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

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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:1

... 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 Rights2 stemmed from concern over the transfer of political power from Parliament to the judiciary.3 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”4, 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. 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. Apart from the case-law generated by ss 7 and 15 of the Charter, 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. 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, nor does this affirmation abrogate or restrict any right or freedom not provided for in the Bill. 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.

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. 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". 13 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. 14 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. 15 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: 16

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 preeminently 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. 17 This increases further the discretion that the judges have always exercised "to expand or contract the methods of controlling the administration" in particular controversies. 18 Furthermore, according to some commentators, the courts are increasingly willing to trespass upon the merits of official decisions, 19 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.


\(^{23}\) [1991] 2 WLR 588 (HL).

\(^{24}\) Ibid, pp 591-592, per Lord Bridge.

\(^{25}\) Ibid, p 592.
far beyond resolution of an ambiguity" and effectively incorporate the Convention into domestic administrative law. Lord Bridge could not accept this:

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 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”.

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. In this case and one other the House of Lords has recognized the need for close scrutiny of decisions affecting fundamental human rights. 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. 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. While primary judgement as to whether the particular public interest justified the particular restriction

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.\footnote{Ibid, P 593.}

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”,\footnote{Ibid, P 595.} 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.\footnote{Idem.}

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.\footnote{Ibid, P 593 (Lord Bridge), p 595 (Lord Templeman) and pp 602-603 (Lord Ackner).}

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.\footnote{See also \textit{Ashby v Minister of Immigration} [1981] 1 NZLR 221.} 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
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.\(^\text{41}\) The power concerned was that in s 21(3) of the Water and Soil Conservation Act 1967.\(^\text{42}\) 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.\(^\text{43}\) Such interests included conservation and the needs of industry.\(^\text{44}\) The Huakina case in 1987 established that Maori cultural values were also a mandatory relevant interest.\(^\text{45}\) 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”\(^\text{46}\) 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).
The New Zealand Bill of Rights Act 1990

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*\(^1\) 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:\(^2\)

> 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:\(^3\)

> 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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\(^1\) (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.)

\(^2\) Ibid, p 442.

\(^3\) Ibid, p 444.
discretion at issue in that case was ambiguous. It was, said Lord Ackner, “not open to two or more different constructions”.54 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.55

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.56

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.57 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.58 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. 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. 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. 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. 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.
4 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 1.68

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.69 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 Gunlet 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.
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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

70 Le Dain J in R v Therens (1985) 18 DLR (4th) 655 adopted in Noort, above, note 50, p 126, per Cooke P, and pp 140-141, per Richardson J.

71 This argument was fuelled by Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (1983) 34 CR (3d) 73 (Ont Div Ct); aff'd (1984) 38 CR (3d) 271 (Ont CA), wherein it was held by the Divisional Court that a censorship board's authority was not sufficiently defined and delimited by the legislation and that the limits on free speech could not, therefore, be said to be "prescribed by law".

72 Above, note 51, p 446.
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.73

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.74 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 Chaulk75):

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).  

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

7 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.

82 As the United States District Court (Alaska) said in Inupiat, above, note 69, p 189: "Carried to it 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.

8 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.
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”. Moreover, in cases where restrictions on movement within states have an economic justification the Committee on Human Rights has tiptoed very carefully.

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. 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. 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.

As a matter of administrative law such a decision is likely unimpeachable. The courts are very reluctant to intervene in immigration matters, 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 Abourezk 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. 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, and that is an area where the courts often defer quiescently to the executive. 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. 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. 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, 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.

111 See Chandra v Minister of Immigration [1978] 2 NZLR 559.
112 Ashby v Minister of Immigration, above, note 38, 226.
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 to believe was taken to include freedom 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.

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.\footnote{Local Government Act 1974, s 37L(4).} As private companies undoubtedly have the common law power as owners to erect such displays on their land,\footnote{Subject, of course, to land use restrictions.} so does the public authority; as long as doing so is not contrary to the Local Government Act\footnote{Local Government Act 1974, s 37L(4).} or an unfair or unreasonable exercise of the public power.\footnote{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.}

The Council also has the powers expressly given by the Local Government Act, other Public Acts and any applicable Local Acts.\footnote{Local Government Act 1974, s 37T(1).} 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”.\footnote{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”.} 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”.\footnote{Ibid, s 601(1).} Also, under Part XVI A, 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.\footnote{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”.}

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
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.  

That conclusion, of course, is similar to the conclusion reached by the Supreme Court of Canada in *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 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 *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 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.

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

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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, 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 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”.

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?).

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.

2 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.

151 Section 80, Private Schools Conditional Integration Act 1975 as amended by s 141, Education Act 1989.
152 Section 35A(c).
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).154 Nowhere is this difference of approach more clearly seen than in the well-known case of *Wheeler v Leicester City Council*.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

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154 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.

155 [1985] 1 AC 1054.
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.