continued detention”, has already been discussed in the context of granting bail.\(^{72}\) The influence of the paragraph is undoubtedly not spent.

The right to have adequate time and facilities to prepare a defence, affirmed in s 24(d), will be relevant to the question of whether in certain circumstances adjournments should be granted. It has already been pressed in that context.\(^{73}\) But further attention may be

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70 See note 39 above.
71 See below, text accompanying notes 86-87.
72 O’Connor v R (CA 305/90, 16 November 1990); I v Police 7 FRNZ 674; Horopapera v R (HC Tauranga, 16 December 1991, Penlington J).
expected to be given to the adequacy of the "facilities" required by the accused to prepare a defence. Will the phrase encompass, for example, scientific evidence for a legally-aided accused at rates which the Court might not presently approve? Furthermore, what is the position if an accused who is not on legal aid but who nevertheless is not able to afford the facilities which his counsel claims are essential to the preparation of his defence? Section 24(f), conferring on an accused the right to receive legal assistance without cost "if the interests of justice so require and the person does not have sufficient means to provide for that assistance", raises the question of whether the Courts are obliged to accept the Executive's determination of a person's means. In other words, notwithstanding that an accused does not qualify for legal aid, is it open to the Courts to hold that he does not have "sufficient means" to exercise his right to legal assistance?

The right to a "public" hearing, as well as a fair hearing, in s 25(a) may bear on the exercise of the Court's power to prohibit the publications of proceedings, as discussed in Police v O'Connor,74 as well as the issue of name suppression. The principle that everyone is presumed innocent until guilty (s 25(c)) has always been a basic tenet of our criminal justice system. Yet, its description as a right in the Bill of Rights will mean that it will be invoked with greater force whenever it is remotely arguable that a statutory provision shifting the onus of proof to the accused cannot mean what it says.75 Finally, s 25(f), which gives the defence the right to "obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution" may give rise to the plea that an accused is being denied this right where he does not have the same resources as the Crown to obtain the attendance of costly experts as witnesses for the defence.

Certain key provisions may now be addressed in more detail.

(i) Sections 23(4) and 25(d)

The point has already been made that the right to refrain from making a statement after being arrested or detained does not encapsulate the so-called right to silence. But I would not quibble with the terms of the subsection. The use of the phrase "right to refrain from" is more morally neutral than many of the formulations of the right to silence advanced by its endangered adherents. Be that as it may, the wording of the present caution may be inadequate. The police officer usually says; "You are not obliged to say anything, but anything you say may be given in evidence". Presumably, however, if the right to refrain from saying anything is a right at the stage a suspect is arrested, it is a right at the time the police officer has decided to charge him with a crime. The underlying principle against self-incrimination would not permit a valid distinction to be drawn between the two situations. If this is so, it is certainly arguable that the suspect should be cautioned in terms that reflect the nature of his "right" to remain silent when he or she is being questioned as a suspect.

Another aspect of the law as it is developing in relation to the so-called right to silence which may require rethinking is the effect the Bill of Rights may have on the Judge's

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75 This has already occurred; see R v Phillips [1991] 3 NZLR 175; R v Rangi (CA 43/91, 19 July 1991); R v Elvines (CA 269/91, 13 December 1991).
ability to comment where the accused has refrained from giving evidence. In appropriate circumstances, it is open to a Judge to instruct the jury that, if there is evidence pointing to the guilt of the accused, they may draw an adverse inference from his silence.\(^\text{76}\) A number of reports into criminal procedure in the United Kingdom have recommended that trial judges should direct the jury that it may draw an adverse inference in such circumstances in much more robust and vigorous terms than is customary.\(^\text{77}\)

Cooke P referred to this topic in his addendum to \textit{R v Butcher}.\(^\text{78}\) The learned President said:

The present law certainly allows an inference adverse to an accused to be drawn if he remains silent at trial in the face of evidence pointing to his guilt. Moreover, by virtue of s 366 of the Crimes Act, the trial Judge may comment to that effect in his summing up to the jury .... The accused is not bound to give evidence, but he refrains at the foregoing risk, so the expression "right to silence" can be somewhat misleading.

This agreeable observation was followed by further dicta in \textit{R v McCarthy}:\(^\text{79}\)

In the ordinary run of cases trial Judges are not to be discouraged from exercising their right of comment ... and we think that criticism of the one-sided effect of the so-called "right to silence" will be less justified if Judges bear this in mind. Silence certainly does not give rise to an inference of guilt; but, depending always on the particular facts, the prosecution evidence and natural inferences from it may more easily be accepted if not contradicted from the accused or other evidence called for the accused. In general, and subject again to the particular facts, the Judge is well-entitled to explain this to the jury. It may well be desirable to do so to prevent "the right to silence" from being over-exploited.

Implicit in the above observations is the notion that the risk of comment and an adverse inference being drawn if an accused does not give evidence is required to off-set the danger that the "right to silence" will be abused. In other words, if it is known that the Judge may comment on the accused not giving evidence and instruct the jury that they may draw an adverse inference from that omission, suspects who are arrested are less likely to shelter in silence, either under questioning by the police or in Court. Before examining the implications of this development having regard to the Bill of Rights, I will briefly proffer two reasons why this stratagem, if it be such, may not work.

The first reason is the unwillingness of some Judges to comment at all, notwithstanding the express authorisation to do so in s 366(1). With many lawyers, the notion invades an article of faith, their inviolate conception of the right to silence. A combination of a frozen Hell and flying pigs will intervene before there is any change of heart on their part. In such circumstances, apart from the fact that the suggestion of the Court of Appeal will not be universally implemented, justice ceases to be even-handed and the outcome of a trial may arbitrarily depend on the identity of the presiding Judge.

The second point I demonstrated in practice. Stirred by the exhortation in the various

\(^{76}\) (CA 1/92, 11 February 1992) 3.
\(^{78}\) Above, note 47, p 268.
\(^{79}\) (CA 263/91, 27 February 1992) ??, per Cooke P.
United Kingdom reports, and choosing a case in which it was clearly "safe" to do so, I commented on the fact that the accused had refrained from giving evidence in "robust and vigorous" terms. Perhaps I overdid it, but it left me feeling considerable disquiet. It seemed to me to impair the judicial detachment which should mark a Judge's direction to the jury. This impression was no doubt exacerbated by the fact that Crown counsel, because he could not do so by virtue of the statute, had not first advanced the point. Possibly, it would be preferable to change the legislation so as to allow the prosecution to comment with the leave of the Court, reserving for the Judge the responsibility of correcting any excessive zeal in the comment which is made.

Even if the Judge's ability to comment is practicable and becomes more prevalent, the Bill of Rights may inhibit its utilization. Of itself, the right to refrain from making a statement following arrest would not have this effect. Combined with s 23(d), which provides the accused with the right not to be compelled to be a witness, however, the basis of an argument which would restrict the Judge's ability to comment undoubtedly exists. Drawing attention to the fact that the Supreme Court in the United States has held that judicial comment on an accused not giving evidence was a breach of the Fifth Amendment, Jeffries J raised the point in R v Andrews. But just as Jeffries J did, I will also leave the issue "for full argument on another occasion".

(ii) Section 25(b)
Another provision which illustrates the consequences of converting principles into constitutionally recognized rights, is s 25(b). This paragraph guarantees an accused the right to be tried without undue delay. The need to avoid excessive delay in the prosecution of an accused has in the past been recognized under the "abuse of process" rubric. Generally, the accused must demonstrate that the delay in the prosecution of the offence has prejudiced his ability to obtain a fair trial. The shift in the focus to the rights of the accused may require this approach to be modified. Other aspects of an over-long delay, such as the stress to the accused, loss of esteem in the community, loss of employment, disruption to the family, exposure to increased legal fees, and the like, will not necessarily impede the accused's ability to obtain a fair trial but may now need to be taken into greater account. In Canada, these kind of features have been described as "the overlong subjection to the vexations and vicissitudes of criminal accusations".

(iii) Section 25(h)
Finally, I propose to focus on s 25(h) because it will serve to demonstrate that no aspect of criminal procedure or principles are immune from the searching touch of the Bill of Rights. Section 25(h) provides that an offender has the right if convicted of an offence to appeal against the conviction or against the sentence to a higher court. It is to be noted

80 "The So-Called Right to Silence", above, note 6, pp312-314.
84 Ibid. See also Paciocco, "Remedies for Violation of the New Zealand Bill of Rights Act 1990", above, note 1, pp 56-57.
that, in respect of sentence, the right to appeal to a higher court is a right to appeal against the sentence. What impact, then, will the provision have on an appellate court which effectively imposes the sentence on the offender against which he might wish to appeal? An offender cannot complain if his sentence is reduced because he has then had the opportunity to appeal against his sentence. But clearly my rarely invoked practice, but practice nonetheless, of increasing a sentence upon an appeal against sentence from the District Court where the sentence which has been imposed is manifestly inadequate will have to be rethought unless the right of the appellant to appeal to a higher court is otherwise secured.

Sentences which the Crown appeals against pursuant to s 383(2) of the Crimes Act 1961 may be under the same question-mark. Let us suppose an offender is sentenced to a term of supervision in the High Court. He does not want to appeal against that sentence. But the Crown does so and, in response to its submission, the Court of Appeal vacate the sentence of supervision and substitute a sentence of three years’ imprisonment. Effectively, this is the first opportunity the offender has had to appeal against his sentence. As best I can ascertain, leave to appeal to the Privy Council against sentence has been rarely, if ever, granted, but could leave properly be refused to an offender who was in substance and effect seeking to exercise his first opportunity to appeal against his sentence? Adopting a purposive approach and accepting that the provision is designed to ensure that no-one is required to suffer a grievance, at least without one right of appeal, it is doubtful if leave could be refused.

To secure this right it is probably desirable that the Legislature examine the procedure available for appeals by the Crown under s 383(2) with a view to interposing an appeal to, say, two or three High Court Judges so that a further right of appeal to the Court of Appeal could be provided in the event that the sentence is increased.

The vexed question of remedies

In its wisdom Parliament saw fit not to include any provision in the Bill of Rights stipulating the remedies which would be available to the Courts to secure the rights, or the criteria to be applied in determining the appropriate remedy in any particular case. It is most unlikely that this was an oversight. The Canadian Charter, which served the draftsman as a model, contains a provision which requires evidence obtained in breach of the fundamental rights in the Charter to be excluded if “having regard to all the circumstances, the admission of it [the evidence] in the proceeding would bring the administration of justice into disrepute”.85

The omission of a specific provision in the New Zealand statute could mean a number of things; it could mean that Parliament was satisfied with the existing law; it could mean that the Legislature thought that the criteria provided in Canada of bringing the administration of justice into disrepute was too severe or, perhaps, equivocal; or it could mean that Parliament apprehended that the question of remedies was a complex one requiring a flexible response which could be best worked out by the Courts on a case by case basis. For myself, I suspect that the question was not properly thought through, but

85 Section 24(2).
I doubt that Parliament anticipated any drastic change in the law. If it had wanted to change the direction of the remedial law for a breach of fundamental rights when the Courts had already described such principles as “rights” and, at times, “fundamental rights”, it could have been expected to say so. But it did not.

This is not to say, however, that the Courts could simply have applied the existing law once the rights were spelt out in a constitutional document. While I reject the notion that it is open to the Courts to forge a fresh start, I accept that some modification to the existing law is inevitable. The question is; how far should it be modified?

In responding to that question I begin with the objective articulated by Bisson J in *R v Webster*, which I have already quoted. I make no apology for quoting it again:

> While the courts have a supervisory function over law enforcement officers, it is not a disciplinary body. The ends of justice must be the paramount consideration. Fairness to the person being interviewed is not to be assessed in a vacuum but in the light of all the circumstances of the particular case and having regard, too, to the public interest in the proper investigation of crime, prosecution of offenders and the protection of the public.

To my mind, the critical task for the Courts in revising and evolving the remedies for a violation of the fundamental rights in the Bill of Rights is to seek to perpetuate this objective as far as is consistent with the objective of promoting and protecting those rights. Whenever possible this would mean preserving for the Courts the ability to weigh the competing interests, one against the other, in order to reach a decision which is both fair to the suspect and consonant with the overall justice of the case. It would also mean mitigating the more extreme application of the Canadian rights-oriented approach with a measured dose of judicial discretion. The endeavour must be made, to my mind, to strike a sensible balance between valid competing interests which remain extant notwithstanding – and despite – the enactment of the Bill of Rights.

Contrary to the Canadian experience, I do not doubt that the Courts in this country will retain the need to establish a causal link between the challenged evidence and the violation. To exclude real evidence which would have been discovered and adduced in any event, and which is in that sense unrelated to the violation, would seem to represent a friendly bonus to the accused and to be out of all proportion to the breach. I consider, however, that there may be an argument to reconsider the admission of evidence excluded because it was discovered “as a consequence” of the accused’s confession where that evidence possesses independent probative value. For example, if in the course of a confession given without a caution or advice of the accused’s right to a lawyer, the accused mentions the name of a witness to his aggravated robbery who would not otherwise have been identified by the police, the independent and probative evidence of that witness should, I believe, be admitted.

Essentially, I consider that what is required is a flexible approach to the question of remedies. At times this flexibility will relate to the choice of remedy; at other times it will relate to the basis or rationale for applying or rejecting a given remedy. Depending on the particular infringement a Court may select one of a number of remedies; it may stay the

86 Above, note 18, p 140.
prosecution; it may quash a conviction; it may exclude evidence; it may issue a writ of habeas corpus; it may, possibly, grant compensation; it may leave it to the accused to pursue a complaint with the Police Complaints Authority; or it may leave the infraction to be dealt with as a matter of internal police discipline, perhaps following a recommendation that the matter warrants an inquiry. Flexibility is also obviously required to enable the remedy to bear some proportion to the seriousness of the breach. It would, I suggest, be an over-zealous application of the rights-oriented approach to suggest that the same violation should be met with the same remedy in both a case of murder and a case of driving without a warrant of fitness. Flexibility permits pragmatic considerations to enter into what may otherwise appear to be a rather sterile legalistic exercise.

The difference in approach, and the problem of rectifying it with words, can be illustrated by contrasting the different judicial reactions to the notion that unconstitutionally obtained evidence should be excluded if it would “bring the administration of justice into disrepute” or, more generally, would otherwise be contrary to the interests of justice or the public interest. To one school of thought the exclusion rule should be applied aggressively because it is in the public interest to enforce police compliance with the Bill of Rights. Failure to exclude the evidence would in fact discredit or undermine the administration of justice. The way to inculcate the values underlying the rights affirmed in the Bill of Rights, it is said, is to therefore apply an aggressive or severe remedy for any non-compliance. Admitting non-complying evidence tends to be perceived as a condonation of the breach and to involve the Court in the complicity of allowing a “tainted prosecution” to continue.87 Such an approach allows for few or limited exceptions.

The other school of thought tends to the view that to exclude relevant and probative evidence solely to vindicate the right which has been breached, when the accused has not been prejudiced or the trial will not be rendered unfair by the admission of the evidence, is itself to bring the administration of justice into disrepute. To this school, the application of an aggressive or severe remedy, far from inculcating the values underlying the fundamental rights affirmed in the Bill of Rights, is likely to have the opposite effect and bring those values into disrepute and disapproval.

How, then, can the conundrum be resolved? It is not easy simply because the Bill of Rights cannot, as Cooke P has said in *R v Butcher*, be reduced to just another relevant factor.88 In *R v Waddel*89 I said as much the day before *R v Butcher* was released. But I overstepped the mark in foreshadowing the prima facie rule of exclusion.90 I now doubt that such a rule is necessary. It sets a standard which is too high to enable competing considerations relating to the interests of justice in the particular case and the public interest generally to exert the influence which such factors should rightfully wield.

If, however, the Bill of Rights is not to be reduced to just another relevant factor, it is difficult to see what other formula might be adopted. Possibly, the primacy of the Bill of Rights could be recognised by making the imposition of a remedy, such as the exclusion of the offending evidence, a presumptive remedy which could be rebutted by other...
considerations. But I am not certain whether in practice the difference between a prima facie rule and a presumption would be all that significant. What is required, to my mind, is a readiness on the part of the Courts to accept that any prima facie rule or presumption can be properly resisted wherever there is good reason for doing so. Any requirement that special reasons, such as the need to prevent the threatened destruction of evidence, the interests of public safety, or emergency situations, must exist to displace the primary rule is far too restrictive. Section 5, while not directly applicable, provides a measure of the Legislature’s expectation that the fundamental rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society. The formula must therefore provide the Courts with access to the interests of the community and the central aim of ensuring the successful detection, prosecution, and conviction of those guilty of crime.

If, as I have suggested above, it is incumbent upon Parliament to clarify its intention, the addition of a remedies clause would be appropriate. Whether the application of a remedy is specified as a prima facie rule or as a presumption would not necessarily matter, providing it is clear that it can be refuted by grounds relevant to the community interest and the overall administration of criminal justice. But a broad reference to these factors would not, I suspect, be sufficient. Express provision would need to be made requiring the Courts to have regard to the question of whether the accused was prejudiced or his right to a fair trial significantly impaired by the infringement.

