The Supreme Court and the Bill of Rights

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Introduction and overview

The Supreme Court of New Zealand was established to patriate – to “bring home” – the state’s ultimate judicial power. That power had been located in the Judicial Committee of the Privy Council in London, but by 2004 that was making little sense. One reason was the Law Lords’ unwillingness to decide a New Zealand case involving freedom of political expression, saying that local knowledge was required.²

As the embryonic Supreme Court of New Zealand was planned, it was axiomatic that it would be a “constitutional court”. We knew well enough what that meant, even though New Zealand has no formal written constitution that permits judicial review of legislation. The new Court would have a discretionary jurisdiction, able to select cases based on their “general or public importance”.³ That would assuredly include cases of constitutional import – affecting the rights of citizens, the powers of government, and the significance of the Treaty of Waitangi – alongside many other important questions for the community. That a country could have a “constitutional court” in this sense, even with a so-called unwritten constitution, ought not surprise. The only thing “off the table”, as it were, was the power to declare a parliamentary enactment invalid on account of inconsistency with constitutional rights.

That aside, much that is “constitutional” manifests itself in other ways. It can arise when human rights are engaged in cases about statutory interpretation, administrative law, criminal law and the lawfulness of executive action. The thesis of this paper is that the work of the New Zealand Supreme Court in these fields has a considerable amount in common with that of constitutional courts elsewhere, operating within their own constitutional orders. This, I shall argue, is to be expected, given some basic structural features of human rights adjudication wherever it arises.

My focus in this paper is on the New Zealand Bill of Rights Act 1990. I might have looked, perhaps, at human rights more widely – at immigration cases⁴ and its one discrimination case (arising in the employment law context).⁵ But my concern is not

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² Lange v Atkinson [2000] 1 NZLR 257 (UKPC). Specifically, the Judicial Committee said (p 262 line 2): “For some years Their Lordships’ Board has recognised the limitations on its role as an appellate tribunal in cases where the decision depends upon considerations of local public policy. The present case is a prime instance of such a case.”

³ Supreme Court Act 2003, s 13(2).

⁴ Ye and Ding

⁵ McAlister v Air New Zealand Ltd
so much to chart the substance of the Court’s human rights case law as to evaluate the Court’s role in translating the “vague but meaningful generalities” of the Bill of Rights into substantive effect. The question is how, in the land of the “unwritten constitution”, our own “constitutional court” has dealt with our “quasi-constitutional” bill of rights – one that combines in one document the subject matter of higher law and the status of ordinary law.

My conception of a “constitutional court”, for this inquiry, is drawn from the record of courts in those countries that share, to varying degrees, our own colonial common law heritage – that is, Australia, Canada, South Africa, the United Kingdom, and the United States of America. Each reckons with rights – some written and some implied – in their constitutions or other human rights laws.

I Reckoning with the New Zealand Bill of Rights

The New Zealand Bill of Rights Act 1990 was 14 years old when the Supreme Court commenced. The Court therefore inherited a ready-made Bill of Rights jurisprudence from the Court of Appeal – indeed, much of it was the work of its foundation members who had served in that Court. Continuity could therefore be expected, and is essentially what we see. But, New Zealand being a small country, that Bill of Rights jurisprudence was rather limited – a small number of cases on a small number of points. And in some respects it was ambiguous and uncertain. It assists to begin by explaining why that was so, the better to see whether and how the Supreme Court has improved things.

The curious pre-history of the Bill of Rights

The root of the problem was not the fault of any court. It was the lack of a clear vision of what the New Zealand Bill of Rights was intended to do. Launched in 1990 in a climate of uncertainty and disinterest, its principal feature was what it wasn’t – the Bill of Rights with teeth that its architect, Sir Geoffrey Palmer, had sought. It came with no instruction manual, no programme of professional or judicial training, little academic analysis, no committee reports or commentary. Was it to be taken seriously? And to what end?

The initial proposal in 1984 had been a supreme bill of rights, requiring judicial review and power to invalidate inconsistent enactments. A White Paper of April 1985 contained the consultation draft, plus extensive commentary. The Bill of Rights text was modelled on the Canadian Charter of Rights and Freedoms, then very recent, as well as the International Covenant on Civil and Political Rights. (In fact the ICCPR was a common ancestor, but the Canadians made more departures from its wording, some of which we also adopted – notably the general “reasonable limits” section that became s 5). The White Paper commentary referred also to United States experience under its Bill of Rights, though often with the intent of distancing itself from that experience.

During the consultation process throughout 1986 and 1987, it became clear there was little support for a constitutional Bill of Rights and that it would not be enacted in that form. But the Labour Government did not abandon the idea of a Bill of Rights completely. Over the votes of the National Party in opposition, it enacted the New
Zealand Bill of Rights Act 1990 as an ordinary statute – containing the same set of rights as the White Paper but adopting a new model. It was to be a Parliamentary Bill of Rights – binding the judicial and executive branches of government, but not constraining Parliament itself from legislating inconsistently.

The operating details of the new model are now well-known. Section 6 requires courts (and, indeed, all who apply enactments) to prefer rights-consistent meanings of enactments where such “can be given”. Section 5 stipulates there should be only “reasonable limits” on rights, such as are “demonstrably justified in a free and democratic society”. Then there is s 4, added at the last minute and following Select Committee deliberations. It provides that courts are not to hold enactments “invalid” or “ineffective” by reason only of inconsistency with the Bill of Rights (and, importantly, s 4 prevails over s 5). That new section dealt with the concern, raised in submissions to the Select Committee, that a parliamentary bill of rights allowing only reasonable limits on rights might be taken by courts to prevail over any enactment, past or future, imposing unreasonable limits. That this was not a fanciful possibility can now be seen in subsequent developments overseas and in New Zealand: the rapid rise of the “principle of legality” and “clear statement rule”, the idea of “quasi-constitutional” statutes being immune from implied repeal, and the case of R v Pora.

Section 4 was, therefore, a conflict-resolving rule – probably more consequential than was realised at the time. It ensured that in cases of conflict with other enactments it was the Bill of Rights that gave way. On one view, it was a straightforward consequence of the decision not to entrench the bill of rights as supreme law. Yet, on a closer look, the combined effect of sections 4, 5 and 6 was a little more complex.

