

## PROBLEM Q.

1. Identify the problem – Limitation: **PRACTICALITIES OF INFRINGEMENT.**
2. Define the ambit of the right
  - i. Purpose? **NATURE OF THE RIGHT + OBJECT DESIGNED TO SERVE**
    - FoE:** ensure “market-place of ideas”; underpins democracy. F & I of press
    - BUT:** US & UK exclude hate speech, violence. (C.F ADVERTISING?)
    - FoT, R & C:** protect **autonomy & choice**; minority belief
    - Sabarimala Ayappa:* how essential & integral is practice to belief?
  - ii. Schematic?
    - New Health:** *Life & Security of the person* – integrity of the body
    - Democratic & Civil Rights?* Choice, autonomy, individuality
  - iii. Generosity – **Noort:** **secure effective enjoyment.** can have limits.  
BUT NZ statutory context  
Elias CJ in **New Health:** **s 4 means Parliament can expressly limit rights where it desires,** thus the Courts should avoid the reading down of rights.  
Tipping in **Hansen:** considerations of s 5 act to limit so **initial definition ought to be as wide as construction allows**
3. Identify legislator’s intent – **NARROWER than purpose?**
4. IW: what can it mean? DID **Parl intend for discretion or specific enforcement?** **DM**  
*Room for dialogue / metaphor?*

## MOONEN. DISCRETION INTENDED? “Conceptually elastic?”

5. Identify possible interpretations which are open on the text. Identify meaning that is least limiting on the rights (**s 6 aided by s 5**)
    - i. **AMM and KJO:** **real limits on the extent of s 6.** An alternative meaning may not be an originally intended meaning, it must be available on text and consistent with purpose.  
BUT: A purpose inconsistent with BORA is not to be lightly found.  
Some **resulting awkwardness in language** must be inherent in adopting a s 6 alternative meaning, for the very reason will not be the ordinary or primarily intended meaning.
    - ii. **Hansen:** **s 6 adds to, but does not displace, the primacy of s 5 of the interpretation act**
  6. Does this new meaning still limit the right or freedom on the facts?
  7. **Prescribed by law?** Accessibility & clarity (**s 5**)
  8. Demonstrably justified? (**s 5**)
    - i. Identify the purpose (objective) + importance & significance
      - **SPECTRUM: DEFERENCE / MARGIN OF A / COMITY?**
      - **REVIEW ROLE: New Health:** did not conclude on effectiveness
      - **OTHER RIGHTS ENGAGED? SOCIAL VALUES?**
    - ii. Way in which objective achieved must be in **reasonable proportion** to the importance of the objective. *“a sledgehammer should not be used to crack a nut”*
      - a. Means used must have rational relationship
      - b. In achieving the objective, there must be **as little interference as possible with the right**  
McGrath J in **Hansen:** whether there was an alternative **but less intrusive means** of addressing the legislature’s objective which would have a similar level of effectiveness
        - **OTHER RIGHTS ENGAGED?**
      - c. Limitation involved must be in light of the objective
9. Remedies?
  - i. **Baigent** damages
  - ii. **Hansen** indication
  - iii. **Taylor** Dol

## SECTION 3 (a) or (b)?

**Ransfield** - How closely is the F, P, D connected to or identified with the exercise of the powers and responsibilities of the state. **SCOPE & SIGNIFICANCE OF RIGHT CAN BE RELEVANT.** Countervailing PI in F & I  
FOCUS ON THE **NATURE** OF THE F, P, D NOT THE ENTITY ITSELF.

- Extent of control – *“kiwi share” – c.f RNZ*
- Exists for a private profit? Or publicly funded
- Source of power statutory?
- Performing a function govt once did
- In the greater public interest (mere b irr)
- Analogous coercive powers
- Performed in public / JR irr
- Extensive or monopolistic?
- Democratically accountable?