I appreciate that this formula will not satisfy those who adhere to the rights-oriented approach and perceive the vindication of the Bill of Rights as the dominant, if not the overriding, factor. There is, however, nothing inherently wrong with the notion that fundamental rights may be held by the citizen subject to the interest of the community in the way in which those rights are enforced. While improperly obtained evidence would not necessarily be admitted every time an accused fails to show that he is prejudiced or that his right to a fair trial would be significantly impaired, his complaint in such circumstances is at once directed to an objection that his fundamental rights have been violated. At this point the accused himself invokes the public interest in vindicating those rights. With the public interest put in issue, the Courts must be entitled to look to the wider community interests.

It also will be said that such a formula does not provide an “effective remedy” for a breach of the Bill of Rights. Reference will be made to Article 2, 3(a) of the International Covenant on Civil and Political Rights which requires that “any persons whose rights or freedoms herein recognized are violated shall have an effective remedy”. Articles 8 and 2(3) of the Universal Declaration of Human Rights are substantially to the same effect. But they apply to rights “herein recognized”, and a number of rights affirmed in New Zealand, such as the right to a lawyer and to be informed of that right and the right to refrain from making a statement, are not rights which are identified in those Covenants. It has been observed by one commentator that the exclusion of evidence would be regarded as a very eccentric way of enforcing standards in nearly all the signatory countries to the Covenant.\textsuperscript{91} Indeed, what is “effective” is an open argument. For my part

I find it difficult to accept that, if it was thought that the existing law was effective to safeguard the rights of the accused prior to the enactment of the Bill of Rights, it is difficult to see why those safeguards should be regarded as any less effective now.

**Conclusion**

It fell to the lot of a Canadian Judge at first instance to point out that the Canadian Charter, paramount though it might be, should not be regarded “as the renaissance after the dark ages of the law”. In more colourful and forceful language than I am capable of penning, Scollin J said:

> The Constitution is the safeguard of the citizen against the fist of the State: not his nanny. The task of protecting a person from State oppression and abuse does not require fevered solicitude for the private interest of the individual at the expense of the public interest he shares with his neighbours. To arm the individual is not to disarm the community .... 92

I too have sought to point out that it would be wrong to regard the Bill of Rights as a renaissance. The legal system which preceded it was a mature and responsible regime in which the Courts were both solicitous for the welfare of the individual as well as the interests of the community. The rights of one were balanced and weighed against the interests of the other. The key aim of the criminal process of securing the conviction of the guilty without increasing the risk of convicting the innocent was not engulfed by a passion to vindicate the accused’s rights for their own sake. The overriding importance of the principles of fairness to ensure for the accused a fair trial were desirable features of that regime. It is my belief that it is possible to reconcile this approach with the objective of providing an effective remedy to safeguard the individual’s fundamental rights as affirmed in the Bill of Rights. In doing so it is, perhaps, possible that the Courts will come closer to achieving the intention of Parliament and meeting the legitimate expectations which people have in their criminal justice system.

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The Impact of the New Zealand Bill of Rights on Administrative Law

Janet McLean, Paul Rishworth and Michael Taggart*

The late Professor Stanley de Smith, in his inaugural lecture at the University of London in 1960, had this to say about a Bill of Rights for the United Kingdom:

... I have not the slightest doubt that the adoption of a written constitution, providing generous opportunities for judicial review of legislation, would revolutionise the study and transform the status of constitutional law in this country. Great issues of state would be determined in a judicial forum, and the attention of newspaper readers would be diverted from the criminal courts to the drama of the latest constitutional case. Fortunes would await the specialist practitioners of constitutional law. The university courses would devote a second year to the subject. Animation would intrude into the discussion class; the case method of teaching would make its appearance; books, Ph.d theses and law review articles would pour forth in spate; the political and social philosophies of our judges would be dissected (with the greatest respect, of course); and we might ultimately come to rival Italy, where more than half the judges of the Constitutional Court are university professors.

However, when the question of an entrenched Bill of Rights was debated in New Zealand from 1985 to 1989 there was little support for this revolutionary step. Most of the opposition to the “White Paper” draft Bill of Rights stemmed from concern over the transfer of political power from Parliament to the judiciary. So strong was the opposition that in the end the Justice and Law Reform Committee recommended an ordinary statute Bill of Rights, “that is, not as supreme law and not entrenched”, which was enacted as the New Zealand Bill of Rights Act 1990 (hereafter referred to as the Bill or Bill of Rights).

The Bill of Rights is a hybrid. In terms of legal status the Bill is an “ordinary” statute (as was the Canadian Bill of Rights of 1960) but for the most part its wording is taken directly from the entrenched Canadian Charter of Rights and Freedoms. This creates a number of difficulties in applying the Bill in the New Zealand context, some of which we explore in this paper.

One valuable lesson from the Canadian experience with the Charter is that once the first wave of constitutional litigation has broken over the criminal law bar the next area to be

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swamped is administrative law.\(^5\) While we believe this will be the case in New Zealand also, it is important to bear in mind that the two sections of the Canadian Charter which have had the most impact on the administrative law of that country have no direct counterparts in our Bill of Rights.\(^6\) Apart from the case-law generated by ss 7 and 15 of the Charter,\(^7\) the Canadian courts and commentators have had remarkably little to say about the impact of the Charter on a critically important area of administrative law: the control of discretionary power.\(^8\) It is this aspect that we will concentrate on in this paper, for the reason that our "ordinary" statute Bill of Rights is likely to have a greater impact on this area of New Zealand administrative law than any other.

The rights and freedoms in the Bill of Rights are affirmed and not created by the Act,\(^9\) nor does this affirmation abrogate or restrict any right or freedom not provided for in the Bill.\(^10\) The rights inhere in an advanced liberal democratic society; they exist already and are protected already to some extent. Most directly, these rights and freedoms are protected against unauthorized or unreasonable interference by the doctrines of administrative law. However, the judicial protection provided by administrative law must yield in the face of explicit and clear legislative provisions to the contrary. This is also the case with our ordinary statute Bill of Rights.\(^11\)

Such is the reluctance of judges to hold that Parliament intended to infringe the rights and freedoms of the citizenry, that it has been said that the difference between the judicial role in administrative law and that in policing an entrenched Bill of Rights is one of degree only.\(^12\) Be that as it may, what difference is there between the administrative law approach and that required by our unentrenched Bill of Rights?

It is often said that an ordinary statute Bill of Rights will only direct the judges to do what they already in fact do or in theory should do. As Jaconelli observed, "[s]uch a Bill would be unnecessary if the judges already used those devices [eg, common law presumptions]

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6 Section 15 of the Charter guarantees equality before the law and equal protection of the law, but it was consciously omitted from our Bill of Rights. One of the drafters of the "White Paper" Bill of Rights has defended that omission on the ground that such a general provision "would give too much power to the courts": Keith, "A Bill of Rights for New Zealand? Judicial Review Versus Democracy" (1984-85) 11 NZULR 307, 316. Nor did the drafters include a "due process" clause of the American (Fourth Amendment) or Canadian (s 7) varieties, whereby certain interests (life, liberty, property, security of the person) cannot be interfered with without "due process of law" or conformity with "the principles of fundamental justice". Our Bill affirms the rules of natural justice in s 27 but in a significantly different way from the American and Canadian models. Section 27 is closer to the still extant s 2(e) of the Canadian Bill of Rights of 1960. Note that s 7 of the Charter has had a more substantive effect than the drafters expected.


8 The exceptions are Slaight Communications Inc v Davidson (1989) 59 DLR (4th) 416 (SCC) and Ross, "Applying the Charter to Discretionary Authority" (1991) 29 Alta LR 382.

9 See the long title and s 2.

10 Section 28.

11 Section 4.

vigorously, and without that vigour to support it no Bill of Rights will flourish". There seems in New Zealand to be no shortage of judicial "vigour"; indeed, there were judges who spoke in favour of the "White Paper" entrenched version of the Bill of Rights. Of course, the majority of New Zealand judges did not indicate publicly their views on an entrenched or even the "watered down" version of the Bill of Rights. So it is not possible or fair to generalize about the attitude of the judiciary as a whole. It is possible, however, to discern a broad distinction between judges of a positivist orientation and those with a bias in favour of natural law. As Professor de Smith said in the quotation at the beginning of this paper one is lead into discussing the political and social philosophies of the judges. Judicial philosophy is a starting point, a point of reference, a way of interpreting the law. In short, it is an interpretive technique. Much of administrative law turns on statutory interpretation and the judge's interpretive technique. This is also true of Bill of Rights adjudication. Starting points, in the law as elsewhere, do determine end points.

Administrative law, however, is a subject of generalities, of general principles, engaged in constant warfare with particular subject areas of the law – like employment law and immigration law – which rebel against the tyranny of general principle and strive for autonomy. Administrative law accommodates these rebellious tendencies by varying the content of these principles as applied in particular contexts and cases. As Sir David Williams has said of administrative law cases:

The cases range over tens of thousands of statutory provisions; this militates against any effective reliance on stare decisis and explains why administrative law is pre-eminently a subject of obiter dicta, with hallowed passages, such as the Wednesbury rule or the Carltona principle, offering judges convenient shorthand principles in the application of the ultra vires rule. The principles themselves become like master keys, capable of fitting innumerable different locks and providing new openings in the law. The wording of a particular statute has to be considered, the facts of the case have to be assessed, the relevant facets of the ultra vires rules must be related to the statute and the facts, but in addition the context and the constitutional implications have to be examined.

In recent years there has also been a move to simplify the grounds of review – to state them in terms of fairness, reasonableness and legality. This increases further the discretion that the judges have always exercised "to expand or contract the methods of controlling the administration" in particular controversies. Furthermore, according to some commentators, the courts are increasingly willing to trespass upon the merits of official decisions, although it is not always clear whether this is the cause or the effect of the

18 Williams, supra, note 16, 163.
struggle for simplicity. By way of defence, commentators comfortable with a broader judicial role in administrative law have rejected the "pragmatic intervention" encouraged by the broad standard of unreasonableness in favour of substantive principles grounded in fundamental human rights. 20 The recognition and application of principles of human rights by way of substantive judicial review is argued to promote coherence, clarity and to strengthen the protection of fundamental rights against the misuse of official discretion, without usurping legislative or executive powers. 21 Not surprisingly, these British commentators look to the European Convention on Human Rights as the primary source of human rights law. The United Kingdom has been a signatory of the Convention since 1951 but has steadfastly refused to incorporate the convention directly into domestic law, notwithstanding the longstanding allowance of the right of individual petition to the European Commission of Human Rights and the European Court. 22 An attempt recently to persuade the House of Lords in effect to read the European Convention into English law via administrative law principles was decisively rejected. But this decision is an instructive introduction to our subject.

The facts of Regina v Secretary of State for the Home Department, Ex parte Brind 23 can be briefly stated. Pursuant to a broad statutory discretion, the Secretary of State directed television and radio stations not to broadcast the voices of persons representing terrorist organisations. This direction was challenged by way of judicial review, one of the grounds being that the discretion could not be lawfully exercised in a way which infringed the right of freedom of expression recognised in art 10 of the European Convention. This seductive argument contained three steps: (1) as the Convention has not been made part of English domestic law the courts have no power to enforce convention rights directly and in the event of conflict between domestic legislation and the Convention the former must prevail; (2) however, in construing an ambiguous provision in domestic legislation – where one meaning conforms with the Convention and the other conflicts with it – the courts will presume that Parliament intended to legislate in conformity with the Convention and will adopt that meaning; (3) similarly, it was argued, when a discretion is capable of being exercised in a way which infringes any right in the Convention it may be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. 24 It was this third and final step in the argument that the House of Lords refused to take.

Lord Bridge of Harwich, with whom Lord Roskill concurred, gave the leading judgment on this aspect of the case. He pointed out that the resolution of an ambiguity in conformity with international treaty obligations "is a mere canon of construction which involves no importation of international law into the domestic field". 25 To presume that a broad discretionary power can only be exercised in conformity with the Convention "would go

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21 Ibid, 369.
24 Ibid, pp 591-592, per Lord Bridge.
far beyond resolution of an ambiguity"\(^{26}\) and effectively incorporate the Convention into domestic administrative law. Lord Bridge could not accept this:\(^{27}\)

It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it. If such a presumption is to apply to the statutory discretion … in the instant case; it must also apply to any other statutory discretion exercised by the executive which is capable of involving an infringement of Convention rights. When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg. It would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

Lord Ackner echoed this view\(^{28}\) but drew attention also to a further subtle contention of counsel. It was argued that not only must the Secretary consider the Convention (which he in fact did) but the Convention is such a vital factor that the Secretary must give it proper regard, and failure to do so is unreasonable. This is very close to an argument that the Convention is not only a mandatory relevant consideration but a "decisive" one, which cannot be ignored or outweighed by other considerations. To use language we will employ later, this is to treat the Convention right as a trump. This argument was rejected by Lord Ackner because it "inevitably would result in incorporating the Convention into English domestic law by the back door".\(^{29}\)

The judges stressed, however, that they were not powerless to prevent the exercise of wide discretionary powers which, on their face, infringed fundamental human rights.\(^{30}\) In this case and one other the House of Lords has recognized the need for close scrutiny of decisions affecting fundamental human rights.\(^{31}\) In Brind's case Lord Bridge observed that most of the rights in the Convention contained reasonable limits, including art 10(2), which spells out the competing public interests by reference to which the right to freedom of expression may have to be curtailed.\(^{32}\) Lord Bridge was prepared to reach much the same conclusion via common law methods. In deciding whether the Secretary of State could reasonably impose this restriction the court should start from the premise that any restriction on the right to freedom of expression must be justified and that nothing less than an important competing public interest will be sufficient to justify it.\(^{33}\) While primary judgement as to whether the particular public interest justified the particular restriction

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26 Idem.
27 Idem.
28 Ibid, p 605.
29 Idem.
30 Ibid, p 592, per Lord Bridge.
31 Ibid, pp 592-3 (Lord Bridge), p 595 (Lord Templeman) and p 606 (lord Lowry), and R v Secretary of State for the Home Department, ex parte Bugdaycay [1987] AC 514, 531 (Lord Bridge) and p 537 (Lord Templeman).
32 Idem.
33 Ibid, pp 592-593.
is for the Minister, the Courts exercise a secondary judgement by asking whether a reasonable Secretary of State could reasonably make that primary judgement.\textsuperscript{34}

Lord Templeman said much the same thing but in language drawn from the jurisprudence of the European Court of Justice. He said that "the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent",\textsuperscript{35} but stressed that the courts will not too readily substitute their views for those of the Secretary of State, for the latter is afforded a "margin of appreciation" in deciding whether and to what extent a restriction on freedom of expression is justified.\textsuperscript{36}

On the facts of \textit{Brind} the House of Lords unanimously found that this "very modest" limitation on freedom of expression was fully justified by the public interest in combating terrorism.\textsuperscript{37}

The first point to note about \textit{Brind} is that it shows that it is possible for the courts in a common law judicial review context to engage in the kind of weighing of right against competing public interests envisaged by s 5 of our Bill of Rights. Certainly their Lordships were nudged in that direction by the experience of the European Court in interpreting the Convention, and, of course, that language and approach has found its way into the Canadian Charter and into the leading cases like \textit{R v Oakes} (where the proportionality test, referred to by Lord Templeman in \textit{Brind}, is approved) whence our s 5 came.

The second point is that counsel for the applicants in \textit{Brind} tried to incorporate treaty obligations into English domestic law via the doctrines of administrative law.\textsuperscript{38} The judges drew a distinction between resolving ambiguities in a statutory provision in conformity with the Convention and placing limits on seemingly broad statutory discretions. (An approach, incidentally, with which we disagree.) The former could be done by the canons of statutory interpretation without importing the Convention into English law, whereas the latter entailed introducing the Convention into English administrative law when Parliament had not declared it part of English domestic law. The situation in \textit{Brind} is clearly distinguishable from that pertaining in New Zealand. Our Bill of Rights is part of New Zealand law and applies to all branches of government including public authorities. Those exercising broad discretionary powers, if covered by s 2 of the Bill, must respect the rights and freedoms contained in the Bill unless doing so is clearly inconsistent with another statute, in which case our ordinary statute Bill of Rights must give way.

It is important to distinguish the methodology required in Bill of Rights adjudication (what we will call constitutional methodology) from that employed in administrative law. The methodology of administrative lawyers when confronted with a broad discretionary power is well known. A discretion is to be exercised according to law and must be used

\textsuperscript{34} Ibid, p 593.
\textsuperscript{35} Ibid, p 595.
\textsuperscript{36} Idem.
\textsuperscript{37} Ibid, p 593 (Lord Bridge), p 595 (Lord Templeman) and pp 602-603 (Lord Ackner).
\textsuperscript{38} See also \textit{Ashby v Minister of Immigration} [1981] 1 NZLR 221.
only to advance the purposes for which it was conferred. In the oft-quoted phrase from *Padfield v Minister of Agriculture, Fisheries and Food,*39 a broad statutory discretion is to be used to promote the policy and objects of the Act. Identifying the policy and objects of the Act, and thereby the purposes of the power, is a process of statutory interpretation. Increasingly the courts use the language of "relevant considerations" to describe what should or can be legitimately taken into account by a decision-maker exercising broad discretionary powers. The stage has been reached where improper purposes and irrelevant considerations are synonymous terms in the context of judicial review of broad statutory discretions.