Recall that, so far as the text of the rights and freedoms was concerned, the new Bill of Rights retained the language of the White Paper draft. It affirmed a set of things that a state should not do: not deprive people of their life, not treat them cruelly or disproportionately, nor abridge their freedom of expression, and so on. It was “constitutional talk”.

6 There was talk of the Canadian Bill of Rights being a model, but in fact that model differed significantly. The CBOR created a significant “manner and form” rule, whereby it prevailed over any inconsistent enactment save for those expressed to operate “notwithstanding” it.


8 In the United Kingdom, Thoburn v Sunderland District Council [2002] XXXX; in Canada the line of cases beginning with Insurance Corp of BC v Heerspink [1982] 2 SCR 145.

9 [2001] 2 NZLR 37 (NZCA).
Yet, in contrast, s 4 explicitly required courts to dutifully apply even those enactments that breached these rights. So, as well as being a catalogue of things that a state must not do, the Bill of Rights was an affirmation that it may well do them.

The enormity of that idea, in a Bill of Rights no less, might seem breathtaking to outsiders, especially from the North American tradition. And for those who, like Lord Cooke of Thorndon, entertained the idea that the common law itself contains rights so “deep” as to limit the power of Parliaments, the assertion in s 4 might even be ineffective. True, s 4 appears to preserve the possibility of there being reasons, other than inconsistency with the Bill of Rights, why an enactment might be invalid. And perhaps inconsistency with deep common law rights, should they be held to exist, is what the drafters had in mind. But recourse to that sort of reasoning implied that the “torture” the Bill of Rights prohibits is somehow different from the “torture” that deep common law prohibits. Given that the Bill of Rights, by s 2, affirms existing rights, this does not seem plausible. Really, there is one set of rights, and the Bill of Rights affirms them (and, by s 28, recognises there may also be other rights not mentioned).

All that said, the apparent enormity of s 4 could be papered over or explained. That is what began to happen in early Bill of Rights cases, in commentary, and in practice. There was no difficulty in applying the Bill of Rights to state actions, to police and customs officers and the like. The difficulty arose when it was legislation that was said to infringe rights. So far as courts were concerned, one obvious approach was to eschew any “judicial review” at all in such cases – that is, make no inquiry into whether apparently legislated limits on rights were justified as “reasonable”. After all, the combined effect of sections 4 and 5 might suggest it made no practical difference to the outcome of a case. Reasonable limits were permitted by s 5; unreasonable ones applied by dint of s 4. Need a court even enter into a “reasonableness” inquiry, balancing legislative goals against the impact on individual rights? That type of inquiry belonged to the realm of constitutional courts enforcing constitutional bills of rights. That was the road not taken. Much better, then, for a court to begin with the impugned enactment, determine its meaning and apply it, whether it was reasonable or not. There might be room for the idea of rights in resolving ambiguities, as there always had been. It was business as usual, in other words.

A more theoretical justification for s 4 was available too. Perhaps it did not so much assert Parliament’s power to override the Bill of Rights as provide – more modestly – that it was Parliament’s own vision of rights, and the reasonableness of limitations in particular statutes, that would prevail in cases of conflict. Section 4 demoted a court’s vision of rights to that of Parliament, which is answerable to the people for its performance and not to courts. That is the Diceyan orthodoxy. It is arguably implicit in the Bill of Rights.

Two bills of rights narratives?

There was, therefore, some mystery and ambiguity surrounding the Bill of Rights. On the one hand there could be no mistaking its constitutional subject matter. On the other, it was, in the pantheon of bills of rights, a uniquely hobbled one. Even so, from 1990 onwards the idea of human rights was beginning to enjoy a renaissance around the world as the long years of the Cold War and South African apartheid were ending. There was a new sense of promise in the liberating power of human rights. And the
the proposition that the words in our own Bill of Rights somehow meant less than the very same words elsewhere seemed deeply unattractive.

There came to be, as I see it, two competing narratives, or explanations, of the Bill of Rights. I call them the “constitutional” and the “parliamentary”. The constitutional narrative is simplest to describe. It flows from the White Paper proposal and the substantive enactment of the rights in the Bill of Rights. As with constitutional bills of rights elsewhere, the Bill of Rights set a baseline standard below which the state should never fall – not in its actions, nor in its policies, nor its laws. There should be no arbitrary detentions, no unreasonable searches, no unjustifiable infringements of freedom of religion, and so on. It functioned in the manner of bills of rights around the world, but with one significant adjustment. From the suite of potential remedies for its breach, one must subtract judicial power to rule inconsistent enactments invalid (though, significantly, courts can and must decide whether they are inconsistent). On that basis the Bill of Rights remains a standard-setting baseline for state conduct. This narrative explains many things about the document itself and the way things have developed:

- the Attorney-General’s “rights-vetting” process under s 7 (this plainly assumes a standard that a parliamentary bill either meets or does not)
- the workings of ss 4 and 6 – which similarly assume something called “consistency” with rights, discernible by courts, who are directed to prefer consistent meanings over inconsistent ones (s 6) but instructed to apply inconsistent ones if that cannot be done (s 4)
- the existence of s 5, recognising the truism that (at least some) rights are not absolute, and may be limited so long as the justificatory standard of “reasonable limits” is met (thereby setting the threshold of what counts as “consistent” or “inconsistent”)
- the impact of the Bill of Rights on the common law (that it must be reformulated so as to meet the Bill of Rights standard, as occurred in Lange v Atkinson)\(^\text{10}\)
- the run-of-the-mill impact of the Bill of Rights in rendering executive and police action unlawful, for failing to meet the standard that it sets
- the fact that our Bill of Rights served as the inspiration for the United Kingdom Human Rights Act 1998, built around the idea of courts being able to declare the “incompatibility” of enactments, albeit that they must still apply them.

The “parliamentary” narrative, in contrast, centres around s 4 and the decision that it reflects – that the Bill of Rights not be supreme law, and that there be no judicial review. On this narrative, the salient motifs were “business as usual” and “no great change”. One can point to these features of the Bill of Rights to support that conception:

\(^{10}\) [200] 3 NZLR 385 (NZCA)
section 2 essentially affirms the common law rights that we knew we had already.\[11\]

section 6 affirms, arguably unnecessarily, the significance that these rights had long had in statutory interpretation cases – resolving instances of ambiguity, avoiding doubtful penalisation, and so on.

rights so conceived had never been seen as setting baselines for state conduct; they functioned more as aspirations that guided courts in cases of doubt.

there was no mandate in the Bill of Rights for “judicial review” of legislation; indeed, s 4 embodied the citizenry’s choice against it.

cases where invoking a right failed to dislodge a statutory meaning did not imply that the impugned statute thereby fell below a baseline standard; only that the right (as a desirable aspiration) could not be accommodated within it.

because s 4 positively anticipates inconsistent enactments (ensuring they prevail) there is a sense that such enactments are not, ultimately, inconsistent with the Bill of Rights at all. Rather, it permits them.