**Police v Alexander;** PB: “staggering result” - **Despite receiving public funding and performing a public role**  
**Fed Farmers;** Despite being a separate entity, wholly owned and ultimately controlled by the Crown as an SEO  
**Lawson v HNZ:** public functions notwithstanding SEO, **extensive of Minister control material**  
**M v PNBHS:** if entity acts as agent of government, BORA applies – OBITER.

## HANSEN. 2 distinct meanings? SPECIFIC ENFORCEMENT

5. Ascertain whether Parliament intended meaning is consistent with the right
6. **Prescribed by law?** Accessibility & clarity (**s 5**)
7. Demonstrably justified? (**s 5**)
  - i. Does the limiting measure serve a sufficiently important purpose in curtailing the right?
    - **SPECTRUM: DEFERENCE / MARGIN OF A / COMITY?**
    - **REVIEW role: New Health:** did not conclude on effectiveness
  - a. Is the limiting measure rationally connected to the purpose?
  - b. Does the limiting measure impair the right or freedom **no more than reasonably necessary?**
    - *As meaning so clearly intended, Court gives more leeway to Parl*
  - c. Is the limitation in due proportion to the objective?
    - How important is right? How important is limit? OTHER RIGHTS?
8. Is there another possible meaning open on the text?
  - i. Section 6? **Hansen:** s 6 adds to, but does not displace, **the primacy of s 5 of the interpretation act**
9. Remedies?
  - i. **Baigent** damages
  - ii. **Hansen** indication
  - iii. **Taylor** Dol
    - a. Standing? Must have dispute on facts
    - b. Process? Crown must be on notice – burden of justification
    - c. Discretion?
      - No PF remedy rule
      - Not a legal right – comity & deference considerations
      - Serious issue – Taylor analogy
      - Adequate adversarial contest
      - Economy in use of judicial resources
      - Sensitivity to the role of the judicial govt
      - **Rusbridge v A-G (UK)** – hypothetical prosecution dismissed
  - f. Taylor application: RIGHTS NEED VINDICATING
    - Right to vote core prerogative of citizenship
    - No justification – A-G did not dispute
    - Legislature knew of inconsistency
    - No possible policy in pipeline

SOME PRINCIPLES.

### Positivist approach in NZ.

No revolution in NZ; rights are law because Parliament has passed BORA.

Stable political environment: top down as opposed to bottom up.

### Existence of Parl Sov / s 4

**Hansen:** more latitude under s 5 as an approach which gives no credence to parliament removes the **check on absolutism which democracy provides**

**Taylor:** "bedrock" of constitution.

### Fear of judicial activism

Interplay between s 4 & s 6 – Courts have to explicitly reference Parl intent.

Has never really played out in NZ: **Hansen. Taylor** the closest possible

**CJ in Hansen:** s 5 is not for the courts.

**Baigent's case:** but could parl have intended to enact without remedies?

### Comity

**Taylor:** whilst each branch has a separate sphere, they also overlap, necessitating restraint on all sides. Sir Owen Woodhouse: made necessary by the imprecise distribution of the powers

### Deference

**Taylor:** Court's decision to refrain from exercising jurisdiction on the ground that another decision-maker enjoys greater institutional competence or democratic accountability

### Review role / dialogue approach: GIVING A MARGIN OF A

**Taylor:** So long as BORA on the statute books, it serves a constitutional function.

"symbiotic": MUTUAL BENEFIT. the branches of government are co-dependent as well as each being sovereign in its own sphere of authority.

**Hansen:** Conflict between views of the majority in parl v purpose of a BORA (entrenched or otherwise) is to **prevent minority interests from an oppressive & overzealous majority**. Parl nevertheless given the Courts a **significant review role**. Limitation as **demonstrably** justified

**Hansen / New Health: Court must review as opposed to substitute their own view**

### RANSFIELD.

Issue: Whether the defendants, when conducting their talkback radio programmes, are performing a public F, P or D conferred or imposed by law within the meaning of s 3(b) of the NZBORA?