There is a hierarchy of so-called "considerations" in administrative law doctrine. At the top is the mandatory relevant consideration; this may be expressly provided in the statute or may be implied. Such considerations must be taken into account by the decision-maker and given genuine consideration. After that has been done, the weight to be given to that consideration in relation to other relevant factors in the decision-making process, is up to the decision-maker unless it can be said that she has acted unreasonably.40 The important point is that administrative law doctrine ensures that such considerations are on the decision-maker's agenda, it does not, except in extreme cases (ie unreasonableness), pronounce on which factor or factors should be decisive in reaching the decision. That, on orthodox theory, is the prerogative of the decision-maker and not the courts.

The second type of relevant consideration is permissive. This consideration can be express but more usually is implied out of the statute. A permissive relevant consideration is one that the decision-maker may lawfully take into account but is not obliged to do so (as is the case with mandatory relevant considerations). Again, if a decision-maker does take into account a permissive relevant consideration, the question of weight is generally for the decision-maker and not the court.

The last type of consideration is the irrelevant one, and it is not lawful for a decision-maker to take this into account at all. By a process of statutory interpretation, the courts will determine what considerations are irrelevant to the purposes of the discretionary power conferred.

The constitutional methodology required by our Bill of Rights is logically prior to administrative law issues and at a higher level. In challenging an exercise of a wide discretionary power as infringing a right under the Bill, it must be shown that (1) a right is prima facie infringed, (2) any limitation on that right is unreasonable and unjustifiable, (3) an interpretation of the power consistent with the Bill of Rights is possible, and (4) the exercise of the discretion in conformity with the right will not render "ineffective" the statutory provision conferring the discretion. If one can survive that obstacle course without faltering at s 5 (reasonable limits) or s 4 (parliamentary sovereignty) then the right is a constitutional *trump* which cannot be interfered with by the decision-maker. In contradistinction to administrative law theory, this is not merely something a decision-

40 *Minister of Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 66 ALR 299, 309-310, Mason J; *New Zealand Fishing Industry Assn Inc v Minister of Agriculture & Fisheries*, supra, note 17, 552, per Cooke P.
maker must have regard to, it is a valid constitutional impediment to exercising the power in a certain way.

The case studies which follow are designed to explore what difference the Bill of Rights might make in the context of control of broad discretionary powers conferred by statute.

I Maori cultural and religious objections to dumping of waste in Auckland's Hauraki Gulf

The first example of the possible application of the Bill of Rights to broad discretionary powers is afforded by a recent case in the Planning Tribunal, *New Zealand Underwater Association Inc v Auckland Regional Council*. The power concerned was that in s 21(3) of the Water and Soil Conservation Act 1967. The relevant words were:

ANY REGIONAL WATER BOARD MAY ... GRANT TO THE APPLICANT ... THE RIGHT TO DAM ANY RIVER OR STREAM ... OR TO DISCHARGE NATURAL WATER OR WASTE INTO ANY NATURAL WATER ....

The Act contained no express guidelines for the exercise of that discretionary power. It had, however, been established in judicial decisions that the Act contemplated a balancing exercise between those interests judged to be relevant under the legislation. Such interests included conservation and the needs of industry. The *Huakina* case in 1987 established that Maori cultural values were also a mandatory relevant interest. But the Maori or any other interest in a particular case was not necessarily decisive; each was weighed against the others.

In the *Underwater Association* case the Bill of Rights was invoked by Maori objectors as a reason why Maori interests should be elevated above others so as to be decisive. The facts were these. The Auckland Regional Water Board had granted to the Auckland port company the right to discharge dredgings taken from the wharf area into a particular location in the Hauraki Gulf. Maori groups objected. They claimed that the Hauraki Gulf was a “taonga” and that the dumping of foreign matter into it was deeply offensive to them in cultural and spiritual terms. Before the Planning Tribunal the Maori objectors invoked s 20 of the Bill of Rights, which reads:

RIGHTS OF MINORITIES—A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

It was not material whether their objection was rooted in culture or religion since s 20

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41 Planning Tribunal, A 131/91, 16 December 1991. The case had been set down for argument in the Court of Appeal in June 1992 but was settled prior to the hearing.
42 Though the Water and Soil Conservation Act 1967 is now repealed the example is used because it represents a category of cases where broad powers are conferred by statute with no express guidelines. The example would not be much different, so far as our present point is concerned, if the Resource Management Act 1991 had been used (where discretionary powers are conferred with vague guidelines in Part II).
43 *Keam v Minister of Works & Development* [1982] 1 NZLR 319.
44 *Auckland Acclimatisation Soc Inc v Sutton Holdings Ltd* [1985] 2 NZLR 95.
45 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.
46 The Maori word in art 2 of the Treaty of Waitangi (1840) taken to signify “treasured possessions”, over which the Crown promised to protect Maori “rangatiratanga” (chieftainship).
protected both. It was argued that the grant of the water right denied them their right to enjoy culture or practise religion in the sense that the dumping would “destroy the tapu and injure the mauri which is central to the relationship between Maori and Tikapa Moana”. 47

Counsel for the Maori objectors argued merely that Maori values as protected by the Bill of Rights should be accorded greater weight than other interests. The argument, however, logically suggested a much stronger proposition and it is this which we wish to explore in this paper – that whenever the grant of a water right would lead to an interference with rights protected by the Bill of Rights, then the Water Board was precluded by the Bill of Rights from making such a grant. That argument elevates Maori interests from being simply one consideration amongst others, to a veto (provided, of course, that a potential breach of the Bill of Rights could be pointed to if the water right was granted). 48

A similar type of argument is also possible in relation to other types of broad statutory powers

The question we address is whether this was a legitimate use of the Bill of Rights in the context of a discretionary power. We conclude that it is. It is necessary, however, to set out the steps in the argument.

1 Public bodies ought not to infringe the Bill of Rights

The starting proposition is straightforward. Once Water Boards are seen as bodies under a duty to obey the Bill of Rights, they cannot be allowed to make orders that infringe it. 49

The only exception possible is where Parliament has conferred statutory authority to infringe. 50 That Parliament might do so is recognized by the Bill of Rights itself. Section 4 provides that an inconsistent statute will prevail over the right and so excuse what would otherwise be an infringement. The crucial question becomes whether s 21(3) of the Water and Soil Conservation Act can be interpreted to justify grants of water rights which infringe the Bill of Rights. Or does it only permit grants of water rights which are consistent with the Bill of Rights?

2 Does the Bill of Rights control statutory discretions?

A powerful argument can be made that s 21(3) permits only those decisions which are

47 Objectors’ submissions – It was not claimed that any cultural or religious practice took place at that point on the ocean floor. Rather, the objection was that the very idea that the Gulf was to be desecrated would offend Maori. The claim was analogous to the sort of claim which might be made if a European religious icon was desecrated.

48 Opposing counsel, and the Planning Tribunal (above, note 41, p 50) recognized that the argument amounted in effect to a claim to a veto upon establishing that a Bill of Rights infringement would occur. As to how the Planning Tribunal dealt with the argument, see text accompanying note 84 below.

49 The Regional Water Boards would be bodies exercising a public function pursuant to law in terms of s 3(b) and so the Bill of Rights would apply to them. As the Explanatory Note to the Bill of Rights Bill said, “[a]ctions that violate ... rights and freedoms will be unlawful”.

50 This was the issue, for example, in Ministry of Transport v Noort (1992) 8 CRNZ 114 (hereafter referred to as Noort). The right breached was the right to be told of the right to counsel in s 23(1)(b). The breach occurred through an executive omission – the failure of enforcement officers to give the required advice. The case was fought over whether or not that omission was justified by the relevant statute, in that case the Transport Act 1962. In the Court of Appeal it was held that the Transport Act did not justify the omission. Conversely in R v Butcher [1992] 2 NZLR 257, where there was a similar failure to advise of the right to a lawyer, this time in the police interview context, no statute could be advanced as a justification for the failure to advise of rights, and a breach of the Bill was made out.
consistent with the Bill of Rights. While the section confers a broad power with no express limits, no statutory powers are in fact taken to confer absolute discretion. Legal limits have long been supplied by doctrines of administrative law, principally that a decision-maker must consider only relevant considerations, with relevance being judged by the statutory purpose for which the power is given. These administrative law doctrines are principally concerned with the process of decision-making. The Bill of Rights argument is different. It suggests that the Bill imposes substantive limits on broad statutory powers: decisions which would amount to an infringement are simply precluded.

Canadian Charter authority supports this approach. In *Slaight Communications Inc v Davidson* the legislation conferred a broad discretionary power upon a labour arbitrator. That power had been invoked to order that the employer respond to any enquiries about its former employee only by providing a letter in prescribed form. The employer argued that this infringed its freedom of speech under s 2(b) of the Canadian Charter. In the Supreme Court of Canada Lamer J (now CJ) said, with all judges expressing agreement on the point:

> As the Constitution is the supreme law of all Canada … it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless of course that power is expressly conferred or necessarily implied.

And later:

> Legislation conferring an imprecise discretion must therefore be interpreted as not allowing Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter, and he exceeds his jurisdiction if he does so.

Could the same principle apply in New Zealand under the Bill of Rights? On the face of it, the answer must be yes. The passage of Lamer J is directed at interpretation and that is the stated mission of our Bill. It is not material, for this purpose, that our Bill is not supreme law. Section 6 is enough to require that general discretionary powers, apparently unfettered, be read as if they contained the implicit proviso “but not so as to infringe the Bill of Rights”. Where New Zealand law must differ from the Charter position is in those cases where the power to infringe rights is expressly conferred or necessarily implied by statute. Under the Charter such a provision must be struck down; in New Zealand it must prevail. But where that is not the position, then s 6 seems to support the *Slaight Communications* approach.

3 *Do broad discretionary powers raise issues of interpretation?*

There is, however, a difficulty with the argument up to this point which must now be faced. In *Brind* their Lordships expressly rejected the submission that the broadly worded

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51 (1989) 59 DLR (4th) 416 (SCC). The relevant statutory words were: “[The adjudicator may] do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.” (The word “like” proved of no significance in the case given that it was not found in the French version of the statute and in any event no common genus in the preceding heads of power could be discerned.)

52 Ibid, p 442.

53 Ibid, p 444.
discretion at issue in that case was ambiguous. It was, said Lord Ackner, “not open to two or more different constructions”. There is an initial attraction in this view. A statute which is plainly broad is not ambiguous: it is simply broad. The difficulties which arise in defining the scope of the broad power do not arise out of the choice between rival meanings of words or sentences, which is the classic form of ambiguity.

The importance of the point will be apparent. If broad powers do not raise interpretation issues then it could be said that s 6 of the Bill of Rights has no impact upon them. For that section appears to postulate, as a precondition of its application, that there are at least two possible meanings of an enactment: one which would be inconsistent with the Bill and another which would not.

Notwithstanding their Lordships’ views in Brind, we suggest that the judicial determination of limits on broad statutory powers is indeed an interpretation issue to which s 6 is relevant. We believe we can establish this argument in either of two ways. First, we think that the House of Lords was wrong to treat broad powers as if they raised no issue of interpretation. Secondly, and in any event, s 6 introduces unique considerations into the New Zealand context which require that it be treated as relevant to judicial interpretation of broad statutory powers, whether or not those powers are classified as “ambiguous”.

Dealing with the first point, it is significant that while their Lordships were not prepared to hold that the section was ambiguous, they nevertheless recognized that the power it created was subject to unstated limits. The implicit limit was that the power be used only for the purposes for which it was given. It is settled that the statutory purpose is to be discerned from the words of the statute, together with such other indicia as courts are permitted to consider. In our submission, the task of ascertaining the scope of a power by reference to its purpose is properly characterized as interpretive. We do not think it possible to separate the meaning of words from the purpose for which they have been spoken. Deciding what a power may and may not be used for is, we think, an

54 Above, note 23, p 604.
55 Ambiguity is often classified as “verbal” or “grammatical”, where the former means two or more possible meanings arising out of the different ways in which one word may be understood and the latter means two or more possible meanings arising out of the way the words are organized and punctuated. Both these types of interpretation problem may be distinguished from “vagueness” (where the issue is where a line should be drawn between items obviously covered and those obviously not covered) and “ellipsis” (where the issue is what extra words are implicit in the stated words having regard to the author’s intentions). It is not uncommon for all types of interpretation problems to be loosely characterized as cases of ambiguity, simply because all cases can be reduced ultimately to a choice between rival ways of reading a statute. But the distinction is important to the argument made in the text. The various types of interpretation problem are dealt with in Jim Evans, Statutory Interpretation: Problems of Communication (Oxford 1988), to which we are indebted.
57 The mischief, the social context, the legislative history and now, it seems, Parliamentary debates.
58 The Court of Appeal in Noort expressly rejected any supposed distinction between the “meaning” of an enactment and the implications necessarily inherent in an enactment as a result of its “operating requirements”. This enabled the Court to say in Noort that s 58B of the Transport Act actually meant that the right to a lawyer set out in the Bill of Rights was only exercisable by telephone. This is a slightly different point from the one made in the text but it does illustrate the reluctance of the Court to draw esoteric distinctions between “meaning” and “operating requirements”. For a brief discussion of the point see Rishworth, “Applying the Bill of Rights to Statutes” [1991] NZ Recent Law Review 337, 341-2, 348-351.
interpretation issue since it depends upon what the author is taken to have meant by the words employed.

It bears repeating here that unlike the European Convention in the United Kingdom, our Bill of Rights is part of the domestic law. If a broad power in a New Zealand statute is characterized as uncertain in its meaning then there is no constitutional impediment to considering the Bill of Rights – indeed, as we say below, s 6 positively requires this. (In Brind, of course, their Lordships were concerned that characterizing broad powers as ambiguous would effectively incorporate the European Convention by judicial decision when it had not been incorporated by legislation.)

On our second argument it is not necessary for us to challenge the logic of Brind on this point. Section 6 is not triggered by ambiguity alone. It says “[w]henever an enactment can be given a meaning ...”. Its influence on interpretation must extend to any enactment which is capable of being interpreted in more than one way, whether the interpretive choices arise through ambiguity or any other reason. Therefore, if the choice is between reading a broad power as if it is unaffected by the Bill of Rights, and reading it as if it said (implicitly) “this power may not be used to infringe rights in the Bill of Rights”, then s 6 appears clearly to dictate the latter.59 The critical question then becomes whether the latter meaning is one which the provision can “reasonably bear”, for the Court of Appeal has made it clear that s 6 does not require a court to prefer strained meanings.60 Obviously, to answer this question one will always have to consider the particular power in question, and we shall shortly address s 21(3) to see if it permits this implicit limitation. But for the moment we confine ourselves to the question of principle. It is, we submit, quite reasonable to suggest that when Parliament has taken the trouble to enact a Bill of Rights affirming fundamental rights and freedoms, it does not intend any broad powers conferred by statutes to be used to justify executive acts which are inconsistent with the Bill of Rights. After all, s 7 of the Bill of Rights provides a mechanism designed to minimize the risk of statutes being enacted which conflict with rights.61 Against that background it would not seem appropriate to regard a broad statutory power as bestowing power on the executive and public bodies to infringe the Bill of Rights.62 Judges should be slow to ascribe to Parliament the purpose of achieving its aims through infringing rights.

We therefore conclude that it is possible to interpret broad discretionary powers as if they were subject to the implied limit “but not so as to infringe rights in the Bill of Rights”. The logic of the Slaight Communications case applies in New Zealand, and s 6 would support such an approach.

59 Subject to the possible effect of s 4, to which we shall come shortly.
60 Noort, per Cooke P, pp 126-7.
61 On s 7 see Fitzgerald, “Section 7 of the New Zealand Bill of Rights Act 1990: A very practical power or a well-intentioned nonsense” (1992) 22 VUWL 135.
62 This argument applies with most force to statutes enacted after the Bill of Rights in August 1990. Indeed, we think that the argument would be unaffected if s 6 had not been included in the Bill of Rights. One could still contend that the mere declaration of fundamental rights and freedoms was enough to require that decision-makers take them into effect unless they are expressly, or by necessary implication, released from the obligation to do so. The presence of s 6, however, supports the application of this approach even to legislation which pre-dates the Bill of Rights.
Applying the Bill of Rights to s 21(3): the methodology

The argument thus far is that broad discretionary powers are capable of being construed as if they were subject to the implied limitation that they will not justify decisions which infringe the Bill of Rights. It is now necessary to consider whether s 21(3) may be so construed, or whether, on the contrary, it authorizes infringements (as permitted by s 4 of the Bill).