So, on the parliamentary narrative, the phenomenon of Parliament’s legislating “inconsistently” with the Bill of Rights does not carry anything like the weight that the constitutional narrative ascribes. It is a Bill of Rights that *anticipates* inconsistency, and accommodates it.

I sketch these competing narratives to signify the choice that courts and others faced when reckoning with the Bill of Rights. In a sense, the first 24 years of Bill of Rights history has involved a “writing” of what the idea of having a Bill of Rights means. Perhaps any country’s bill of rights narrative gets written in this sense – even the Constitution of the United States Bill of Rights was not taken to confer powers of judicial review and invalidation until the Supreme Court deduced them in 1803 in the famous case of *Marbury v Madison* in 1803.

In general terms, it seems to me that the constitutional narrative has prevailed in the courts – including, as we shall shortly see, the Supreme Court. That is, the Bill of Rights is recognised to set standards that the state’s law and conduct must meet, with such consequences as are permitted by its status as an ordinary statute. This view is also ascendant within the government legal service. Those advising the Attorney-General (for s 7 “rights-vetting” purposes) on the consistency of bills have functioned, understandably, on the basis that a proposed bill either meets or does not meet Bill of Rights standards. They essentially ask the question, “if the Bill of Rights were the supreme law, and this particular bill were to be enacted but challenged before the courts, would it pass or fail that challenge?”

In the broader executive branch, and in the legislature, the picture is more mixed. Here the parliamentary narrative is more prominent. There have now been 63 “s 7

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\[11\] As well as the ICCPR rights, which had not previously been thought to need incorporation into New Zealand law presumably because they were understood to be protected already by common law, or then extant statutory law such as the Human Rights Commission Act 1977.
reports” whereby successive Attorneys-General have advised the legislature that parliamentary bills contain inconsistent provisions. Of these, 31 have been in relation to a government’s own bills and all but one of these have been enacted. The 7 reports exemplify the Bill of Rights in its constitutional, standard-setting, dimension, but the sheer number of them, and the outcome, may suggest a certain casualness within the executive and legislative branches and about whether there is any political price to pay for not meeting that standard. In particular, there seems no concern that the Government’s Attorney-General is put in the position of reporting that one of its own bills is not justified in a free and democratic society, yet expected to vote for it. It suggests that political judgments are being made – that there might be so-called “policy” reasons for overriding the Bill of Rights (as if these reasons are somehow different from the sorts of reasons that have already informed the calculus of whether limits on rights were reasonable in terms of s 5). In short, there is evidence that some policy advisers, and some in Parliament, believe that overriding or departing from the Bill of Rights is not necessarily a bad thing.

II The Bill of Rights in the Court of Appeal

My present concern is the Bill of Rights narrative in the Supreme Court. But I need to begin with the jurisprudence that the Supreme Court inherited from the Court of Appeal. In its early days that Court breathed life into the Bill of, laying the foundations for the constitutional narrative. It should, said the Court, receive the “generous and purposive” interpretation that constitutional courts elsewhere ascribed to constitutional rights. Then there was the innovative even if short-lived “prima facie exclusionary rule” for evidence obtained after rights breaches, and the new remedy of public law compensation. Commentators now appear to agree that the Bill of Rights is part of the “canon” of documents that make up New Zealand’s unwritten constitution.

The Court of Appeal’s first major encounter with the complex interaction of sections 4, 5 and 6 came in 1992 in Ministry of Transport v Noort. The case was fought over what now seems a small point but, since it contains the seeds of a controversy that has since surfaced in the Supreme Court, I deal with it briefly.

The question was whether the Transport Act 1962, which empowered police officers to detain motorists for evidential breath tests, implicitly overrode the detainee’s right to consult a lawyer (a right affirmed in s 23(1)(b) of the Bill of Rights). On the face of things, being “detained” triggered that right, which applied in full measure unless (as the Ministry argued) it were abrogated or limited in some way. Since the Transport Act said nothing about lawyer access at all, the case turned entirely on what limits a Court was prepared to infer. If there were no restrictions, the spectre was prolonged

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12 This phenomenon is reported in a newspaper in a manner consistent with the “statutory narrative”: see “Finlayson ‘just doing my duty; on crime bills”, NZ Herald, 4 March 2009: [Attorney-General Chris Finlayson was] “just doing his duty” by raising concerns about rights breaches in legislation. The report continues: [these concerns] “were … formally those of the Attorney-General, rather than his personally as a National MP and minister ‘sticking it to the National Party’. So as an MP he will still vote on party lines for both bills.”

delays in administering breath alcohol tests as motorists contacted lawyers and waited for them to arrive. There would be wasted police time, alcohol levels would abate, and the traffic safety purpose of the Act would be frustrated. In the end the Court’s unanimous conclusion was that the Transport Act implied limits on lawyer access: that legal advice be allowed but ordinarily by telephone only, with only a reasonable time allowed for it before testing could resume.

The interesting part of the case was a 3-2 division on a methodological point – whether the statement in s 5 (that limits on rights be reasonable) formed any part of the judicial inquiry when applying s 6 so as to prefer a “consistent” meaning. The majority view was that it did: that (as applied to the Noort case itself) reasonable limits on lawyer access, satisfying the s 5 test, could be read in to the Transport Act. In so holding, Richardson P cited the then recent (and now internationally famous) Canadian Charter case of R v Oakes, which set out a four stage “test” for determining whether limits on rights were reasonable and demonstrably justified.

The minority (Cooke P and Gault J) saw it differently: that s 5 was not relevant to the interpretation function required by the Bill of Rights. Rather, they said, the task was to take the rights as written, independently of any idea of the possibility of reasonable limits upon them, and seek to accommodate those rights in the statute. In Noort this produced no difference in result: on the minority’s approach the Transport Act generated precisely the same limits, and for the same reasons, as the majority had held. Telephone access to lawyers, within a reasonable time. So the methodological dispute did not “cash out” in any meaningful way.

