



## **Introduction and factual background**

[1] Radio New Zealand appeals out of time under s 18 of the Broadcasting Act 1989 against a decision of the Broadcasting Standards Authority. The decision was issued on 21 December 2009 and related to statements broadcast by Radio New Zealand about the complainant Mr Kerry Bolton during a segment called “Ideas” on a programme known as *Sunday With Chris Laidlaw*.

[2] The relevant facts are fully set out in the Broadcasting Standards Authority’s decision and I have borrowed liberally from it for the purposes of setting out the background in this judgment.

### *The broadcast*

[3] In the “Ideas” segment on 8 June 2009 Mr Laidlaw interviewed a sociologist by the name of Dr Scott Hamilton. He spoke about anti-Semitic fringe groups in New Zealand that were seeking to deny or downplay the gravity of the Holocaust. Dr Hamilton said that New Zealand was getting a new generation of people attracted to anti-Semitic discourse both in relation to current and historical global events. Toward the end of the interview, Dr Hamilton stated:

I certainly think there are hardcore Holocaust deniers active in New Zealand, and they’re always trying to get their message out there. Quite a key figure is Kerry Bolton. He has close connections with Frederick Toben and the Adelaide Institute. Frederick Toben has been in the news in the last couple of weeks because he’s been sent to jail for Holocaust denial in Australia, and Toben and Bolton work quite closely, and Bolton’s been absolutely, very industrious in pushing these ideas in New Zealand.

And [Bolton has] attempted to insinuate himself into things like the anti-war movement in New Zealand, the Palestine Solidarity movement. He’ll go along to demonstrate and he’ll present himself as a legitimate critic of Israeli foreign policy and he’ll slide from that to anti-Semitism and Holocaust denial. And there have been isolated instances of, especially young people, in the anti-war movement and Palestine Solidarity movement who have been taken in by this stuff.

[4] The host then asked Dr Hamilton a question about the theory of New Zealand’s original settlement by an advanced civilisation of Europeans before Māori “invaders” wiped them out. Dr Hamilton then said:

Well, there's an intersection between the people promoting these ideas, um, the Celtic New Zealand thesis was actually created by Kerry Bolton, who, of course, is promoting anti-Semitism and Holocaust denial.

### *The complaint*

[5] Mr Bolton lodged a complaint with Radio New Zealand. He alleged that the broadcaster had breached Standard 5 of the Radio Code of Broadcasting Practice. This standard relates to accuracy. It provides:

Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:

- is accurate in relation to all material points of fact; and/or
- does not mislead.

[6] Mr Bolton said that Dr Hamilton's claim that he was anti-Semitic and that he actively promoted Holocaust denial were both inaccurate. He added that five other specific statements were also inaccurate. Those statements were:

- He had worked closely with Frederick Toben;
- He was the "inventor" of the Celtic New Zealand theory;
- He had infiltrated the anti-war movement and had attended meetings to air his views;
- He had infiltrated the Palestine Solidarity movement;
- He had exercised influence over unwary youth.

[7] Radio New Zealand responded that Standard 5 of the Code did not apply to this broadcast because the programme was opinion rather than fact related. In the alternative the broadcaster said that Dr Hamilton stood by all of his statements anyway.

[8] Mr Bolton was dissatisfied with this response and referred the matter to the Authority under s 8(1B)(b)(i) of the Broadcasting Act.

*Further information*

[9] On receipt of the complaint the Authority asked Radio New Zealand to provide more information. The Authority asked Radio New Zealand to outline the basis for the statements made by Dr Hamilton and alleged by Mr Bolton to be inaccurate.

[10] Insofar as the Holocaust denial and New Zealand Celtic theory statements were concerned, Radio New Zealand said these were expert opinions rather than facts and so are not caught under Standard 5.

[11] On the allegation relating to Frederick Toben, Dr Hamilton explained that Mr Toben was the founder and director of the Adelaide Institute, an Australian organisation devoted, in his view, to denying the Holocaust. He said that Mr Bolton was until recently listed as an associate of the Institute and had presented at least one paper at a conference of the Institute. He said that a number of Mr Bolton's works had been on the Institute's website until recently. Dr Hamilton referred to the Waikato Students' Association magazine *Nexus*, which published a collection of Mr Bolton's quotes. He also referred to website articles referring to Mr Kerry Bolton – the first at <[www.fightdemback.org](http://www.fightdemback.org)> and another at the Auckland Unitec Students' Association site <[www.usu.co.nz](http://www.usu.co.nz)>.

[12] In response Mr Bolton said he had never presented a paper to the Adelaide Institute and was not listed as its associate. He said he had not been to Australia for over 20 years.

[13] On the Celtic New Zealand issue, Dr Hamilton referred to a series of books or articles written, he said, by Mr Bolton prior to 1999 on the subject. Mr Bolton meanwhile denied that any of these texts contained such a theory.

[14] On the issue of Mr Bolton's alleged infiltration of the anti-war movement, Dr Hamilton focused on the Palestinian Solidarity Movement and said that Mr Bolton had attended several events organised by Wellington anti-war groups in 2003. Mr Bolton said he had only attended one anti-war protest in 2003 in

Wellington, along with several hundred protestors. He denies having attended “several events”.