The first step in applying the Bill of Rights to interpretation of broad discretions must be, of course, identifying the right which the litigant claims would be infringed by the particular exercise of discretion sought to be avoided or held wrongful. In the Underwater Association case, the right invoked was s 20.

There is an initial onus upon a litigant to establish that her right is or would be affected. The exact nature of this onus is left unclear by the leading case on the Bill of Rights to date, Ministry of Transport v Noort. There are two possibilities. The first is that a litigant need only show that her right is prima facie infringed, in the sense that the exercise of the discretion has impaired or would impair the full enjoyment of the right. If it does, then it falls to the party seeking to uphold the decision to argue under s 5 that the impairment is a “reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society”. This approach is adopted in the judgment of Richardson J (concurred in by McKay J). It is also consistent with the approach taken by Canadian courts to alleged infringements of the Canadian Charter, from which our Bill of Rights was substantially adapted.

The second possibility arising out of Noort is that the litigant must show that the exercise of discretion would impair his or her right in a manner which is not reasonable. This view is suggested, though not stated explicitly, by Cooke P and Gault J in Noort. Effectively this means that the litigant must shoulder the burden of persuasion as to what limits are reasonable under s 5, so as to show that there has been a breach of those rights as limited. We do not propose to spend time in this paper debating which approach is correct. This is explored elsewhere, where it is suggested that the approach of Richardson J is preferable, and we follow that approach in the balance of this paper. The issues therefore are whether the water right would amount to a prima facie breach of the rights set out in s 20. Secondly, if the answer is yes, would that breach be no more than a reasonable limit

63 (1992) 8 CRNZ 114.
64 Ibid, p 141.
65 See, especially, R v Oakes [1986] 1 SCR 103, 134. Dickson CJ there stressed the desirability of keeping the questions of definition of the right and limits on the right “analytically distinct”.
66 Both Cooke P and Gault J doubted the relevance of s 5 of the Bill of Rights to cases where limits on rights are imposed through legislation (see above, note 50, pp 125 and 152 respectively). Both agreed that the right to a lawyer in s 23(1)(b) of the Bill was limited by the Transport Act. The extent of those limits was gauged not by any explicit consideration of what was “reasonable” under s 5 but simply by giving as much effect to the Bill of Rights as it was felt possible having regard to the provisions of the Transport Act. It is not clear, however, that Cooke P and Gault J would necessarily regard s 5 as irrelevant in cases of actions taken under discretionary powers. When judges are called upon to assess reasonableness of actual decisions under statutes, rather than the statutes themselves, the factors which led them to their conclusions in Noort are not present. If that is the case then the dichotomy in possible approaches referred to in the text may not arise.
on the rights in s 20 (with the result that it is, in the end, not a breach of the Bill of Rights at all)?

5 Did the grant of a water right amount to a prima facie breach of the Bill of Rights?

The Charter approach to the prima facie breach issue is that the rights are construed broadly to determine their scope and content. Any question of limitation is left to the second stage for the “reasonable limits” analysis. So, for example, race vilification, pornography and commercial expression are each “expression” within s 2(b) of the Charter because they are attempts to convey meaning, though it has been held that each may be subjected to reasonable limits in terms of s 1.

We shall not explore the prima facie issue in this case in detail. Suffice it to say that a number of definitional issues arose, not all of them addressed in the case. Amongst them was the meaning of “ethnic minority” and “religious minority” (it was taken for granted that Maori were both) and, most importantly, the meaning of “denied”. The right in s 20 is a right not to have certain things “denied”, and this raised the question whether a mere interference through the causing of offence and outrage amounted to a denial. On the facts there were some difficulties for the Maori objectors here given that there was no claim that any particular religious activity was precluded by dumping on the harbour bed. But our present concern is of course with the form of the argument rather than its merit on the facts of this case. If, as the Maori objectors contended, an interference with rights to culture and religion can count as denial, then we are faced with a question of degree—what level of interference constitutes denial? Presumably not trivial interference. On this approach, the right in s 20 falls into that special category of rights in the Bill of Rights which are not stated as absolutes but contain their own “modifiers”, eg, the right to be free of unreasonable search and seizure (s 21); the right to be free of cruel and unusual punishment (s 9). With this class of rights, some evaluation of the right beyond mere definition is required in order to establish a prima facie breach. It is otherwise with the rights to freedom of speech and religion (ss 13 to 15) and many of the criminal procedure rights, which are stated as absolutes so that any question of derogation from them falls for consideration at the second stage rather than as part of their definition.

We shall assume a prima facie breach was made out in order to develop further the form of the argument.


69 There is a series of United States cases in the environmental area raising similar issues to the Underwater Association case. The broad message from these cases is that it will be very difficult for American Indians to make out a First Amendment “freedom of religion” claim to prevent development projects when the subject land is not specifically associated with a religious practice. The case of Inupiat Community of the Arctic Slope v United States, 548 F Supp 182 (US Dist Ct, 1982) is most similar to the one under discussion: oil exploration in off-shore waters in the Beaufort Sea was claimed to offend religious beliefs since it affected hunting and gathering, these being intertwined with religious observance. The Court rejected the claim saying that there was no serious obstacle to the exercise of native religion. The only actual sites associated with religious observance were on land. The other cases are Badoni v Higginson, 638 F2d 172 (10th Cir, 1980); Wilson v Block, 708 F2d 735 (DC Cir, 1983); Crow v Gillet 541 F Supp 785 (US Dist Ct, South Dakota, 1982); Sequoyah v Tennessee Valley Authority, 620 F2d 1159 (6th Cir, 1980); and Lyng v Northwest Indian Cemetery Protective Assn, 485 US 439 (1988). In none of these cases did the Indian plaintiffs win.
6 Is the breach saved by s 5?

Two aspects must be satisfied under s 5. To be acceptable, limits must be both "prescribed by law" and "reasonable ... in a free and democratic society."

(a) "Prescribed by law"

The phrase was adopted from s 1 of the Charter. The rationale for providing that any limits must be prescribed by law as well as being reasonable is that limits should be fixed and ascertainable in advance, rather than being arbitrary. The Canadian Supreme Court has formulated the following definition of "prescribed by law" for Charter purposes, which the Court of Appeal adopted in Noort:

The limit will be prescribed by law within the meaning of s 1 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. The limit may also result from the application of a common law rule.

In the context of limits on rights imposed through the exercise of discretionary powers, the "prescribed by law" requirement was initially seen in Canada as a problem. It could be said that when a broad power is used to infringe rights, then the limit it thereby imposes on the right is not "prescribed" in any detailed sense. That is, the law itself imposes no clear limits; the limit is imposed by the particular exercise of power. If this view was correct, then broad discretionary powers could never justify any impairment of rights, not even reasonable impairments, since the "prescribed by law" aspect of s 1 could not be satisfied. The Slaight Communications case has resolved the issue. The result of that case was that, although the labour arbitrator's award did infringe the free speech of the employer, it was nonetheless a "reasonable limit prescribed by law" under s 1 of the Charter. Lamer J said:

However, this limitation is prescribed by law and can therefore be justified under s 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the Charter.

The effect of Slaight Communications is that the phrase "prescribed by law" is easily satisfied in cases of statutory discretions. The mere fact that a statute supplies the power will mean the power (and its right-infringing potential) is "prescribed". This empties the phrase of much of the content which it was thought to have, though one can see why such an approach was taken. In the context of statutory discretions, if the phrase required enumerated criteria for limiting rights then it could never be satisfied by broadly worded statutory powers. The result would be that actions under broad powers could never be
justified under s 1 of the Charter as reasonable limits prescribed by law. This would lead to the invalidation of many actions which could have been held reasonable, and in some cases to the invalidation of the statutory provisions themselves. After Slaight Communications the “prescribed by law” requirement is almost inevitably satisfied, shifting the focus to the reasonableness of the particular decision.

In our view the Slaight Communications approach should be followed in New Zealand. If it were not, then our s 5 could never operate to qualify rights in the Bill, leaving the rights in their absolute form where they would more easily be held to conflict with broad statutory provisions. Those provisions would have to prevail by virtue of s 4 of the Bill (a matter discussed by Gault J in Noort), with the result that the Bill would lose its potential role in limiting the scope of discretionary acts under broad powers.

For these reasons, any limits s 21(3) imposes upon s 20 of the Bill of Rights will be “prescribed by law”. When interpreted so as not to justify unreasonable infringements of rights, s 21(3) does “prescribe” the Water Boards’ powers.

(b) “reasonable limits ... demonstrably justified in a free and democratic society”

The question now is whether a grant of a water right which infringes the Maori right to enjoyment of their culture or religion may nonetheless be permitted as a reasonable limit on the Maori right. This analysis is to be made on the facts of the particular case, not in a general sense.  

The Canadian law on how limits should be assessed for reasonableness is sophisticated. In Noort, Richardson J referred to the Canadian law as an example of “helpful case law in other jurisdictions as to the principled bases on which courts ought to proceed in making their assessments under [s 5]”. Richardson J proceeded to quote a passage from a recent Canadian case setting out the so-called Oakes test for assessing reasonable limits. Richardson J also set out his own assessment of the types of issues involved in an “abridging enquiry under s 5”:

[A s 5 enquiry] 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 limit sought to be placed on the application of the Bill provision in the particular case; and (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

The Oakes test in Canada is as follows (here re-stated by the Supreme Court of Canada in R v Chaulk):

The procedure to be followed when the state is attempting to justify a limit on a right or freedom under s 1 was set out by this Court in Oakes:

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73 For, applying Slaight Communications, it is the particular decision under the broad power which has infringed the right and which is therefore to be assessed for reasonableness. It is not the statute itself.
1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
   (a) be rationally connected to the objective and not be arbitrary unfair or based on irrational considerations;
   (b) impair the right or freedom in question as little as possible; and
   (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

It is of course no surprise that the observations by Richardson J incorporate substantially the same inquiries as the Oakes test contemplates: the task of assessing reasonableness of actions necessarily involves weighing up the importance of the objective against the importance of the right affected, and asking whether the effects on the right are necessary and in proportion to the objective. There are various ways this balancing exercise can be expressed, but it will come to much the same thing. One of the attractions of the Oakes test, however, is that it has formalized the nature of the enquiry and requires judges to express reasons why a particular limit on a right is reasonable. It keeps the rights question out in the open.

It is an inescapable fact, however, that the Oakes test was developed and is usually applied in the context of evaluating legislation for reasonableness — something which is not possible under our Bill of Rights. When applied in that context the first aspect of the test — a compelling objective — is inevitably satisfied if only because the courts are unlikely to hold that the legislature has acted with no good reason. In practice the crucial part of the Oakes test has turned out to be the second part of the proportionality test — has the right been infringed “as little as possible”? Canadian jurisprudence on that part of the test is still in a state of flux. Recent cases speak of a need for “flexibility” in application of the proportionality test. What has emerged is that the courts are more willing to uphold legislative choices even where a less intrusive way of attaining the legislature’s objective could be conceived. A “margin of appreciation” has been allowed, so that so long as the legislation is within a range of reasonable responses to the problem which it addresses, the courts will not strike it down on the basis that an alternative (less infringing) option was available. On the other hand, where the infringement at issue is imposed by a common law doctrine rather than legislation, the Court has stated that no similar need for deference arises — the Oakes test may legitimately be applied with rigour.

76 In Slaight Communications, above, note 51, p 422, Dickson CJC makes this point in recording his disagreement with Lamer J’s characterization of the labour adjudicator’s order as “unreasonable” (in administrative law terms). Dickson CJC observed that if Lamer J had analysed the order in terms of the Oakes criteria of reasonableness, he may well have agreed with the other judges that the labour adjudicator had exercised his discretion reasonably.


79 Re Prostitution Reference (1990) 77 CR (3d) 1 (SCC).

In *Slaight Communications*, where the *Oakes* test was applied to a labour adjudicator’s decision and not to legislation, there is no explicit statement that a rigorous *Oakes* analysis is required, but neither is there any statement of a need for deference. The Court simply concluded that the order in *Slaight Communications* did impair freedom of expression as little as possible and so passed the *Oakes* test. The Court did not rest its judgment on any need for deference to the adjudicator’s assessment of whether the order was necessary. The Court made its own assessment and determined that it was. We think there is merit in that approach. While the courts may properly defer to the judgement of tribunals in their fields of expertise and authority, this is not necessarily the case when prima facie infringements of rights in the Bill of Rights are made out.

We shall now apply the *Oakes* test to the Water Board’s grant of a water right in the *Underwater Association* case.

(a) Importance of the objective

The objective of the grant of a water right was to facilitate waste disposal in order to enable the port of Auckland to function to capacity. It was plainly an important objective, one which could not be categorized as trivial and insufficiently important to warrant limiting rights. (Incidentally, this is an instance where the *Oakes* test applies only with difficulty to administrative decisions: one could say that the Water Board’s objective in granting the right was merely to observe the terms of the statute under which it operated and which obliged it to grant the right upon persuasion that it was in the public interest to do so. To make the *Oakes* test work in the administrative law context one has to adapt it slightly.)

(b) Proportionality of objective and means

Three aspects of proportionality are identified in the *Oakes* test. The first is rationality. That is satisfied here – granting the right to discharge dredgings into the harbour was rationally connected to the objective of enabling the dredgings to be disposed of somewhere.

Second, does the grant impair the right “as little as possible”? Or, if the courts are prepared to defer to the Board’s judgment, does it impair the right “as little as reasonably possible”? The probable answer here is that there was no way of granting a water right to dispose of waste in the Hauraki Gulf which would impair the right any less – given the evidence that any introduction of foreign material into the harbour was antithetical to Maori custom and belief.

The third aspect of the proportionality test is probably the most important in this administrative law context, though it rarely has been so in Canada. This part of the test asks whether the limit on rights imposed by the water right is in proportion to the importance of the objective sought to be gained by the grant. There is room for more argument here, though we suggest that since the Maori right affected was essentially a right “not to be offended”, and not a right actually to do something at the subject site, it would be reasonable for a court to conclude that the third aspect of proportionality was established. This is because the objective of the water right was substantial and compelling – the continued operation of the harbour to its full potential. In contrast, the

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81 See Hogg, above, note 74.
Maori objectors' right could have been perceived as being “at the periphery” of the interests protected by s 20, given the rather indirect nature of the denial of cultural rights which was involved (no particular cultural or religious significance attached to the dumping site – the entire Gulf was the subject of a generalized claim). 82

It is not necessary for us to express a conclusion on the merits of the s 5 analysis.

What if the grant had amounted to an unreasonable limit on s 20?

If the grant of a water right under s 21(3) did interfere with Maori rights in s 20 of the Bill of Rights, it would be necessary to consider whether that interference is nonetheless justified by the legislation – a possibility recognized by s 4 of the Bill.

There is as yet no case-law to assist on the difficult question of determining what inconsistency with the Bill of Rights actually is; still less is there case-law dealing specifically with discretionary powers. The analysis we offer is that one should start from the premise that discretionary powers do not authorize right infringements unless that is expressed or necessarily implied in the statute. Express provision is unlikely; the real question is when is inconsistency with the Bill implicitly authorized. We suggest that inconsistency is authorized only in cases where the potential application of the discretion would be substantially curtailed if a statute was read so as not to authorize infringements of the Bill of Rights. In such a case, applying the presumption that Parliament intends its statutes to be effective, the broad power should be taken to override the Bill of Rights and authorize exercises of discretion which infringe rights. In most cases, however, we suggest that reading in the implied limit “but not so as to infringe the Bill of Rights” would not seriously affect the intended sphere of operation of a statute (especially when it is recognized that reasonable limits on rights are not infringements of the Bill).

Section 21(3) raises, however, a particular problem as to the meaning of “inconsistent” in s 4 of the Bill of Rights. It might be argued that since Maori cultural values are already determined by the law (Huakina) to be a relevant consideration for Water Boards, then the “field” of Maori interests has been covered already. On that view it would be “inconsistent” to impose on this statutory regime a further requirement that Boards should not make orders which infringe Maori rights in the Bill of Rights. The issue is, of course, whether “inconsistency” arises whenever two different legal regimes co-exist, or only when one on its own terms is inconsistent with the other. 83

82 As the United States District Court (Alaska) said in Inupiat, above, note 69, p 189: “Carried to its ultimate, their contention would result in the creation of a vast religious sanctuary over the Arctic seas ...”