One might wonder, then, whether any of this mattered. But I am on record as supporting the majority’s approach in Noort – that s 5, the Bill of Rights’s own statement of the test for acceptable limits on its rights, supplies the standard that determines consistency. Section 5, and its counterparts in the international instruments and other bills and charters of rights, supplies a structured proportionality test for assessing the acceptability of legislated limits on rights.

It seems to me that there was a unique explanation for Cooke P’s idiosyncratic (as I see it) view (shared by Gault J). It is the one I alluded to earlier. Cooke P had been on record in the Bill of Rights debate in the 1980s as suggesting that the baseline of validity suggested by his own theory of fundamental rights (those which Parliament was powerless to abrogate) was the same as the one that the embryonic New Zealand bill of rights would sketch. And, if that were so, then s 4 – requiring that courts apply even inconsistent enactments – was problematic. By eschewing any judicial role in assessing Bill of Rights consistency under s 5, Cooke P avoided the possibility of a judicial finding that a law failing the Bill of Rights standard must nonetheless be applied by dint of s 4.

In any event, whatever lay behind it, Cooke P’s view was a minority one. The idea that s 5 played a role in interpreting and applying legislation affecting rights became orthodoxy. A series of cases so held.

Most of these involved the application of general phrases and concepts – such as “interests of justice” or “in the public interest”, or the narrowing of broad discretionary powers (such as the powers of the Parliamentary Speaker) – where it was axiomatic that rights-consistent meanings or applications were available. What counted as consistent could be discerned by applying the proportionality test required
by s 5. The idea of the *Oakes test* – of proportionality between ends and means – was workable and became familiar to judges. It was closer to judicial review of administrative action than to review of legislation.

There was another category of case where the Bill of Rights methodology worked equally well in preserving rights-consistency of statutes: those where liability or lawfulness turned on the applicability of broad concepts that denoted some sort of *spectrum*. Here the best example comes from the High Court, which had to decide what counted as “dishonouring” a flag, the phrases found in the Flags, Emblems and Name Protection Act, a case that is considered below.

The approach of the Court of Appeal and the High Court resonated with the so-called “principle of legality”, and in the parlance of United States constitutional law, “as applied invalidity”. Rights-infringing applications of broad powers, and broad concepts, could be severed from the general words, leaving their constitutional applications.

But the harder cases were always going to be those that appeared to present “facial invalidity”, where the impact of a rights argument might be to deny effect to an enactment altogether. That potentially implicated s 4.

This sort of case was first confronted by the Court of Appeal in 1998 in *Quilter v Attorney-General*. The plaintiffs argued that the Marriage Act 1955 allowed marriage licenses for same-sex couples, Kerr J in the High Court held that on its true construction it did not do so. That finding determined the case, of course, but was Delphic on the underlying “merits” question. That is, we did not learn whether the right against discrimination actually *demanded* same-sex marriage – only that, whether or not it did, the Marriage Act did not allow it. In my terms, this was the “parliamentary”, business as usual, “narrative” in play.

The Court of Appeal, reflecting a subtly different argument put to it, took a different tack. Each judge recognised explicitly that reliance on s 4 would suggest the non-availability of same-sex marriage was discriminatory and breached s 19. In the result, four of the five judges essayed judgments on whether the Act discriminated (these four dividing 3-1 in holding that it did not). That is, they entered the merits question of whether New Zealand law satisfied the baseline set by the Bill of Rights. For the one judge who held that it did not, the question then became whether the Marriage Act accorded to the standard set by the Bill of Rights. He held that it did not. And in this case lay the seed of the idea that Bill of Rights methodology required judicial review of legislation as part of the task of seeking consistent meanings over inconsistent ones, and the possibility of “declarations of inconsistency” (necessarily implicit in any case where s 4 operated so as to require application of an inconsistent statute).

The following year, in 1999, the Court of Appeal summarised the position in *Moonen v Film and Literature Board of Review*, one of its two most important cases on the interaction of the Bill of Rights cases with other statutes. *Moonen* now essayed a general Bill of Rights “methodology” for applying sections 4 to 6. Consistently with the *Noort* majority, the substantive “consistency-with-rights-question” was treated as

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part of the interpretive exercise (meaning, in practice, that before a meaning was to be avoided via the s 6 process, it had to be shown to be inconsistent). *Moonen* became the first case where the Court of Appeal explicitly recognised that it might “declare [an unjustifiable inconsistency] to be so”. Thus the seed sown in *Quilter* came to life. The possibility of a “judicial declaration of inconsistency” was born (although opinions differ as to whether there has ever been one, or ever will be – as to which, more later).

A second major Court of Appeal case followed in 2001, *Drew v Attorney-General*. The Court of Appeal there held that a general empowering provision – to make regulations – could not be read to empower the making of *rights-breaching* regulations. The impugned regulation was therefore invalid. This reasoning was readily transferable to all forms of delegated legislation and perhaps to administrative action more broadly. In such cases all the work is done at the stage of reviewing the delegated legislation for consistency with the Bill of Rights – if inconsistent, then a reference back to the empowering Act is necessary to check that such inconsistency is not positively empowered. But that is likely to be rare indeed. So a working hypothesis is that rights-infringing applications of general powers are invalid and of no effect. “As applied” invalidity, or “unconstitutional applications”, as the Americans would say.

This was the state of the play in 2004, when the Supreme Court began its work.

### III The Supreme Court and the Bill of Rights

In general terms the story in the Supreme Court has been one of continuation and refinement of the approach taken in the Court of Appeal. The number of cases is relatively small, and can be categorised in this way:

**Cases revolving around interpretation of an enactment in light of the Bill of rights:** *Zaoui v Attorney-General; Police v Morse, R v Brooker, Cropp v A Judicial Committee*

**Cases revolving around interpreting a term in the Bill of Rights itself and its application to the facts:** *Morgan v Superintendent, Rimutaka Prison; Taunoa v Attorney-General; Abdula v The Queen*

**Cases concerning remedies:** *Taunoa v Attorney-General; Chapman v Attorney-General*

**Cases concerning common law offence of contempt and impact of Bill of Rights:** *Siemer v Solicitor-General*

It is cases in the first category with which I am concerned. There are cases in each of the categories I identified as featuring in the Court of Appeal: the reading down of broad powers; the refinement of vagueness in spectrum cases; and confronting the possibility of facial inconsistency (that cannot be avoided by reading down).