Held: Although defendants were performing a function or power conferred by law - as empowered by statute - that function was a private one as

- i. there is a **clear distinction under NZ law between public and private broadcaster**;
- ii. No government ownership interest; "light handed" control via the RCA only
- iv. No government funding
- v. The nature of the function is not governmental, as any governmental functions are pursued through public radio

### MOONEN.

Issue: Whether "promotes and supports" can be interpreted in a way that impinged as little on possible on freedom of expression?

Held: Interpreting in line with s 6 NZBORA, "promotes and supports" meant not merely that a prohibited activity be described but that the way it was described could fairly be said **to have the effect of promoting or supporting that activity**.

Section 5 gives the Court the power to indicate that although a statutory provision must be enforced, it is inconsistent with BORA in that it constitutes an unreasonable limitation on the relevant right in a free and democratic society.

**HANSEN.** – A-G thinks justified limitation.

Issue: Whether "until the contrary is proved" can be interpreted as an evidentiary burden - in light of s 6 NZBORA - or whether, due to clear parliamentary purpose, it has to be interpreted as a balance of probabilities.

Held: "until the contrary is proved" could not - even in light of s 6 NZBORA - be interpreted to mean evidentiary burden. **The natural meaning of the words was well established, and their effect was a statutory allocation of the burden of the proof.**

**HANSEN INDICATION:** However, the reversal of such burden of proof under the Misuse of Drugs Act was inconsistent with the presumption of innocence (s 25(c) NZBORA) and was not a justified limitation. **The limitation was - even if rationally connected - a greater limitation than reasonably necessary and unproportionate.**

**CJ:** A preference for a meaning consistent only with **the rights as limited under s 5 fails to respect the rights and freedoms as enacted by Parliament** - the Courts approach should be as generous as possible. HOWEVER, on these facts, parliament purpose too clear (s 5 1A).

**TAYLOR.** – A-G accepts law is inconsistent with BORA.

Issue: Whether the higher courts of NZ have the jurisdiction - and if so, what is the source and ambit of the jurisdiction - to make a DoI

Held: Inconsistency between statutes was a question of interpretation and law, therefore law within the jurisdiction of the courts. Such jurisdiction was also further confirmed by s 5.

While a **Hansen indication** should ordinarily suffice, there could be circumstances in which a Court might need to go further. A DoI can be used to better convey inconsistency as is a formal declaration.

As the **right to vote is a core prerogative of citizenship in a free and democratic society** because it underpinned equality and consent to government. In light of the lack of any justifications, and the fact the legislature knew of the inconsistency.

### A-G SUBS:

**No judicial function, trespass 3 branches:** As long as BORA remains on the statute books, it serves a constitutional function. It authorises Courts, within prescribed limits, to interpret legislation by imputing to Parliament an intention derived from protected values. **(jurisdiction)**

**Must be conferred by statute:** parliament intended judicial assessment **(source)**

**Inconsistent with ICCPR:** NZ Courts not in dialogue with IHR. Expected to fashion own remedies

**Inimical to judicial branch as unenforceable:** does not exclude but is **NECESSARILY DISCRETIONARY**. **Restraint / acknowledgement of comity & deference**

**92J HRA does not support:** Court found it does

**Floodgates:** difficult argument in HR context. Need a dispute on the facts

**In the alternative:** core to vote prerogative right, parl knew of inconsistency

**AMM & KJO** – A-G accepts law is inconsistent with BORA.

Inherent tension between s 4 & s 6 means sometimes one has to pull stronger: while textual ambiguity is not a prerequisite to adopting a different meaning, s 6 meaning cannot be a strained meaning. **Alternative reading as under s 6 cannot subvert the original purpose (s 5 1A)**. NZ cannot follow the "radical, strongly assertive" line of the UK judges. **BUT it can be awkward**

Held: Given **the legitimacy of interpretation, deliberate inaction of Parliament** in limiting interpretation explicitly (following widespread statutory reform) and **the fact that no attempt was made to advance any justification** of such discrimination a wider meaning was possible on text.