83 An example of this issue is afforded by R v Stewart (1991) 7 CRNZ 489 (CA). The case concerned s 23G of the Evidence Act 1908, which permits psychiatrists and psychologists to give evidence as to (effectively) the veracity of a child complainant. Subsections 23G(2)(a) to (c) set out the specific matters upon which the expert witnesses may give evidence. It is possible to make an argument that the right to a fair hearing in s 25(a) of the Bill of Rights requires a court to allow evidence from these experts on matters which do not fall precisely within s 23G. Had that argument been accepted on its merits, a further issue would have arisen under s 4 of the Bill of Rights. Was Parliament’s legislative statement in s 23G intended to be a comprehensive “covering of the field” as to the type of evidence which these experts could give as to child complainants? Alternatively, does the Bill of Rights justify extending the category of matters upon which evidence can be given (there being no clear statement in s 23G that the matters set out there are the only matters upon which an expert can testify)?
We take the view that the *Huakina* requirement to consider Maori cultural values is not inconsistent with the Bill of Rights requirement to consider the individual Maori person’s right to culture and religion. The two can co-exist. We say this for two reasons. First, because *Huakina* and the Bill of Rights deal with two different matters. The former with the collective Maori right to have cultural values recognized, the latter with the individual Maori’s right to have her own capacity to share in that culture protected from state infringement.

Secondly, we think that *Huakina* and the Bill of Rights can co-exist as dual restraints on the Water Board’s powers because they operate at two different levels. *Huakina* made Maori cultural values a mandatory relevant consideration. But it said nothing about the weight to be accorded to the interest. The Bill of Rights, on the other hand, does require that weight be given to the interest protected by s 20. It is not enough for a Board merely to consider s 20: it must not make an order which infringes it. It is possible, then, for the Bill of Rights to be super-imposed upon the existing *Huakina* regime and in no sense is it inconsistent with it.

### What did the Planning Tribunal decide?

It remains now to examine the Planning Tribunal’s decision on the Bill of Rights argument. Its conclusion was expressed in the following paragraph:

> However s 4 of the Bill of Rights Act has the effect that the provisions of the Water Act are not to be treated as ineffective by reason of being inconsistent with any provision in the Bill of Rights Act. As the long title of the Water Act contemplates a range of matters of community value being taken into consideration, we cannot apply section 20 in such a way as to negate consideration of those other matters. Yet despite [counsel’s] disavowal of priority for the Maori interest in any circumstances, that would be the effect of accepting his submission that profound Maori interests are to be protected to the extent that little or no weight is given to offsetting benefits. Counsel for the applicant submitted that it would elevate Maori spiritual concerns to the point at which even an individual Maori could claim a veto which would be to deny the Water Act its intended effect.

It seems to us, however, that a veto is precisely what the Bill of Rights envisages. But it must be appreciated that the term “veto”, like the other term often used in this area, “trump”, merely describes the result of the case if it is held that a right has been unreasonably infringed by an exercise of discretionary power. In the process of determining whether a right is unreasonably affected, a balancing exercise has already been carried out. The right will be a trump (and so allow a veto) only where it is impaired in a manner which is not reasonable in a free and democratic society. One of the central purposes of the Bill of Rights must surely be to protect individual rights from being impaired in that way, absent legislative authority.

We do not think that allowing the Bill this effect derogates from the other interests which are relevant in considering water right applications. They must continue to be the primary concern. They dictate what Water Boards must or may consider. But we suggest that if a litigant establishes that a water right, granted on the usual criteria, would *unreasonably*
infringe one of his or her rights affirmed in the Bill of Rights, then the Board would go beyond its statutory authority to make such a grant.

II Restriction of movement and the unemployment benefit

Under s 58(1) of the Social Security Act 1964 a person over 18 years of age is entitled to the unemployment benefit if the Director-General is satisfied that she or he:

(a) is unemployed; and
(b) is capable of undertaking and is willing to undertake suitable work; and
(c) has taken reasonable steps to obtain suitable work; and
(d) has resided continuously in New Zealand not less than 12 months at any time.

This provision goes on expressly to disentitle full-time students and those workers on strike to the benefit.

For many years the Department of Social Welfare (DSW) has had a “policy” that any person who moves to a low-employment region of New Zealand without good cause is not entitled to receive the unemployment benefit. This “policy” flows from the departmental interpretation of the section and its application to numerous cases over the years.\(^85\)

The statutory standard is willingness to work and the taking of reasonable steps to obtain work. The departmental view is that unless an unemployed person has good reason to move to a low-employment area it will infer an unwillingness to work or that less than reasonable steps have been taken to obtain work. It is not difficult to glean the statutory purpose that only the genuinely unemployed – those that are ready, willing and able to work – should receive the benefit, and not those who by relocating diminish their chances of employment.\(^86\)

In administrative law terms we are in the area of interpretation/application and the judicial review standard is error of law. The law in New Zealand can be stated quite briefly. Where the statutory provision presents a “definite” or “ascertainable” test or involves a so-called “pure question of statutory interpretation” it is ultimately for the court on review to say what the provision means, but, having done that, application of the correct test to the facts lies with the administrator and will only be corrected by the court on the grounds of mistake of fact or unreasonableness.\(^87\)

It seems to follow from this that where the statute does not present a definite or ascertainable test nor involves a pure question of interpretation, the “correctness” test is replaced by the less intrusive unreasonableness standard of review.\(^88\) In addition, it should be noted that the courts have traditionally shown considerable judicial restraint or deference in the social welfare arena. The courts in England at least have intervened only for a real error of law, and the judges have been


\(^86\) This purpose is not unique to New Zealand unemployment benefit law. For a survey of the American law, see Note, “Concept of ‘availability’ in California’s unemployment insurance program: any reason for requiring good cause?” (1978) 66 Calif LR 1293.

\(^87\) The leading case is Bulk Gas Users Group Ltd v Attorney-General [1982] 2 NZLR 306.

disinclined to give too wide a definition of "law" as opposed to "fact". What this underscores is the variability of application of the broad and deceptively simple standards of judicial review.

In light of this it seems to us unlikely that a court on judicial review would hold that the DSW has misconstrued the statute or acted unreasonably in denying benefits to those who move to low-employment areas of New Zealand without good cause.

How, if at all, does this change if we switch from administrative law to the Bill of Rights? On its face, the DSW's interpretation of s 58 of the Social Security Act 1964 does infringe the right of freedom of movement and residence, provided in s 18(1) of the Bill of Rights. But before proceeding to s 6 of the Bill, with its direction to the judges to give an enactment a meaning consistent with the Bill wherever possible, we must look to s 5 to see if the right in s 18 is subject to any reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. If the low-employment region "policy" is a reasonable and justifiable limit then there is no infringement of the right and so the direction in s 6 does not come into play.

The "policy" satisfies the phrase "prescribed by law" as interpreted by the Supreme Court of Canada in Slaight Communications. Is it a reasonable limit however? Should the State (ultimately, of course, the taxpayers) support by unemployment benefit those who prefer for lifestyle or other reasons to move to Great Barrier Island, the Coromandel Peninsula, the West Coast of the South Island or the Marlborough Sounds? This is one of those instances where one only has to look at the Oakes test to see that it is satisfied. The purpose of the provision is crystal clear and the means chosen to achieve the objective are proportionate and impair the right as little as possible.

The American jurisprudence on this issue is highly relevant not only in terms of reasonableness of limitation but also, as the United States is a free and democratic society, to the demonstrable justification limb of s 5. It is a feature of American federal and state social security law that the right to unemployment compensation is lost or suspended when the claimant moves to another community in which there is no employment available and no reasonable expectation of finding any. Occasionally this is expressly provided in a State’s social security legislation but more commonly it is the result of administrative interpretation/application of general requirements in each State’s legislation that the claimant be ready, willing and able to work. Both the explicit statutory provision and the administrative interpretation/application have survived constitutional

90 Above, notes 70-72 and accompanying text.
91 These are some of the low-employment regions that the DSW is said to recognize. See Legal Information Service, Legal Resource Manual (1990) p 2.7/5.
92 81 Corpus Juris Secundum, (Social Security) § 263.
93 For example, Illinois. For discussion of the Illinois statutory provision, see Yadro v Bowling, 414 NE 2d 1244 (App Ct, Ill 1976) and Wadlington v Minder, 259 NE 2d 257 (SC Ill 1970), appeal to US Supreme Court dismissed "for want of a substantial federal question", 400 US 935.
94 See the cases cited in Corpus Juris Secundum, above, note 92.
challenge in the United States. We will focus here on the latter type of case as it is the closest to our own situation.

In two almost identical cases arising in New York, one in the federal court and the other in state court, some Puerto Rican born citizens of the United States challenged the denial of unemployment benefits when they lost their jobs in New York and moved back to high unemployment areas in Puerto Rico. The Courts noted the long-standing policy of the Commissioner to deny benefits to those who leave the area where they were last employed and move to another area where there is no reasonable prospect of suitable work. It was argued that this policy constituted a violation of the constitutional right to travel, due process of law and to equal protection of the laws. The federal District Court, sitting with three judges, did not think that New York was necessarily required by the Constitution to provide employment benefits for anyone who leaves the state, but, in any event, the Court noted that the right to travel freely throughout America is not an absolute right. In the words of a Supreme Court opinion quoted by the court, American citizens are “free to travel ... uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement”. District Judge Tyler said:

In the case before us, the restriction involved is a minor one; claimants forfeit their rights only if they go to an area of such “high persistent unemployment” that they are deemed to have effectively isolated themselves from any possibility of employment. Furthermore, at least on the record before us, this limitation is reasonably and directly related to the long-standing and valid policy of the unemployment insurance provisions of New York law – eg that a claimant be “ready, willing and able to work”.

In the other decision, the Court of Appeals of New York described the policy as “eminently correct”, and similarly rejected in the following terms the argument that the policy violated the constitutionally protected right to travel:

It neither prevents nor attempts to hinder anyone from leaving the State and going wherever he chooses. The policy underlying the determination is simply designed to assure that unemployment insurance benefits are paid only to persons genuinely involuntarily unemployed, persons who are “ready, willing and able to work”...

Both Courts rejected also the due process and equal protection challenges.

In contrast to the American process of constitutional adjudication, where seemingly “absolute” rights are read by the judges as subject to reasonable limits, our Bill and human rights documents like the International Covenant and the European Convention contain explicit limits on the rights affirmed. The limits on the right to freedom of movement in the Covenant and, (to a lesser extent) the Convention, however, are more specific and narrower than those in s 5 of our Bill.

95 See Wadlington v Mindes, above, note 93; Patino v Catherwood, 277 NE 2d 658 (CA NY 1971); Galvan v Catherwood, 324 F Supp 1016 (SD NY 1977).
96 Galvan v Catherwood, ibid, 1019.
98 Above, note 96.
99 Patino v Catherwood, above, note 95, 660-61.
The International Covenant on Civil and Political Rights provides in s 12(1) that everyone lawfully within a state shall have the right to liberty of movement and freedom to choose her residence. This right is then said to be subject to those restrictions “which are provided by law, are necessary, to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present charter”. From this list only public order (ordre public) and possibly the rights of others could conceivably justify denial of unemployment benefit to those who move to high unemployment areas. It seems likely that public order/ordre public would be read widely to encompass an “accepted level of public welfare and social organisation”.100 Moreover, in cases where restrictions on movement within states have an economic justification the Committee on Human Rights has tiptoed very carefully.101

The restrictions on liberty of movement in the Fourth Protocol to the European Convention for the Protection of Human rights are almost identical to those in the Covenant with this important addition: The right of liberty of movement may “be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society”. This is closer to the language of s 5 of our Bill.

The state has a clear and strong interest in making sure that only those persons ready, willing and able to work receive unemployment benefits. This is essential to the integrity of the unemployment benefit scheme.102 The restriction on a person’s right of movement is relatively slight. A person can travel to, and reside in, any part of New Zealand but if she chooses to move to and reside in a high unemployment area the state will not support that person by way of unemployment benefit. This, we submit, is a reasonable and demonstrably justifiable limit on a person’s right of freedom of movement. Hence the Department’s “policy” does not infringe that right and s 6 is not called into operation.

III Visitors’ visas and freedom of expression

The power to grant visitors’ visas to foreigners proposing to visit New Zealand on business or for pleasure is a broad one.103 Sometimes this power is exercised in ways that appear to infringe the Bill of Rights. Take as an example the refusal in 1990 of a visitors’ visa to a South African politician (W), who had been invited here to speak to a community group. The Minister was quoted in the newspaper as saying that it was “quite out of line” for W to speak in New Zealand so close to an election.104

As a matter of administrative law such a decision is likely unimpeachable. The courts are very reluctant to intervene in immigration matters,105 and place emphasis on the width of

102 Cf Wadlington v Mindes, above, note 93, 263.
103 Immigration Act 1987, s 14D.
the discretion, the political sensitivity of the issues, the high political office held by the
decision-maker and the non-justiciability of many such decisions. 106

One consequence of adjudication involving a Bill of Rights, even an unentrenched one,
is that the veil of non-justiciability is more easily pierced than in administrative law. 107
The reason is that Bill of Rights methodology begins by focusing on the right rather than
on the nature and subject-matter of the power. The first question always is: does the right
allegedly infringed apply? In our case, has W’s right to freedom of expression been
interfered with?

W has no right to enter New Zealand. That is clear from the Immigration Act and from
the Bill of Rights itself. 108 Nor is such a right to be found in the International Covenant
or in international law. 109 However, most of the rights in our Bill are guaranteed to
“everyone” and their enjoyment is not restricted to New Zealand citizens or residents. Nor
does it appear that a person need be in New Zealand as long as the action or decision
complained of is taken by someone to whom the Bill of Rights applies. If this is correct,
and W’s right to freedom of expression is protected by the Bill, then the Minister’s denial
of a visa on the stated ground is a prima facie infringement of that right.

But even if a foreigner is somehow held not to have the benefit of the protection of our
Bill of Rights, s 14 of the Bill protects the right to receive information as well as the right
to speak, and so those who invited W to speak in New Zealand would necessarily have
their constitutional rights infringed (prima facie) by the decision to deny W a visa on
ideological grounds. American courts have consistently recognized that American
citizens who invite a foreign speaker have standing to challenge a denial of visa to their
invitee based on her political views. 110

It is for the Government to show, if it can, that taking account of W’s political views in
a visa determination is a “reasonable limit prescribed by law as can be demonstrably
justified in a free and democratic society” (s 5). If this can be demonstrated then there is
no infringement of S’s right to freedom of expression and the decision cannot be
impugned on Bill of Rights grounds. Administrative law challenge would remain but, as
we have said, it is unlikely to avail the foreigner seeking a visitor’s visa.

In terms of the Oakes test, the objective of the provision containing the broad discretion
must be identified. The purpose is to allow a Minister to regulate who enters the borders
of New Zealand, a power traceable back to the royal prerogative but today put on a

106  See Ashby v Minister of Immigration, above, note 38.
107  Compare, for example, the approaches of the New Zealand and Canadian courts in relation to review
of decisions to close Post Offices: The Wellington Regional Council v Post Office Bank Ltd and New
Zealand Post Ltd (HC Wellington, CP 720/87, 22 December 1987) and Re Rural Dignity of Canada
et al and Canada Post Corp (1991) 78 DLR (4th) 211 (affirmed by the Federal Court of Appeal, 14
108  Section 18 (2) of the Bill of Rights states that every New Zealand citizen has the right to enter New
Zealand, whereas “everyone” has the right to leave under s 18(3).
L 804.
110  Shapiro, “Ideological Exclusions: Closing the Border to Political Dissidents” (1987) 100 Harv LR 930,
930-1 n 6, citing Abouezk v Reagan, 785 F2d 1043, 1050-1051 (DC Cir 1986), since affirmed per
curiam by an equally divided Supreme Court, 484 US 1 (1987).
statutory footing in New Zealand as elsewhere.\(^{111}\) That this can relate to "pressing and substantial" concerns in some cases is shown by the traditional reluctance of the courts to become involved. Immigration, as Cooke P has said, is linked to foreign policy,\(^{112}\) and that is an area where the courts often defer quiescently to the executive.\(^{113}\) Whether this objective is "sufficiently important" to override the right of freedom of speech is another matter.

The freedom to express views unpopular with the government of the day is at the very core of the freedom, and is jealously protected in liberal democracies with Bills of Rights.\(^{114}\) In this type of case, which does not involve racist speech or the like, the objective appears to fail the proportionality test. The possibility of arbitrariness is high and it appears the decision was influenced by irrelevant considerations (ie embarrassment and damage to the Government). Moreover on the strict *Oakes* test, it does not impair the right as little as possible. On the relaxed post-*Oakes* test allowing greater deference – a margin of appreciation – there is less certainty because the courts defer so much in this context in administrative law litigation. Surprisingly, this can be seen most clearly in the United States. Refusal of a visa to a foreigner is non-reviewable in American law, even when the refusal is based on ideological grounds and limits free speech.\(^{115}\) While the criticism of this immunity from judicial review and of the inconsistency with First Amendment values suggest that this last remaining citadel of non-reviewability cannot long survive,\(^{116}\) it does show that in one free and democratic society the courts have viewed refusing a visa on ideological grounds as a reasonable limit on free speech.

One advantage of the structure of our Bill of Rights, where the rights are subject to an express reasonable limits provision, over the American Bill of Rights, where the rights are stated in absolute form, is that the judicial resolution of clashes of right against right and right against important public policies is more guided and visible. One American commentator, speaking of s 1 of the Canadian charter, applauded it as an invitation to judicial candour and for making the inevitable process of limiting rights a more open one than that which occurs in the United States.\(^{117}\)

\(^{111}\) See *Chandra v Minister of Immigration* [1978] 2 NZLR 559.