*Zaoui v Attorney-General*

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This case, one of the Supreme Court’s first engagements with Bill of Rights methodology, though brief, affirmed the unconstitutional applications approach. *Zaoui* concerned the interaction between, on one hand, New Zealand’s obligations under the Refugee Convention and, on the other, the risk to national security that a refugee might pose. The Court construed the Convention to allow expulsion of refugees on national security grounds without need to balance any of the refugee’s interests (such as being deported to face torture or death). The Court went on to hold, however, that the Minister’s statutory power to deport on security grounds (under s 75 of the Immigration Act 1977) was implicitly limited. Section 6 of the Bill of Rights required s 75 to be read consistently with the rights to life and against torture in ss 8 and 9 of the Bill of Rights. Those rights themselves, said the Court, were to be interpreted on the basis of the customary and international treaty law upon which they, in turn, were based (relevantly, the ICCPR). So read, s 75 could in appropriate cases prevent removal of a person even if a threat to national security was made out.

*Cropp v A Judicial Committee*

This unanimous Supreme Court decision was similarly premised on the Bill of Rights subtracting the inconsistent applications of a statutory rule-making power – here that of New Zealand Thoroughbred Racing. Citing the Court of Appeal in *Drew v Attorney-General* the Court regarded it as settled law that “the rule making power and the validity of a rule must be interpreted and determined consistently with the requirements of the Bill of Rights”. In *Cropp* the rule was held to be consistent. Another salient point of Bill of Rights methodology was also settled by *Cropp*: that the idea of “reasonable limits” in terms of s 5 was “not in play” when a right, such as the right against unreasonable seizure, contained its own modifier. (There could not be, in other words, a reasonable unreasonable search). This was consistent with the approach taken in *Drew* on the same point: there the right to natural justice was determined, in the context of prison disciplinary cases, to require that legal representation be permitted in cases of complexity. Because the right was determined contextually, no further consideration was required as to whether it could be subjected to reasonable limits.

*Zaoui* and *Cropp* affirmed, therefore, the structure of rights adjudication that had been seen in the Court of Appeal in *Drew*.

The Bill of Rights replicated, or embraced, the impact of the so-called “principle of legality” whereby broad powers were shorn of their rights-infringing applications.

**Dealing with vague concepts requiring application: Brooker and Morse**

Two of the Court’s major cases are in this category.

*Brooker* concerned a man who, in protest at police actions in searching his property, went to the residential home of a female police constable at 9 am on a weekday and knocked on her door, knowing that she was likely asleep after night duty. On being told by the constable to “piss off”, he retreated to the footpath outside her house and sang songs of protest, accompanying himself on his guitar. This lasted for about 15

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16 [2002] 1 NZLR 58 (CA) at para [68].

17 At [6].
minutes, until police arrived and he was arrested. He was in due course convicted in the District Court of “disorderly behaviour” contrary to s 4(1)(a) of the Summary Offences Act 1981. His appeals to the High Court and Court of Appeal were dismissed. The Supreme Court gave leave to appeal.

Argued in December 2005, judgment was delivered in May 2007, a lengthy gestation period no doubt explained by there being a split decision. By a majority of 3-2 Brooker’s appeal succeeded. The majority of Elias CJ, Blanchard and Tipping JJ held that a conviction for disorderly behaviour under s 4(1)(a) necessitated that there be some real-world impact upon public order, and this was not established merely by a showing of annoyance on the part of reasonable people – not even with the qualification in earlier cases such as Melser v Police that such annoyance must rise to level justifying imposition of the criminal law. That real-world impact required a showing that there had been a disrupting of the use of public space – not necessarily by behaviour causing a likelihood of violence, but in the sense that the behaviour forced other persons to withdraw or refrain from entering an area to avoid conflict.

This reasoning drew explicitly on insights from cases involving constitutional rights to free expression in Australia and Canada. McGrath and Thomas JJ dissented on the basis that the value of residential privacy was equally engaged by the facts, alongside public order. They held that the case required balancing Brooker’s freedom of expression against the state interests in protecting both order and that privacy interest. On that basis, they ruled in separate judgments, a conviction was warranted.

*Morse v Police*

This case concerned the words “offensive behaviour”, also found in s 4(1)(a) of the Summary Offences Act. During the Anzac Day dawn service in Wellington, Morse had set fire to a New Zealand flag that she had brought with her. This was, she said, to register her protest at New Zealand military involvement in Afghanistan. She was arrested and charged with offensive behaviour, convicted in the District Court, and made unsuccessful appeals to the High Court and Court of Appeal. Her case duly came to the Supreme Court.

Before proceeding it is worth noting that Ms Morse was not charged with the offence of destroying the flag with the intention of “dishonouring” it, under s 11(a) of the Flags, Emblems and Names Protection Act 1981. That offence had been explored by Justice Ellen France in *Hopkinson v Police*, perhaps the most radical Bill of Rights interpretation case yet decided. Essentially s 11 as written criminalises the destroying of a flag with the wrong attitude: the very mode of destruction might be lawful if, say, done respectfully (say) to get rid of old or unwanted flags and not with intention to dishonour. Accordingly, the offence makes some obvious inroad into the protections secured by s 14, and (though it was not argued in the case) s 13 (freedom of thought).

Justice France had employed the *Moonen* methodology, succinctly expressed as follows:

… first, whether the conduct of the applicant falls within the natural or applied meaning of s 11(1)(b), and in particular that of “dishonour”. Them to ask whether the prohibition of that conduct is prima facie inconsistent with the Bill of Rights. If it is, is it a justified limit? If not, the next step is to ask whether the section can be read consistently. If it can, it should be read in that
way. If it cannot, then the natural or applied meaning has to be given effect to but on the basis that s 4 of the Bill of Rights applies.

Justice France found that the Act did, on its applied meaning, unjustifiably limit freedom of expression. That conclusion was reached after a proportionality test, weighing the impact upon the right against the importance of the law’s objective, in which comparative jurisprudence was influential. Her conclusion was that the Act wrought an unreasonable limit on freedom of expression by restricting a form of protest. It was disproportionate to the objective of the law. This meant the judge had to approach the critical word “dishonouring” and see if that might be interpreted in a manner that attained a rights-consistent interpretation. This she felt able to do. A dictionary meaning of “dishonour” suggested, as one possible meaning, a high threshold for the term: that it involved defiling. An alternative and rather broader conception was possible – something like “to treat without honour”. Given that there were these two possible meanings in play, the judge preferring the high threshold meaning as the one consistent with the right to freedom of expression. She went onto hold that the appellant’s symbolic burning of the flag did not reach the level of defiling, and hence fell outside the adjusted meaning of “dishonouring”. This was, then, a spectrum case in which the Bill of Rights had assisted in setting the level at which rights were limited.

This explains why, in Morse, the Police did not lay charges of flag burning, relying instead on the more abstracted conception of “offensive behaviour” in the Summary Offences Act. And that, of course, took the inquiry into the effect upon other people, raising similar issues as Brooker.

As in Brooker, the Court ruled that s 4(1)(a) must be interpreted with regard to its purpose: the preservation of public order. Though the term “offensiveness” did not, semantically, suggest a public order purpose in quite the same way as the term “disorderly” it was significant that each appeared in a section under the heading “Offences against public order”. Hence, conduct could be offensive only if it rises to the level that produces or tends to provoke disorder. In particular, offensiveness does not lie in feelings of annoyance in observers. Elias CJ saw in offensive behaviour a notion that it be attacking or aggressive – that which provokes disorder. Therein lay the scheme within s 4(1)(a). While disorderly behaviour is that which disrupts order, so offensive behaviour is that which tends to provoke such disruption.

Though differing slightly in their expression, all members of the Court agreed that the courts below had not applied the right test, with the result that the conviction could not stand.

In form, this type of reasoning is well-grounded in constitutional adjudication. In the United States case of Chaplinsky v New Hampshire, for example, a New Jersey statute that prohibited any offensive, derisive of annoying word to another person in a public street was read down by the New Jersey Supreme Court to apply only to the use of words directly tending to cause a breach of the peace. So construed, agreed the US Supreme Court, it was constitutional: it did not substantially or unreasonably impinge upon freedom of speech. That was not a case of striking down, but a case of statutory construction.

As Elias CJ pointed out, similar reasoning had been employed by three judges in the Australian case of Coleman v Power, which involved a substantially similar sort of
offence in the law of Queensland. There, the expression “insulting words” had been taken, by those three judges, to operate only when there was a tendency to breach the peace. That degree of reading down was not apt for s 4(1)(a), observed Elias CJ, if only because a breaching the peace requirement had featured in a predecessor to s 4(1)(a) and its omission in the current section therefore signified it was not intended to be necessary. Even so, the requirement that there be an impact on public order in the sense described by members of the Court was a narrowing construction.

A similar rights-enhancing and narrowing construction is to be found in constitutional cases elsewhere in related cases. In the Supreme Court of Canada’s decision in Saskatchewan Human Rights Commission v Whatcott the words “exposes to hatred” in the context of racial vilification laws were taken to denote only “extreme manifestation of emotion” such as “detestation and vilification”. Expression that is merely repugnant and offensive does not rise to that level and so is not caught.

In Chaplinsky v New Hampshire, Coleman v Power and Whatcott, the critical point in each is that, without the narrowing down of the broad term involved, the enactment would be unconstitutional in its application. In each of these states, of course, a irredeemably overbroad prohibition of speech is unconstitutional and the law would be struck down. But each recognises interpretive remedies to avoid that unconstitutionality. The essential commonality with the exercise undertaken by New Zealand courts applying the Bill of Rights will be apparent.

To expand that last point, in the other jurisdictions the impetus for a narrowing construction comes from a conclusion that, without it, the enactment would be unconstitutional. The “saving construction” – the reading down to avoid unconstitutionality – is in fact relatively common. Other Canadian examples include:

the reading in, by the Supreme Court of Canada, of comprehensive qualifications as to what counts as a defence of “reasonable force” in the Canadian Criminal Code provision permitting corporal punishment by teachers and parents – so as to preserve consistency with the Charter rights of children; 18

the reading in (to preserve freedom of expression) of an exception in the Criminal Code prohibition of child pornography so as to exclude video recordings of sexual activity between young persons of an age where that sexual activity was not unlawful; 19

reading in of comprehensive qualifications on a statutory power to order medical treatment of minors so as to accord due respect to the wishes of mature minors and thus preserve their Charter rights. 20

United States examples include some of the famous free speech judgments, where the reach of broad phrases and concepts is narrowed by a requirement of “clear and

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18 Canadian Foundation for Children Youth and the Law v Canada (Attorney-General) [2004] 1 SCR 76.
20 AC v Manitoba (Director of Child and Family Services) [2009] 2 SCR 181.
present danger”. As Justice Holmes pout it in Abrams v US in 1919, construing the Espionage Act:

But, as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.

That translated, for Holmes, into allowing the appeal.

In the Morse case, there is in the judgments of Elias CJ, Blanchard, McGrath and Anderson JJ a similar finding that, without the narrowing of the scope of the offence that they found to be required, the provision would be inconsistent with the right to freedom of expression. As Elias CJ put it: “so construed, s 4 is not in conflict with s 14 of the New Zealand Bill of Rights Act”.

Indeed, so far as I am aware, there is no instance of a “constitutional court” ascribing a meaning to an enactment that goes beyond avoidance of the “unconstitutional” (rights-infringing) meaning. Rather, these cases turn on a finding that, without the saving construction, there would be inconsistency.

This is what one would expect. Our Court is therefore in the mainstream of constitutional method. This is because, in ss 5 and 6, our Bill of Rights has effectively embraced the interpretative dimension of rights adjudication, even if the invalidating dimension is precluded by s 4.

What remains to explore, then, is the Supreme Court’s approach to determining when inconsistency with the Bill of Rights exists. Here there are some nuances.

The first is that there is an apparent difference between the approach of Elias CJ and that of the other judges in both Brooker and Morse over the role, if any, that the Bill of Rights plays in application of the statutory concept once its meaning has been determined. Essentially the issue is this. If an enactment, such as s 4(1)(a), is construed in light of its purpose and adjudged, after the narrowing construction, to be consistent with the Bill of Rights, is there any further role for the Bill of Rights in the process of applying that meaning to the facts of the case? On the Chief Justice’s view there is not, for once properly construed the enactment can be left to do its (proper) work. And the application of a statute properly construed is not a question of law.