\(^{112}\) *Ashby v Minister of Immigration*, above, note 38, 226.


\(^{116}\) The critical literature is quite large. See, eg, Note, "Recognizing the Judicial and arbitral Rights of Aliens to Review Consular Refusals of 'E' visas" (1991) 66 Tulane LR 203; Wildes, "Review of visa denials: The American Consul as 20th century absolute monarch" (1989) 26 San Diego LR 887; Shapiro, above, note 110.

There is a strong case, in our view, that the Government's interest in excluding a foreigner on the ground of the unpopularity of his or her views is not a reasonable limit on that person's right to freedom of expression. If this is held to be the case, then the limit is unreasonable and the right is infringed by the exercise of the discretionary power, and the decision is invalid for breach of the Bill of Rights.

The Government would argue, in this event, that any such holding would impliedly repeal, revoke or in some way invalidate or render ineffective the provisions in the Immigration Act giving a broad discretion to the Minister. Section 4 of the Bill of Rights protects unreasonable limits on rights where the Bill of Rights is inconsistent with statutes. In the context of statutory discretions, the answer to the challenge posed by s 4 depends on whether or not the discretionary power can be exercised in a significant number of cases without infringing the right of expression. If the discretion can be exercised without necessarily or typically interfering with freedom of speech, the enactment is not rendered ineffective and so s 4 cannot be invoked. On the other hand, if in exercising the discretion infringement of a right is a necessary or typical or usual occurrence, and there is little or no scope for its exercise without infringing the Bill of Rights, then the provision would, practically speaking, be rendered ineffective and s 4 would operate to save the decision.

The legal position can be put in a positive form, as the Canadian Supreme Court did in Slaight Communications. As the Bill of Rights is part of the law of the land, legislation conferring discretionary power and the exercises of discretionary power should not infringe the Bill unless that power is "expressly conferred or necessarily implied".

IV Nativity displays on public property: a clash with freedom of religion?

Imagine that a local authority decides to erect a nativity display at Christmas time, with shepherds, wise men, animals, Mary and Joseph, and a baby in a manger. The display is erected at public expense on public property. Can anyone object to such a display by invoking the Bill of Rights?

This type of issue continues to be a fertile field for litigation in the United States. The First Amendment to the United States Constitution prohibits both the "establishment of religion" and abridgement of the "free exercise of religion". Public religious displays are conceived as potential violations of the first prohibition, commonly called the "establishment clause". This is because when state resources are used to fund religious displays, it may be perceived as state endorsement of a particular religion. Even when labour and funds to create and maintain the display are donated, the mere fact that such displays take

119 Above, note 8.
120 Ibid, p 442, per Lamer J.
121 See most recently County of Allegheny v American Civil Liberties Union 492 US 573; 106 L Ed 2d 472 (1989). We are grateful to our colleague Scott Optican, who has practised law in the United States, for assistance with references in this section.
place on public land or with public approval will be enough to attract the prohibition of the establishment clause.\textsuperscript{122}

If objection was taken to such a display in New Zealand, a preliminary issue would be whether our Bill of Rights precludes government endorsement of religion. Sections 13 and 15 are concerned with the exercise of religious belief. In common with the Canadian Charter, there is no establishment clause in our Bill. However, as the United States jurisprudence testifies, the questions of establishment and free exercise are theoretically separate but in practice intertwined.\textsuperscript{123} In the leading Canadian case of \textit{R v Big M Drug Mart Ltd}\textsuperscript{124} the Supreme Court of Canada held, for this reason, that the distinction between free exercise and establishment was not to be perpetuated in Charter jurisprudence. Rather, the acceptability of apparent state support for religion would have to be "determined on a case by case basis".\textsuperscript{125} In \textit{Big M} the Court held that laws compelling observance of the Christian sabbath infringed religious freedom. It was incontrovertible that the Sabbath laws in that case had been enacted with the purpose of protecting the religious conception of Sunday. Accordingly the Supreme Court struck down the law.\textsuperscript{126} Said Dickson CJC: "[T]he Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians."\textsuperscript{127} This was not because the Act affected the ability of Canadians to believe whatever they wished, but because it imposed a legal duty (that is, refraining from Sunday trade) which was founded in religious reasons. Freedom \textit{to} believe was taken to include freedom \textit{from} imposition by the state of religious beliefs.

It is conceivable that New Zealand courts would read the religious freedom sections in our Bill to prohibit government endorsement of religious views. While a public religious display is plainly not coercive in the same way that the Sunday closing laws in \textit{Big M} were, much of the language in the judgments in \textit{Big M} seems equally applicable. For example, Dickson CJC said:\textsuperscript{128}

\begin{quote}
In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians.
\end{quote}

\textsuperscript{122} Assuming the display is otherwise caught by the prohibition. Therefore, even a disclaimer notice on behalf of a council or other state owner of land upon which a religious display appears is not certain to overcome the constitutional objection: \textit{County of Allegheny v American Civil Liberties Union}, ibid, p 511; see also \textit{Stone v Graham}, 449 US 39, 41 (1980), \textit{Kaplan v City of Burlington}, 891 F 2d 1024, 1029 (2nd Cir, 1989); \textit{Smith County of Albemarle} 895 F 2d 953, 958 (4th Cir 1990).

\textsuperscript{123} The issues are separate because it would be possible for there to be state endorsed religion together with freedom of religion for all citizens. On the other hand, a state may endorse no religion, yet penalise religious belief amongst its citizens. Though separate in this way, the issues are related because state fostering of religious freedom (through, say, protecting the ability of religious persons to have their Sabbath days free of work) may be construed as state assistance to religion and hence establishment. A significant part of the American jurisprudence is devoted to issues arising out of the potential conflict between guaranteeing free exercise while refraining from establishment.

\textsuperscript{124} (1985) 18 DLR (4th) 321.

\textsuperscript{125} Ibid, p 357.

\textsuperscript{126} This did not mean Sunday closing laws were inherently unconstitutional. Since the \textit{Big M} decision, provincial Sunday trading laws have been enacted under the Provincial power to legislate and welfare of citizens, though there have continued to be constitutional challenges to the scope of the permitted exemptions (see \textit{R v Edwards Books & Art Ltd} (1986) 55 CR (3d) 193 (SCC)).

\textsuperscript{127} Ibid, p 354.

\textsuperscript{128} Idem.
It takes religious values rooted in Christian morality and, using the force of the State, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.

At least the first and last sentences of the quoted passage imply that government endorsement of a religion simply through displaying the symbols of that religion would contravene “freedom of religion”. Certainly much of the United States jurisprudence emphasizes the subtle coercion which is wrought by religious displays. In American Civil Liberties Union v City of St Charles the two plaintiffs grounded their standing in the fact that a lighted cross on a public building offended them so much that they had to detour from their normal city routes in order to avoid it. The Seventh Circuit Court of Appeals accepted this slight cost as giving the plaintiffs standing.

If ss 13 or 15 of the New Zealand Bill are held to prohibit establishment, the next issue for a plaintiff in this type of case will be whether the particular display amounts to an endorsement of religion which falls foul of the prohibition. United States jurisprudence on this point is, as may be expected, complex but it appears that much will depend on the context in which a religious display appears. In Lynch v Donnelly, for example, the display was upheld because there was a mixture of religious and secular symbols of Christmas (sleigh, Christmas tree, carollers, and a “Season’s Greetings” banner). In County of Allegheny, on the other hand, the display was entirely religious in character with a banner reading “Gloria in Excelsis Deo!”. A cross at Christmas, however, even along with secular images, will be difficult to sustain since it is not historically connected to celebration of Christmas.

Assuming that the right to freedom of religion is successfully invoked, the next question will be whether or not it is unreasonably infringed by publicly sponsored religious displays. The s 5 analysis in this type of case will be particularly difficult.

1 Prescribed by law

First, can the local authority demonstrate that any limit is “prescribed by law”? As a creature of statute, the powers exercised by a local authority must be traceable back to statute. The authority to erect displays of this kind – requiring the expenditure of money, time and effort – may be found either in the legal nature of the authority or in more specific provisions in the Local Government Act 1974. But, in either case, the powers must be exercised in conformity with the purposes of that statute.

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129 As to the potency of the symbols, see Lynch v Donnelly, 465 US 668, 708 (1984), per Marshall J: "[The nativity scene] is the chief symbol of the characteristically Christian belief that a divine Saviour was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption."


132 The historical significance of religious practices and symbols can be decisive: it is what immunized prayers in the Nebraska legislature from constitutional challenge on First Amendment grounds (Marsh v Chambers, 463 US 783 (1983)).
The Council is a body corporate and, subject to the Local Government Act and any other legislation, is capable of acquiring real and personal property, and of doing all such things as bodies corporate can do.\textsuperscript{133} As private companies undoubtedly have the common law power as owners to erect such displays on their land,\textsuperscript{134} so does the public authority; as long as doing so is not contrary to the Local Government Act\textsuperscript{135} or an unfair or unreasonable exercise of the public power.\textsuperscript{136}

The Council also has the powers expressly given by the Local Government Act, other Public Acts and any applicable Local Acts.\textsuperscript{137} There are at least three express powers which might authorize the erection of nativity displays on public property at the council’s expense. The Council may “undertake, promote and encourage” such services and facilities as the Council considers necessary to maintain and promote the “general well-being of the public”.\textsuperscript{138} Similarly, the Council may undertake development of such “services, facilities, amenities, and programmes” as it considers necessary to provide for the “recreation, amusement, and instruction of the public”.\textsuperscript{139} Also, under Part XVIA, headed “Works and Contracts”, every council has the power to plan, implement and maintain any “work” (a term not defined in the Act) which, in the Council’s opinion, “is necessary or beneficial” to the district.\textsuperscript{140}

In forming its opinions as to the necessity of promoting or developing the above stated interests, the Council must be guided by the purposes of the Local Government Act 1974. Section 37K sets out the purposes of local government in New Zealand; the most relevant of which for our purpose are: (a) recognition of the existence of different communities in New Zealand; (2) recognition of the identities and values of those communities; (c) definition and enforcement of appropriate rights within those communities; and (d) scope for communities to make choices between different kinds of local public facilities and services.

These, then, are the statutory provisions which prescribe the Council’s actions in erecting a religious display. Plainly, they are vague and do not amount to clear legislative authority to undertake acts which infringe religious freedom. The requirement to consider the values of different communities, for example, could be construed either as a statutory encouragement or as a prohibition of a religious display with Christian significance. At this point a court must, we think, apply s 6 of the Bill. The question is what the law actually does prescribe. Since there is an interpretive choice, the injunction in s 6 to prefer a

\textsuperscript{133} Local Government Act 1974, s 37L(4).

\textsuperscript{134} Subject, of course, to land use restrictions.

\textsuperscript{135} Local Government Act 1974, s 37L(4).

\textsuperscript{136} This limitation flows from the public nature of the power of councils. See \textit{Webster v Auckland Harbour Board} [1983] NZLR 646, 649, Cooke and Jeffries JJ (quoting with approval Sir William Wade’s observation that public authorities are essentially different from private persons, and must act reasonably and in good faith and upon lawful and relevant grounds of public interest) and affirmed by Cooke P in \textit{Webster v Auckland Harbour Board} [1987] 2 NZLR 129, 131.

\textsuperscript{137} Local Government Act 1974, s 37T(1).

\textsuperscript{138} Ibid, s 598(1). Cf s 596(1), where the phrase “well-being of the public” seems limited in meaning by its juxtaposition with “public health”.

\textsuperscript{139} Ibid, s 601(1).

\textsuperscript{140} Ibid, s 247B. Compare the narrower power under s 225, whereby the Council may acquire and maintain property “as is necessary for the efficient and effective performance of its functions”.
meaning consistent with the Bill should be followed. The statutory powers and purposes in the Local Government Act should therefore be taken not to allow imposition of unreasonable limits on religious freedom.\footnote{141}

That conclusion, of course, is similar to the conclusion reached by the Supreme Court of Canada in \textit{Slaight Communications}. There, as in our “dumping in the Gulf” example, there were no statutory criteria to guide the decision-maker and the Court supplied the implicit limitation (that rights-breaching decisions were not allowed). The Local Government Act, on the other hand, does supply guiding criteria for discretionary powers, but being ambiguous those criteria too must be filtered through the interpretive prism of the Bill of Rights. Under s 6, the meaning favourable to rights is selected.

This does not mean that a religious display is beyond the power of a Council which seeks to act in accordance with the purposes of the Local Government Act. What it does mean, however, is that the display would need to be formulated in such a manner as to stop short of infringing the individual’s freedom from the appearance of state-endorsed religion.

2  \textbf{Reasonable limits}

The next question is whether the incursion caused by the religious display on Council land is reasonable. Step one of the Oakes test – identifying the purpose sought to be attained by the act complained of – is problematic here. The purpose can be articulated at various levels of abstraction and some versions will dictate the result of applying the second step of the test. For example, if the purpose of a display is seen as promoting the religious aspect of Christmas, then although the display is rationally connected to the purpose, a court may conclude that the right to be free of such state-endorsed promotion is at the very core of the values in ss 13 and 15. Therefore, applying the third limb of the proportionality test in \textit{Oakes}, the infringement of the right is too serious in relation to the countervailing state interest in promotion of religion (which must be at the outer limit of legitimate state interests).

On the other hand, the matter is not so self-evident when the purpose of the display is characterized as the promotion of Christmas festivity and community well-being. That is a secular goal. But there will be difficulties, even then, in establishing that this sort of goal can be pursued at the expense of interfering with the religious freedom of citizens. Much will depend, we think, upon the particular nature of the display. This contextual approach is the very sort of inquiry which runs through the United States jurisprudence.

3  \textbf{Section 4}

Finally, assuming an infringement is held to have occurred, there seems little prospect of s 4 being invoked to justify the infringement. This is because, if our analysis under s 5 is accepted, the Local Government Act may be read to permit only reasonable limits on religious freedom. We are now assuming the Council has imposed an unreasonable limit.

\footnote{141 The s 5 analysis in these cases is not, then, a matter of identifying the limits and then asking whether they are “reasonable”. For s 4 requires that once statutory limits are identified, they apply whether reasonable or not. Rather, s 5 requires, in cases where the absence or vagueness of guidelines leaves interpretive choices, that only reasonable limits on rights are permitted.}
There being no clear statutory authority to do so, that imposition must be beyond the Council’s power. Section 4 does not apply to justify the infringement.

V Freedom of expression and the removal of school library books

The Education Act 1989 gives school boards of trustees complete discretion to control the management of schools. Would a Bill of Rights argument be available to a student if the Board of a state school were to direct the school librarian to remove school library books in purported exercise of this power? For the purposes of this example let us imagine that the Board directed the school librarian to remove books which portray New Zealand’s involvement in World War II in an unfavourable light.

On its face the Board’s action infringes the student’s right to receive information and opinions of any kind in any form protected by s 14 of the Bill of Rights.

A preliminary question is whether the School Board is exercising a public function under s 3(b) of the Bill of Rights. State schools, integrated schools, and private schools registered or provisionally registered under the Education Act 1989 and receiving public funding, would clearly fall within the broad wording of s 3.

Given that the Board has perpetrated a prima facie infringement, the next question is whether its actions are a reasonable limit on the right and are prescribed by law. The provision conferring the discretion says:

Except to the extent that any enactment or the general law of New Zealand provides otherwise, a school’s Board has complete discretion to control the management of the school as it thinks fit.

So the Board’s discretion is expressly circumscribed by other enactments, including the Bill of Rights. It follows that a Board may not infringe rights in the Bill of Rights.

However, a preliminary issue in this example is whether the removal of library books falls within the term “management” in s 75. If it does not, then the Board of Trustees simply has no power to order their removal, and it is not necessary for students to argue that the removal would infringe their rights.

“Management” is ambiguous in that it may extend to content-based decisions (such as the removal of library books based on subject matter) or it may mean only “administration”. The Act supplies conflicting clues as to which meaning is intended, though its overall

142 Education Act 1989, s 75.
143 Access to the reasons for the decision would be available under the Local Government Official Information and Meetings Act 1987.
144 Cf the narrower wording of s 32 of the Canadian Charter of Rights and Freedoms. Although the question of the application of the Bill of Rights can be disposed of relatively quickly, school boards of trustees are not simply proxies for the state. The Act contains a number of provisions outlining the relationship of boards to central government. Those provisions themselves provide guidance about the nature of the board’s discretion and are relevant to the later discussion.
145 Section 76 (which immediately follows) describes the principal’s role (not necessarily exclusively) in terms of the management of the school’s day-to-day administration. The section makes the exercise of the principal’s discretion subject to policy directions from the Board and makes an explicit link between management and administration. See also s 78(4) of the Education Act 1989.
tenor suggests that boards should have a large role in setting and attaining educational goals, and this could conceivably support the view that management includes making content-based decisions. In any event, s 75 makes it clear that whatever "management" means, the exercise of management discretion is not to offend rights affirmed in the Bill of Rights.