The reasoning of McGrath and Thomas JJ (the latter in Brooker alone) speaks more to the process of factual evaluation, raising the question whether there might be Bill of Rights review of the way the statute was applied even if the correct approach to its meaning is adopted. This issue has lurked in other cases, such as Moonen (2) where Mr Moonen’s second bite at the cherry (having succeeded in Moonen (1) on the interpretation point) was to contest the tribunal’s actual decision on the basis that it breached s 14 of the Bill of Rights. In this he was unsuccessful, the Court holding that it would not disturb the classification made by a specialist tribunal that, by considering s 14, had applied the correct legal approach.

What is essentially at stake here is whether every freedom of expression case can be reduced to “an appeal on a point of law” – on the basis that the Bill of Rights was not applied properly in evaluation even if appropriate statutory meanings were adopted. If the impact of the Bill of Rights on administrative powers is to sever all rights-
infringing applications, so rendering them unlawful, then is every application to be reviewed for its rights-consistency. As we have seen, *Brooker* (for the majority judges) and *Morse* turned on there being legal error in approaching the interpretation, and not on an impugned application.

One can understand the concern for the burden on appellate courts. Similar concerns in the United States appear to be addressed by a different tack: more bright line rules and doctrines in the “free speech field” – such as “public forums” and “limited public forums” – such that the plausibility of constitutional challenges to decisions can be assessed by potential litigants in other ways. Perhaps the answer lies in the proposition that the Bill of Rights does control applications as well as interpretations. But within the Bill of Rights methodology and the idea of reasonable limits that are demonstrably justified in a free and democratic society, there is scope for courts to recognise that the evaluative judgments of specialist bodies such as the Chief Censor and the Board of Film and Literature Review attract a level of deference.

The second nuance in *Morse* lies in her remark of Elias CJ that, once properly construed, s 4(1)(a) was consistent with s 14 but that no question arose of whether it amounted to a reasonable limit in terms of s 5. Her point was that s 14 in the Bill of Rights is, as it were, pre-loaded with the limitations already inherent in its having been affirmed in ICCPR, whereunder limitations are permitted so as to (amongst other things) protect public order.

In so holding, Elias CJ was alluding to the conclusions she had reached about the operation of the Bill of Rights in a different case, *R v Hansen*, to which I now turn.

*R v Hansen*

In its early Bill of Rights case of *R v Hansen*21 the Supreme Court traversed ss 4 to 6 of the Bill of Rights, as the Court of Appeal had done in *Noort* and *Moonen* but this time in connection with the right in s 25(c) (“to be presumed innocent until proved guilty”). This was the Court’s first case to confront an enactment that appeared to be “facially” inconsistent with the Bill of Rights, rather than raising questions about its application.

Hansen had been convicted of possessing cannabis for supply. He possessed a quantity that triggered the “reverse onus” in s 6(6) of the Misuse of Drugs Act 1975, meaning that he was deemed to be a supplier “until the contrary is proved”. His case, however, was that the drugs were for his own use. His argument involved these steps: (1) s 6(6) was facially inconsistent with s 25(c); (2) it could, however, be read to mean “until a reasonable doubt is raised”; (3) that meaning would be consistent with s 25(c) and; (4) being available, it was the Court’s duty under s 6 of the Bill of Rights to ascribe it, rather than the inconsistent meaning.

The Court (Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ) unanimously dismissed Hansen’s appeal, but took different pathways. Taking Hansen’s arguments in the order just given, I will explore them.

21 [2007] 3 NZLR 1
First, was s 6(6) inconsistent with the presumption of innocence? The courts below had taken s 6(6) to require a “balance of probabilities” demonstration of innocence by Hansen – that was the natural meaning of the words and a Court of Appeal decision, R v Philips, had so held. But Philips had not explored the “consistency” question in any depth – resting instead on the fact s 6(6) was not capable of any other meaning. Indeed, Philips came from the era before Quilter and Moonen augured the judicial review that sections 5 and 6 implied, and possible findings of inconsistency. Philips, in other words, was rather like the High Court decision in Quilter: its critical finding was the non-availability of another meaning; that s 6(6) applied regardless of whether it was consistent or inconsistent with the Bill of Rights.

The immediately significant point about Hansen, then, was the willingness of all five judges to entertain the question of s 6(6)’s consistency with the presumption of innocence. That is the constitutional narrative in play. Indeed, four members of the Court (Elias CJ, Tipping, McGrath and Anderson JJ) agreed with Hansen that the reverse onus infringed s 25(c). For these judges Hansen’s case nevertheless failed at the next step: s 6(6) permitted no other plausible meaning. Reading s 6(6) to impose only a requirement of generating a reasonable doubt would effectively be legislating, not interpreting. It was, in short, a true s 4 case – a case where a court was required, after demonstrating an enactment’s facial inconsistency, to apply it nonetheless.

In so holding all four judges rejected the argument that they should adopt the interpretive approach of the United Kingdom courts under s 3 of the Human Rights Act 1998 (UK). That provision, identical in substance, to s 6 of the New Zealand Bill of Rights, had been taken in Ghaidan v Godin-Mendoza to legitimize even substantial readings in, and readings down, to preserve consistency and avoid the making of declarations of incompatibility (as they are called in the United Kingdom).

In so holding the Supreme Court aligned itself with the orthodoxy in other constitutional courts. Saving constructions are made only when it is plausible to do so. In states with supreme law constitutions, invalidation is the alternative. It is only the United Kingdom that has gone out on a limb on this point.

Hansen, then, is the first clear case of a judicial “declaration of inconsistency”: a finding that s 6(6) of the MODA falls below the baseline set by the Bill of Rights. That said, there is no agreed definition of what a “declaration of inconsistency” looks like. I have long argued that the structure of the New Zealand Bill of Rights Act 1990, like its international counterparts, necessarily requires precisely the approach that the Court took in Hansen. It seems to me that this determination of inconsistency lies in the reasoning process that the Bill of Rights dictates. But one does not find, because no-one in 1990 was thinking along these lines, any particular mandate for the form that a “declaration” may take – that it be in bold type, or under a special heading, communicated to the executive and legislative branches, and so on. So I do not believe the Court can be faulted for not making more of the idea of declarations of inconsistency.