The question, therefore, is whether this particular decision amounts to an infringement — that is, in terms of s 5, did it unreasonably limit the students' rights affirmed in s 14?

The "prescribed by law" component of the s 5 test is easily satisfied. The Board's discretion in s 75 is expressly circumscribed by the need to observe other enactments. The Slaight Communications qualification — "but not so as to infringe the Charter" — is even clearer here. So the question becomes whether the library decision is reasonable. This assessment must, we think, be made in the context of the educational values sought to be secured by the Education Act. Having said this, s 75 and the Bill of Rights must also require that an individual's right should ultimately prevail. There seems no room for arguing, under s 4, that the Education Act legitimizes acts contrary to the Bill of Rights. Rather, s 75 would prohibit them.

1. Is the limit reasonable?

The first step according to Richardson J's approach in Noort is to consider the significance of the values underlying the Bill of Rights in the particular case. United States jurisprudence suggests that students do not shed their constitutional rights to freedom of speech at the schoolhouse gate. The Board could argue that the significance of the right to freedom of expression in this situation is reduced by the fact that schools are routinely engaged in the selective presentation of ideas. Section 161 of the Education Act secures academic freedom only for tertiary institutions. An attempt could therefore be made to

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146 The Act contemplates that the Board, in consultation with the Minister, should have a large role in determining the school's educational goals and a degree of independence in determining how those goals should be met. While the central government influences a school's substantive task via the national educational guidelines and exercises some control over the content of school charters, this guidance is in the broadest terms. The Act characterizes the charter as the Board's undertaking to ensure that the school is managed for those stated (broad) purposes and that the school achieves its stated aims. Moreover s 40(2)(i) of the Private Schools Conditional Integration Act 1975 contains a provision expressly restricting the right of a proprietor of an integrated school to question the curriculum or the teaching methods used in the school.

147 The administrative-curriculum dichotomy is in any event difficult to sustain. In the exercise of its administrative discretion the Board might embark upon a systematic programme either to withhold the funding of school library books or to attach conditions to the funding of library purchases. Whether a Board which restricts library acquisitions because of an ideological motivation is the constitutional equivalent of one which removes books espousing a certain viewpoint is a large question which we do no more than raise here. (See Board of Education v Picot 457 US 853 (1982). Justice Brennan for the majority restricted his conclusion that the Board had exceeded its constitutional limitations on its discretion as to the removal of school books. Presumably, elections of various boards over time would protect the diversity of the library shelves. The misuse of a discretion by the politically motivated use of purchasing power is discussed in R v Lewisham London Borough Council, ex parte Shell UK Ltd [1988] 1 All ER 938.)

148 See above, text following note 74.


150 Academic freedom is there described as including the freedom to state controversial or unpopular opinions.
characterize primary and secondary schools as having a more inculcative function. Moreover, the Act allows schools to follow their own particular philosophies. This is particularly so in the case of integrated schools, the special character of which continues to be protected after the enactment of the 1989 Act,\textsuperscript{151} and of designated character schools (which may be established under s 156 of that Act).

At the next stage, the Board could argue that there is a recognizable public interest in encouraging patriotism among schoolchildren. Indeed, the Education Act itself recognizes this in its criteria for registration of\textit{private} schools (the implication being that it is already a norm for state schools). The statutory scheme is to evaluate the "efficiency" of private schools by considering (among other things) whether the school provides "suitably for the inculcation in the minds of students of sentiments of patriotism and loyalty".\textsuperscript{152}

While that value has not been included in National Educational Guidelines applying to state schools, it has been legislatively recognized. Its significance could be enhanced by a showing that the Minister had approved such a goal in the Board's charter (or perhaps in any board's charter?).\textsuperscript{153}

However, it would be difficult for the Board to establish that its educational aims would be thwarted or put in jeopardy without removal of the books. Access to school library books is supplementary to discussions which take place in the classroom. Compulsory reading for the classroom is likely to be more influential in any event. A less restrictive alternative would be to ensure that the reading of the books is supervised and an opportunity is given to discuss them, or that only students of a certain age and ability to evaluate their content should have access to them. The relevance of the availability of the books elsewhere (at the public library for example) might also be considered.

These are not strong arguments. In our view, the likely result in such a case is that the decision will be held to be an unreasonable limit on the right to receive information and struck down. As noted above, s 4 of the Bill cannot operate to legitimate the decision because s 75 of the Education Act expressly makes the Board's discretion subject to the Bill of Rights.

\section*{A note on the applicability of the administrative law approach}

Some administrative lawyers might query the need to refer to the Bill of Rights at all in this situation. They might say that the question is simply whether the Board has the power to order the removal of library books, and that the answer lies in the interpretation of the term "management" in the context of the Education Act. This is a straightforward ultra vires issue, which is the bread-and-butter of administrative law practice, and does not require reference to the Bill of Rights.

\textsuperscript{151} Section 80, Private Schools Conditional Integration Act 1975 as amended by s 141, Education Act 1989.

\textsuperscript{152} Section 35A(c).

\textsuperscript{153} The nature of the ideological motivation becomes particularly significant at this point. Consider for example if the books were removed because the Board thought they were obscene in the hands of the age groups having access to the library. The Board could point to other legislation which restricts vulgar expression and makes an assessment of the vulnerability of the audience.
We disagree. Where the decision or action taken pursuant to a wide discretionary power allegedly infringes rights or freedoms affirmed in the Bill, the constitutional methodology is obligatory. This is what Parliament has required by enacting the Bill of Rights Act 1990. Our Bill, as a largely interpretive one, is directed precisely to interpretive issues that were previously the sole preserve of administrative law.

Of course, where the decision or action taken does not infringe rights the ordinary administrative law approach is not displaced by the Bill of Rights. Take, for example, a school board's decision to build a house for the principal on the school grounds. As no rights or freedoms in the Bill are conceivably infringed by this decision, the administrative lawyer can focus on the express and implied limitations on the Board's powers without the aid of the Bill or the methodology it mandates.

**Conclusion**

We have attempted to show through the examples given that the Bill of Rights superimposes a higher constitutional dimension on top of the traditional administrative law grounds of review of discretionary authority. Administrative law protects due process in decision-making and controls outcomes by means of statutory interpretation and the application of the unreasonableness doctrine. The ordinary statute status of our Bill focuses attention on its interpretive power. Whereas both the Bill of Rights and administrative law address the same interpretive question – what is the extent of the power? – Parliament has directed that the Bill of Rights be applied preemptively to interpretive issues involving the alleged infringement of rights under discretionary authority. The question under the Bill is whether the decision amounted to an unreasonable invasion of a right in the Bill. This requires assessment of administrative acts from the starting point of fundamental rights and freedoms, evaluated in the crucible of s 5. It is true that in the s 5 assessment there is scope for judicial deference to the decision-maker's own judgement as to the reasonableness of the infringement in a particular case. While it is possible that the degree of deference shown might simply mirror that already shown in the high threshold of administrative law unreasonableness, we submit that this ought not to be the case.

The focus of the inquiry under s 5 is the reasonableness of limits on rights and freedoms affirmed by Parliament as the minimum decencies to be afforded the citizenry by the state. Vague assertions of deference or of non-justiciability have now to survive the transparent particularisation and weighing which s 5 requires. This is a large advance on the often conclusory statements in administrative law cases that so-and-so has (or has not) acted *Wednesbury* unreasonably (or, as Cooke P, prefers, beyond the limits of reasons *sans* the geographical epithet). This combines what Cooke P said in *New Zealand Fishing Industry Association Inc v Minister of Agriculture & Fisheries*, above, note 17, 552 and *Hawkins v Minister of Justice* [1991] 2 NZLR 530, 534.

154 [1985] 1 AC 1054.

155 In his dissenting judgment in the English Court of Appeal, Browne-Wilkinson LJ began by recognizing the fundamental importance of the right to freedom of speech enjoyed by each individual in
a democratic society, and from that starting point went on to hold that such basic constitutional rights cannot be overridden by general discretionary words in an Act of Parliament. The House of Lords upheld the appeal, reaching the same result as Browne-Wilkinson LJ but for different reasons. Lord Roskill’s judgment, in particular, is characterized by assertions of unreasonableness and unfairness, and little else. The clarity, persuasiveness and overtly rights-respecting approach of Browne-Wilkinson LJ is noticeably absent.

This illustrates the most general “impact” of our Bill of Rights on the control of discretionary power. As we have said, the constitutional methodology prescribed by the Bill of Rights is logically prior to the application of administrative law doctrines controlling discretionary power. It must be engaged in first, whenever decisions or actions pursuant to discretionary authority allegedly infringe the rights and freedoms in the Bill.

Most, if not all, of the questions posed by the Bill of Rights are (or can be) raised also in administrative law, but they are not there “packaged” in quite the same way. Often in administrative law the “rights” issues are not visible at the abstract level of principle or are lost sight of amid the flexible application of doctrine in particular contexts. In contrast, the Bill of Rights methodology requires the same issues to be addressed in the same sequence in every case. Thus the Bill of Rights provides a loose-fitting methodological straitjacket which, while it can never completely tie the hands of the judges, does provide a significant restraint. Arguments (or as often assertions) about context, policy and political controversy must pass muster under the sequenced and visible Bill of Rights methodology. The Bill of Rights, then, requires administrative lawyers to “repackage” what they already know, and perhaps to rethink some of the old learning.

The second impact of the Bill of Rights is that it will in some cases invalidate exercises of discretionary power which would survive administrative law scrutiny. This is illustrated perhaps by some of the case studies in this paper, eg those relating to the nativity scene, denial of a visitor’s visa and the removal of school library books.
The Bill of Rights and the Legislative Process

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Introduction

When Parliament enacted the New Zealand Bill of Rights Act 1990 it included in the General Provisions of Part I of the Act a procedural requirement in relation to future legislation. Section 7 of the Act provides:

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.

The focus of this paper is to discuss the impact to date and likely future impact of a provision plainly intended to bring protection for the values incorporated in the Bill of Rights Act to bear on the process of Government that is concerned with promotion of new legislation.

The legislative history of s 7

The White Paper “A Bill of Rights for New Zealand”\(^1\) proposed enactment of a statute giving protection for certain rights and freedoms thought essential to the preservation of liberty in a democratic society and declaring the measure to be supreme law. In the words of the White Paper:\(^2\)

... it would be supreme law, and accordingly legislation enacted by Parliament which was inconsistent with it would be of no effect.

Thus it was contemplated that the Courts would have powers in the area of public law beyond the interpretation of the law and the review of the lawfulness of the administrative action taken pursuant to it. There would be a power of judicial review of legislation. The power of the Court would extend to enforcing against the agencies of state the guarantees provided for by the Bill of Rights. In short the Court’s power was to be akin to that of the Courts in Canada and of the Federal Courts in the United States of America and would extend to striking down legislation found to be inconsistent with the Bill of Rights.

However, as all here know, following its consideration of the White Paper, the Justice and Law Reform Committee recommended the introduction of a Bill of Rights in the form of an ordinary statute, not supreme law and not entrenched, and the measure that is now the New Zealand Bill of Rights Act 1990 was passed in that form.

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2 Ibid, para 3.11.
Had it been enacted as supreme law it was well recognized that one of the main ways the Bill of Rights would afford protection was through strong incentives on the process of government to ensure that proposals for new legislation did not infringe the protected rights and freedoms. The White Paper in fact contemplated that the Courts would strike down legislation rarely and only with good reason and added: 3

In fact one of the greatest values of a Bill of Rights is that it imposes restraints on politicians and administrators themselves in contemplating new laws and policies. The fact that the courts can strike down legislation operates as a disincentive to the Executive to promote legislation that is likely to be questioned under a Bill of Rights.

Where, despite the disincentive, legislation was enacted of a kind that was at risk of being held inconsistent with protected rights and freedoms, a further means of giving protection short of striking down legislation was provided for. Clause 23 provided:

**Interpretation of Legislation**

The interpretation of an enactment that will result in the meaning of the enactment being consistent with this Bill of Rights shall be preferred to any other interpretation.

Section 6 of the measure enacted later provides for this purposive approach. Obviously such a provision would reduce the need for the Courts to strike down legislation to those cases where rights and freedoms could not be accommodated by means of an interpretation sympathetic to giving that protection.

In recommending that the Bill of Rights proceed in the form of a statute that was neither supreme law nor entrenched the Justice and Law Reform Committee of Parliament was influenced by its perception of a "limited understanding of and support for the role of the judiciary" under such a Bill of Rights. New Zealand was seen as not ready for a Bill of Rights along the lines of the White Paper draft. The Select Committee was nevertheless plainly concerned to achieve some of the restraints on the power of the executive that such a measure would bring. The lack of knowledge of fundamental human rights issues and the value a Bill of Rights in another form could have in educative and moral terms to fill that gap were also factors prompting the measure now enacted.

A Bill of Rights, insofar as it provided strengthened protection for human rights in relation to administrative actions, did not need to be supreme law. The Courts could be expected to apply and develop the principles of such legislation in the context of executive action in the full manner the Courts regarded as appropriate. The Select Committee and the then Attorney-General recognized that valuable checks on the executive in this area would flow from a Bill of Rights Act even if it was not supreme law. The decision not to give the statute that status, however, would substantially lessen the incentives on the executive not to promote legislative measures infringing the protected rights. Three mechanisms were mentioned in the final report of the Justice and Law Reform Committee to meet this need. Of these the most significant was the suggestion that the Bill could require the Attorney-General to certify on introduction of a Bill if the Attorney-General considers the

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3 Ibid, para 6.6.
Bill is inconsistent with the protected rights. Section 7 of the Bill of Rights Act was the result.

The origin of the proposal appears to lie in s 3 of the Canadian Bill of Rights, which requires the Minister of Justice to scrutinize all bills and regulations against the rights in the Bill and to report any inconsistency to the House of Commons. The Canadian Bill of Rights was, unlike its successor, the Canadian Charter of Rights and Freedoms, not entrenched, and did not expressly provide for the courts to override other statutes: the context of the Minister's duty was thus analogous. The Canadian experience, it seems, was that the provision operated as a disincentive in the sense that a report was regarded as politically undesirable.

Two other specific suggestions were made by the Select Committee. The first was to reiterate the desirability of a provision directing the courts as to manner of interpretation along the lines of cl 23 of the White Paper. As a consequence s 6 was included in the New Zealand Bill of Rights Act 1990 providing:

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

The other suggestion was to amend Standing Orders of Parliament to establish a Standing Committee on Bill of Rights matters to which all bills might be referred for examination and report on inconsistencies with protected rights.4

The New Zealand Bill of Rights Act received the Royal Assent on 28 August 1990 and came into force on 25 September 1990.

Section 7 in operation

The thesis I offer is that s 7 is a provision intended to have an impact on the political and administrative process by which new legislation is promoted, and in particular to bring the values in the Bill of Rights Act to bear on that process. It is intended to apply some of the incentives in the original form of the Bill. My own view is that it is a provision the value of which is to be seen in that light rather than as one concerned fully to inform Parliament of the content of legislation.

On 8 April 1991 the Attorney-General issued a memorandum outlining the interim procedure to be followed in Government to enable effect to be given to s 7. When a Government Bill reaches drafting stage it is referred to the Department of Justice unless it is a Bill promoted by the Minister of Justice, in which case it is referred to the Crown Law Office to avoid conflicts of interest. Consideration is then given to whether the proposal appears to be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act. In practice, at the time when their proposals are put to the Cabinet Legislation Committee Ministers are required to state whether or not the proposed bill is in compliance with the Bill of Rights Act 1990. That is the point in the

4 No committee of the type suggested has been established.
process when an initial decision must be made, effectively by the Cabinet on the Committee's advice, as to whether the Bill, in draft, is approved for introduction to the House.

An issue arises as to the basis on which the Attorney-General must report under s 7. The obligation to report arises in the case of Government bills on the introduction of the bill and is "to 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". Part I of the Bill includes a number of general provisions in relation to the rights specified in Part II. They provide broadly that other enactments are not affected by the passing of the Bill of Rights Act (s 4), that rights and freedoms may be subject to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society (s 5) and the direction already mentioned to interpret other legislation consistently with the Bill of Rights where the other Act can be given a meaning that is consistent (s 6). Part II of course specifies the protected civil and political rights.

The issue is the basis on which the Attorney-General should assess whether provisions in the proposed legislation appear inconsistent with the rights and freedoms contained in the Bill of Rights. Is that to be done solely by reference to the words expressing the rights in Part II of the New Zealand Bill of Rights Act? Or should the Attorney-General interpret those words in the context of s 5, thus allowing "reasonable limits" on the rights before reaching the conclusion that inconsistency is established?

Present practice in government is for the Attorney-General to follow the latter course, whereby inconsistency is measured against the rights as expressed in Part II but subject to qualifications in Part I including s 5. Effectively this means that if the Attorney-General is of the view that a Bill to be introduced contains provisions prima facie inconsistent with protected rights, but in a way that the prima facie inconsistency is a justified limitation on the right in a free and democratic society, the Attorney-General is not required to report. On the alternative view he or she would be required to report the inconsistency, although presumably able to add an explanation by reference to section 5 to the effect that the legislation proposed was not in breach of the Act.

The recent Court of Appeal decision in Ministry of Transport v Noort; Police v Curran contains passages in the judgments of Cooke P and Richardson J relevant to the issue. Cooke P said:

Section 5, as to justifiable limitations on the rights and freedoms contained in the Bill of Rights, is subject to s.4. So, if an enactment is inconsistent with any provision of the Bill of Rights, that enactment prevails and the Courts are not concerned with s.5. The Courts may be concerned with s.5 in common law issues, an aspect which need not be explored in the present case. The Attorney-General is likely to be concerned with s.5 in performing his function under s. 7. If he considers that any provision of a Bill appears to be inconsistent with any of the rights and freedoms affirmed in the Bill of Rights, in drawing it to the attention of the House he may well wish to draw attention also to s.5 and to the question whether the Bill,

5 (1992) 8 CRNZ 114
6 Ibid, p 19.
although apparently inconsistent with one or more of the rights and freedoms, nonetheless prescribes a reasonable limit demonstrably justifiable in a free and democratic society. The present Attorney-General, the Hon. Paul East, took precisely that course in speaking to the Transport Safety Bill on 17 December 1991 ....

These observations suggest s 7 should be addressed by reference to the words creating the rights alone. In the Parliamentary speech cited the Attorney-General was reporting on a Bill permitting random breath-testing, whereby enforcement officers could require a driver to take a breath test in the absence of any suspicion that he or she could consume alcohol. The Attorney-General, the Hon Paul East, said:

Pursuant to s 7 of the New Zealand Bill of Rights Act 1990 I bring to the attention of the House clause 17 of the Transport Safety Bill. The advice that I have received on this matter, and the view that I have formed, is that clause 17 appears to be inconsistent with the rights and freedoms contained in section 21 and section 22 of the New Zealand Bill of Rights Act, notwithstanding the justified limitation provisions of section 5 of the New Zealand Bill of Rights Act. Sections 21 and 22 respectively refer to the right to be secure from unreasonable search or seizure and the right not be arrested or detained arbitrarily. Given the importance of the matters raised by my report, I want to explain why clause 17 infringes the New Zealand Bill of Rights Act. (Emphasis added.)

I shall return to the subject of random breath testing and the Attorney-General’s speech later, but note that the course the Attorney-General followed, referred to by the learned President, plainly addressed inconsistency having applied section 5.

In his judgment in Noort and Curran Richardson J appears to see interpretation of the protected rights provision as necessarily taking place in the context of the general provisions of which s 7 is one. He said:

To sum up at this point, the Bill of Rights Act is a legislative commitment to the protection and promise of those basic human rights and freedoms set out in the Bill. Those rights are not absolute and that commitment does not preclude Parliament from abridging or even excluding their application. Sections 5 and 6 reflect a strong legislative intention to protect the rights and freedoms contained in the Bill of Rights. In determining under s4 whether there is an inconsistency between the provisions of another enactment and a provision of the Bill of Rights, it is proper to have regard to the statutory objectives of protecting and promoting human rights in New Zealand, and New Zealand’s commitment to international human rights standards, and also to the limiting provision of s5 and s6. In the end, and in the absence of an express statutory exclusion of a Bill of Rights provision, it must be a question of determining under s4 whether there is any room for reading along with other enactment a Bill of Rights provision whether absolute or modified or limited pursuant to ss5 and 6.

The provisions that His Honour is discussing are expressed in the Act to be “General Provisions” because they are of general application. While his Honour does not expressly

7 521 NZ PD 6376-6378.
8 Ibid, p 6376.
9 Ministry of Transport v Noort; Police v Curran, above, note 5, pp.135-6.
refer to s 7 it is of like character and I suggest is appropriately given like application in
determining the scope of any protected rights and freedoms under Part II. To require the
Attorney-General to report on apparent inconsistency without having regard to the area
of justified limits under s 5 is to give the right an absolute status for those purposes.
However, the rights and freedoms are not intended to be absolute. There are limits on
them. Indeed, at times, rights would be in conflict with each other without allowing for
limitations.\(^{10}\) It is suggested that as a matter of interpretation s 7 requires the Attorney-
General to exercise his reporting function by reference to the language expressing the
rights taking into account s 5 and indeed the other provisions of general application to the
Act.

Whether or not this approach is correct my view is that the course followed by the
Attorney-General is sound in terms of achieving policy goals in terms of incentives on
Government to give weight to the protected rights in legislative proposals. It thus reflects
the apparent intent of s 7. The Rt Hon Geoffrey Palmer, Prime Minister, saw s 7 as a
measure that “will ensure that pressure to get things right is placed on those who are
involved in the legislative process .... If for some reason a Government should wish to
introduce a bill that is inconsistent with the Bill of Rights the House would be given notice
of that inconsistency through the Attorney-General’s report.”\(^{11}\)

If the need for an Attorney-General’s report is premised on whether the proposed
legislation is inconsistent with rights and freedoms in the context of the Act as a whole,
including whether the justified limitation clause has application, that will be the focal
point for politicians and administrators involved in promoting legislation. There will
generally be a strong incentive on the Minister introducing the legislation, which will pass
down through governmental process to his or her officials, to ensure the measure does not
include provisions inconsistent with the Bill of Rights Act. There will be in the process
a desirable incentive to avoid an Attorney-General’s report because the very act of
reporting will denote a criticism of the measure.

If, however, the Attorney-General must report whenever a right is limited without regard
to whether or not that is a justified limitation in terms of s 5, it seems likely a pattern will
develop whereby many reports are made – including explanations that s 5 excuses
inconsistency with the Bill. Inevitably there will be little or no incentive on the executive
to avoid any report at all. My view is that unless proceeding with proposed legislation that
will be subject to an Attorney-General’s report comes to be seen as warranted only in
extraordinary political circumstances there is a danger that the Bill of Rights Act will fall
into disrepute. Rishworth in his comment on Noort appears to be in accord with my
preference.\(^{12}\) Other commentators see value in leaving the legislature the question of
justifiability of limits.\(^{13}\) My concern is that if a report comes to be seen as anything other
than a strong impediment in the legislative process a valuable restraint on the executive’s
powers to promote legislation will disappear.

\(^{10}\) See the discussion in the White Paper, paras 10.24-10.26.
\(^{11}\) Hansard, 14 August 1990, p.3450.
\(^{13}\) Eg, Fitzgerald: “Section 7 of the New Zealand Bill of Rights Act 1990” (1992) 22 VUWLR 135, 139.
I instance my point with some examples. In late 1990 the Minister of Justice was considering the form of appropriate legislation introducing new restrictions on the grant of bail. The particular proposal in its original form would have required the courts to refuse bail to any person charged with a “specified offence” who had two or more previous convictions for such an offence. “Specified offences” are certain violent crimes. There was to be an exception where there were special circumstances persuading the Court that bail should be granted. The measure being considered would have effectively removed the element of judicial discretion in granting bail, confining it to cases of “special circumstances”. At issue was whether such a measure would infringe section 24(b) of the Bill of Rights Act, providing:

Everyone who is charged with an offence (a) ....
(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention.

The advice given the Minister was that the fact that an applicant for bail had previous convictions could not without more constitute “just cause for continued detention” and refusal of the application. Nor could it be said to be a justified limitation on the s 24(b) right. The restriction on the right was a substantial one, especially given the very strong curtailment of the courts’ discretion. Accordingly the proposal would require a report by the Attorney-General if introduced in that form.

The Minister of Justice was not prepared to introduce a measure requiring such a report. As is well known the measure ultimately enacted in 1991 (now in s 318 of the Crimes Act) provides that no person charged with and previously convicted for a “specified offence” is to be granted bail unless the person satisfies the judge on the balance of probabilities that bail should be granted and that no offences involving violence or danger to safety of any person will be committed. The provision in other words retained a judicial discretion on an application for bail albeit subject to a reverse onus provision. The Attorney-General was advised the amended proposal was consistent with the right concerned and accordingly no report was required. The case is an example of how s 7 of the Bill of Rights Act brings to bear incentives on the executive to amend proposals for legislation so as to comply with the Bill of Rights Act.

This example, however, highlights a potential weakness in the process. Section 7 applies to what is done at the time of introduction of the Bill. That may bear little relation to the Bill as it emerges in final form. As introduced the Bail Amendment Bill provided differently from both the original and the final form proposal. It would be a matter of concern if a practice emerged whereby changes relevant to the Bill of Rights Act protection were to be made at stages subsequent to introduction. To date Parliament has not established in the Select Committee structure the type of continuing review mechanism that the Justice and Law Reform Committee had suggested in its final report in 1990.

Two other instances during 1991 show that legislative proposals can die in circumstances where it seems likely that the Bill of Rights Act has contributed to their demise. The Napier City Council (Control of Skateboards) Empowering Bill provided for the Council to make bylaws controlling or prohibiting use of skateboards in public places that might include the right to seize or confiscate any skateboard. Difficulties, depending on the
terms of bylaws passed, were pointed out in advice given to the Attorney-General. They related to s 21 of the Bill of Rights Act in relation to unreasonable seizure of property. The Select Committee recommended the Bill not proceed for reasons that included non-compliance.14

The Kumeu District Agricultural and Horticultural Society Bill reconstituted that Society. Clause 8 provided that those who contravened or failed to comply with bylaws on conviction could be liable to a fine “and shall also be civilly liable for all damage caused by the contravention or non-compliance”. At issue was first whether the provision was in breach of the right under s 27(1) of the Bill of Rights Act to observance of natural justice and secondly, if so, whether this was a justified limitation on that right. The advice given was that the right was infringed without there being justification for the limitation. The offending provision was omitted by the Select Committee.

However, perhaps the most interesting example of the testing of the Bill of Rights in the legislative process, and one as yet not concluded, is the Transport Safety Bill previously mentioned. There the legislative proposal is to authorize random breathalysing of motorists. The Attorney-General was advised that such a measure was contrary to ss 21 and 22 of the Bill of Rights Act:

21. Unreasonable Search and Seizure
Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the Person
Everyone has the right not to be arbitrarily arrested or detained.

In this case, however, introduction proceeded vigorously defended by the responsible Minister. Inconsistency with the Bill of Rights did not prove to be an insurmountable impediment. However, of importance is the speech of the Attorney-General in reporting on the inconsistency pursuant to s 7. Mr East noted that current law permits random stopping but allows a breath test only on a basis of reasonable cause. Canadian authority indicated a demand for a breath sample was a “search” and taking it a “seizure” under the equivalent of s 21.15 The Attorney-General continued:16

Accordingly, in terms of the New Zealand Bill of Rights Act, the question is whether that search and seizure is a reasonable one. In determining the reasonableness of the search and seizure it is important to note that road safety is a high priority. Its achievement may necessitate measures that, in other contexts, would be considered unjustified. However, the advice that I have is that the standard of reasonableness, in terms of search and seizure, must require that there be a clear link between the road safety objective and the proposed provision in clause 17. The evidence available to date on that link, in my view, is inconclusive. Rather, it tends to support the view that the observational method, that is, observing what the driver looks like and whether he or she has been drinking – coupled with the effect of random stopping, which is, in effect, our present approach, is more effective at detection and equally effective at deterring the intoxicated motorist. Other factors

16 521 NZPD 6367.
such as the resources also appear relevant to the success rate in this regard. In essence, the evidence suggests that the current law is likely to be an equally effective but less intrusive means of reducing drunken driving. Consistency with s 21 of the New Zealand Bill of Rights Act would require that the least intrusive method be adopted.

Mr East then referred to s 22 and reported that a provision that gives an officer power to breath-test at his or her discretion without any criteria express or implied to govern the exercise of that discretion is arbitrary and cl 17 accordingly breached s 22 of the Bill of Rights Act. He then said:17

The final question is whether it is, none the less, a justified limitation in terms of s 5 of the New Zealand Bill of Rights Act. Section 5 provides that the rights in the Act are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The approach taken in determining whether the provision is a justified limit again requires some rational connection between the road safety objective and the random breath-testing proposal. The principal aim of the proposal is deterrence. The difficulty, in terms of the New Zealand Bill of Rights Act, is that the available evidence is not convincing on the deterrent effect of random breath-testing. Again, the present law appears to achieve the same result but in the least intrusive way. Accordingly, clause 17 appears to be inconsistent with the New Zealand Bill of Rights Act and is not saved by s 5 of that Act.

Finally the Attorney-General concluded:18

Personally, while I am very aware of the need for effective enforcement of our drinking/driving laws, I am not persuaded that the evidence of the benefits that will flow from random breath-testing is such that a departure from the New Zealand Bill of Rights Act is justified. The available evidence suggests rather that the current ability to stop randomly and breath-test on suspicion is likely to be as effective, while at the same time, complying with the New Zealand Bill of Rights Act. However, others take a different view and consider that the problem of death and injury on the road has reached such a proportion that fresh measures have to be tried.

The Attorney-General has, I suggest, reported in terms that fully reflect the element of independence in his office. That the measure was introduced and referred to a Select Committee (it has not at the present time finally been enacted) reflects the strong concern of Ministers to find means of preventing and to be seen to be promoting prevention of road accidents. While it is still an early period in the application of the Act it may be the case that a matter must assume a high level of political significance before ministers will be willing to promote legislation in the face of an Attorney-General’s report.

If this turns out to be the case s 7 will be seen to have an important place as a restraint on the powers of the executive in its promotion of legislation. While many would never to see a Bill introduced which was the subject of a report that in my view is unrealistic given the rejection of a Bill of Rights that is supreme law. The Act can still, however, operate as a disincentive if its values must be outweighed by heavy political factors before an adverse report is accepted by the Government. As long as that happens

17 Ibid, pp 6367-6368.
18 Ibid, p 6368.
s 7 will be a provision of value as a curb on an aspect of executive power that has previously lacked restraint.

**Judicial review of the s 7 power?**

The decision of the Attorney-General on whether or not to report under s 7 is one based on the Attorney-General’s opinion on a question of law – whether any provisions in the Bill appear inconsistent with the protected rights and freedoms of the Act. On such a matter opinions can of course vary. That raises the issue of whether the Attorney-General’s report or failure to report is susceptible to judicial review for error of law.

It is perhaps unsurprising that a Solicitor-General takes an orthodox view on this issue. My starting point is art 9(1) of the Bill of Rights 1688:

> The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament.

My view is that the functions of the Attorney-General under s 7 of the New Zealand Bill of Rights Act 1990 constitute a proceeding in Parliament. To seek judicial review of the exercise or non-exercise of the functions, even if all that was sought was a declaration, would, I suggest, be to question them.

This approach is supported by the line of cases which emphasizes the reticence of the courts when asked to interfere with the processes by which legislation is prepared, introduced and passed. Quite apart from their constitutional obligation the courts have consistently refused to inquire into the manner in which a Bill was initiated when resulting legislation is before them.

In *Pickin v British Railways Board* it was alleged that the Board had misled Parliament in obtaining the passing of the British Railways Act 1968 and argued that Act was therefore ineffective to deprive Mr Pickin of land. The House of Lords, however, was unanimous that the Court could not go behind the Act to examine proceedings in Parliament in order to demonstrate that the Board, by misleading Parliament, had caused the plaintiff loss.

Lord Reid said:

> The function of the Court is to construe and apply the enactments of Parliament. The Court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. Any attempt to prove they were misled by fraud or otherwise would necessarily involve an inquiry into the manner in which they had performed their functions in dealing with the Bill which became the British Railways Act 1968.

As Robertson J has noted in a recent New Zealand decision applying *Pickin* outside of the

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19 "Parliamentary proceedings cover everything that is directly and formally connected with an item of business in the House or in a committee": McGee, *Parliamentary Practice in New Zealand* p.427.
21 Ibid, p 787G; see also Lord Simon of Glaisdale, pp 788-789.
Bill of Rights Act 1990 context, "(the) position is not restricted to the end of the law making process, but applies to steps necessarily preliminary to it".\(^{22}\)

If such an approach were followed by a New Zealand Court in any application for judicial review of action or inaction under s 7, in my opinion, that would accord not only with the legislative history of the New Zealand Bill of Rights Act 1990 but also its prospects for a future beneficial influence on our legislative process. The Act is plainly not intended to disturb the sovereignty of Parliament. Its place as an incentive for those involved in the process of promoting new legislation is still to be ascertained. However, one can even now, I suggest, see the prospects of a convention emerging which will ensure that the executive, in this aspect of its functions, comes to give full weight to the values the Bill of Rights Act was passed to protect. Judicial intervention, I suggest, would not promote the incentives concerned and may rather have negative consequences. Application of constitutional orthodoxy in this area is more likely to make this Act a positive force in the content of legislation.