Even so, the legacy of the ambiguous Bill of Rights – of the two narratives – is obviously at work in the arena of judicial declarations. There is the possibility of “declarations of inconsistency” – that enactments fail to meet rights standards in ways that cannot be avoided through interpretation – is plainly immanent in the Bill of
Rights. But because this was never anticipated and articulated, still less celebrated or affirmed, by the Bill of Rights framers, they are “soft declarations”.

Yet it appears that it was our Bill of Rights that inspired the UK model – built around the idea of declarations of incompatibility, there made quite explicit, and linked to the requirement that the Court’s declaration be tabled in Parliament and responded to. Similarly, when in 2001 the Human Rights Act 1993 in this country was amended, specific provision was made for declarations of inconsistency – our idea having been apparently validated by its adoption in the mother country.

The very close connection between our s 4 and the UK’s declaration of incompatibility should be appreciated. After the decision was taken to demote our Bill of Rights to ordinary law, s 4 was introduced to occupy the “space” that might have been occupied by one of two other approaches. There might have been an explicit power to declare the inconsistency, while, sotto voce, requiring the enactment be applied nonetheless (the UK approach), or there might have been an explicit power to resolve the inconsistency by preferring the Bill of Rights and holding the inconsistent enactment ineffective (also a UK approach in the special field of European Community law which, when applicable in the UK prevails over inconsistent UK law). Obviously the latter would be almost indistinguishable from having a supreme law bill of rights, so it is no surprise that s 4 took the form it did.

Significantly, there is no suggestion in Hansen – not from counsel nor from any judge – that an enactment that fails to meet the standards set by the Bill of Rights is thereby fails also to meet the “common law” base-line famously alluded to by Lord Cooke.

So, each of the five judges were concerned to inquire into the consistency of s 6(6) with s 25(c). Blanchard J held it consistent, the other four judges inconsistent. For present purposes, it is not that division of opinion that interests me, so much as a different division between the 5 judges. For Blanchard, Tipping, McGrath and Anderson JJ, the question of the consistency of s 6(6) was approached using the section 5 methodology of “reasonable limits”. That is, once it was determined that s 6(6) was a prima facie infringement of Hansen’s right to be presumed innocent, the issue became whether it was a justified limit on that right pursuant to s 6. (Blanchard J simply came to a different view on the merits form the other three judges in this group).

This was to employ the approach suggested in both Noort and Moonen, and exemplified in Hopkinson – of ascribing meanings under s 6 only after the establishing the inconsistency of the meaning that the litigant seeks to avoid, a process that often, but not invariably (because some rights contain their own evaluative modifiers) involves s 5.

The Chief Justice, though a member of the Court that gave the unanimous Moonen judgment in the Court of Appeal was in a minority on this point. She said “I do not consider that s 5 of the Bill of Rights Act forms part of the s 6 inquiry”. Section 5 was, she said, directed at those enacting law – that is, legislators. And, in particular, she did not accept that “s 6 gives preference to a meaning consistent with limitations justified under 5, if a meaning consistent with the unlimited right is tenable.” [my emphasis]
She recognises that limits on rights can be and often will be justified, but does not regard s 5 as setting the standard for the acceptability of those limits. Instead they are to be given a content “by reference to the register provided by the Bill of Rights Act viewed in context (including the context provided by the International Covenant)”.

I take this to mean as follows: that the judicial task is to ascribe a content to each right in the Bill of Rights, recognising that what is affirmed is a right sourced from the Covenant wherein the possibility of intrinsic limits on some of those rights is already recognised.

There are many hares set running by these ideas, and my completed paper will seek to articulate them and deal with them. Essentially, though, my response is that even if the Bill of Rights could work in this way, why would we want it to? Its apparent purpose is to declare a set of rights that the state must observe, recognising that in their observance it is permissible to impose reasonable limits upon them. And, in s 5, it supplies a broad test for what counts as reasonable limits, based upon the equivalent section in s 1 of the Charter. The definition of rights, and the acceptability of limits upon them, are (as the Chief Justice says) analytically distinct questions. But the acceptability question, it seems to me, can only be addressed ad hoc, in the context of each different enactment that seeks, for some reason, to limit a right. Proportionality of ends and means is an exercise that demands a context: what is the end sought by this statute, and what are the means employed? To say that the rights affirmed in the Bill of Rights are already limited because the ICCPR recognises the possibility of limits does not seem to me to assist. So, in Brooker and Morse, the real question was whether the statutory terms “offensive” and “disorderly” had to be narrowed to avoid unreasonably limiting expression. It was not in that case a hard question, but it seems to me that it is s 5 that supplies the test that courts are to apply.

The Chief Justice is concerned that judicial recourse to s 5 might mean that rights are read down too readily, and that there will be a “soft form of judicial review”. But this does not follow. The impact of the s 5 test can be every bit as rigorous as Canada’s s 1 test, or the Australian equivalent (the proportionality test involved in applying the implied constitutional right to freedom of political communication). That is up to the judges applying it. Recall that the Canada’s s 1 was designed to replicate (but express more succinctly) the proposition drawn from the ICCPR and ECHR that there can be permitted limits on rights. It is not a softer standard.

The larger point here is not quibbles about Bill of Rights methodology. It is about what a Bill of Rights is. The core idea is to affirm a set of standards that the state must adhere to. This is the legacy of the US Bill of Rights (the English one had a slightly different focus, being more concerned with establishing the supremacy of parliament over the King). Since 1789 the norm has been a bill of rights of the American model, from which our type of Bill of Rights is a recent deviant.

The point is to set standards of human rights with which the state’s law and practice must be consistent. They do so, in the main, by simple affirmations and pithy phrases. Some rights are well capable of being regarded as absolute (though will involve the issues of definition and evaluation such as “what is torture?” and “what is a fair trial?”). Others, such as the fundamental freedoms (expression, religion, movement and so on) are a little different, for they are not sensibly regarded as inimitable. These are the ones to which the International Covenant on Civil and Political Rights and the
European Convention on Human Rights attach the idea of justifiable limits. Perhaps the mistake of the Canadian Charter was to strive too much for brevity, by removing the idea of reasonable limits from the specific liberty rights to which they attached in the international instruments, and to have, in s 1, a separate section that asserts that all rights (even torture) may be subject to reasonable limits. But it has not been read in that way, and nor has our own Bill of Rights.