[15] On the question of influencing unwary youth, Dr Hamilton referred primarily to Mr Bolton’s former role as National Secretary of the National Front. Mr Bolton admitted that he was National Secretary in 2004 but had since left that organisation. He said he had no influence over unwary youth.

*Authority’s decision*

[16] The Authority found by a majority that the “Ideas” segment of *Sunday with Chris Laidlaw* was a factual programme and therefore caught by Standard 5 of the Radio Code of Broadcasting Practice. One member dissented from this conclusion and so participated no further in the Authority’s later analysis. The majority held that on the information provided by the parties it was unable to determine whether Dr Hamilton’s statements were accurate or not. Thus the question of error was left at large. Having said that the Authority recorded firm conclusions on the relative strength of Dr Hamilton’s claims. The majority said:

However, the majority observes that the evidence provided by Dr Hamilton is scant and, based on that information alone, the majority finds that Dr Hamilton did not have a strong basis upon which to make such serious allegations about Mr Bolton’s character. To label Mr Bolton as an active and “hardcore” Holocaust denier requires, in the majority’s view, much more than one website page in which an undated quote attributed to Mr Bolton referred to the Holocaust as “fictitious blather”. Dr Hamilton has not been able to provide any other supporting material – such as publications or quotes – that would lend support for his assertion that Mr Bolton is actively, and industriously, promoting Holocaust denial within this country.

The majority considers that Dr Hamilton’s other statements about Mr Bolton are of less importance, as they were simply used to bolster his point that Mr Bolton was an active Holocaust denier. However, Dr Hamilton has not satisfied the majority of the Authority that he had a sound basis for his allegations regarding Mr Bolton “insinuating” himself into anti-war movements and influencing young people. Dr Hamilton’s only evidence is that Mr Bolton appeared at one anti-war rally in 2003 and was previously the Secretary of the National Front. It does appear that Mr Bolton had contributed to the website of the Adelaide Institute at some point in time, although the links to his publications are now dead. Similarly, although Mr Bolton may have written on the subject of what could be labelled as a “Celtic New Zealand” theory, Dr Hamilton has not provided any evidence

upon which the majority could reasonably conclude that Mr Bolton was the creator of that theory.

[17] The majority then turned to whether the broadcaster had made “reasonable efforts” to ensure the accuracy of the factual statements in the segment in accordance with Standard 5.

[18] The majority found that Radio New Zealand had not made reasonable efforts to ensure that Dr Hamilton’s allegations that Mr Bolton was an active Holocaust denier was accurate. The majority reasoned as follows:

In the majority’s view, RNZ allowed Dr Hamilton to launch a personal attack on Mr Bolton without adequately checking the basis for his statements. Stating that a person is a “hardcore Holocaust denier active in New Zealand” is extremely serious and potentially damaging to an individual’s reputation.

In the majority’s view, a higher standard of what constitutes “reasonable efforts” must be applied to pre-recorded items, such as the item under examination here, because the broadcaster has the opportunity to make its own inquiries or request supporting material from an interviewee to assess the veracity of factual statements.

In this case, RNZ had an opportunity to question Dr Hamilton about the basis for his statements about Mr Bolton, and edit them out of the programme if he could not provide a satisfactory basis for the claims. Instead, RNZ accepted what Dr Hamilton said and made no further inquiries to corroborate his assertions. While Dr Hamilton may have been an expert on anti-Semitism and Holocaust denial, the majority considers that, in light of the seriousness of the allegations and the fact that they were about a named individual, RNZ should have required Dr Hamilton to substantiate them. If he could not do so, RNZ had an opportunity to remove the comments from the broadcast version.

[19] Radio New Zealand appealed.

[20] Having found against Radio New Zealand on the substance of the complaint, the Authority declined to make any further order. It considered that publication of the decision was a sufficient penalty in light of the fact that the decision was not unanimous and because this was the first application of the new standard.

[21] Radio New Zealand appealed pursuant to s 18. By the terms of s 18(4), the Authority’s decision is to be treated as having been made in the exercise of a discretion.

## **The Broadcasting Act and the Authority**

[22] Part 1 of the Broadcasting Act relates to programme standards. Section 4(1)(e) provides that every broadcaster is responsible for maintaining programme standards that are consistent with a relevant approved code of broadcasting practice. The Authority approved the latest Radio Code of Broadcasting Practice effective from 1 July 2008. It is worth setting out the terms of Standard 5 again:

Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:

- is accurate in relation to all material points of fact; and/or
- does not mislead.

[23] There are three guidelines under this standard. They provide as follows:

- 5a The accuracy standard does not apply to statements which are clearly distinguishable as analysis comment or opinion.
- 5b Talkback radio will not usually be subject to the accuracy standard, except where the presenter makes an unqualified statement of fact.
- 5c In the event that a material error of fact has occurred, a broadcaster should correct it at the earliest appropriate opportunity.

[24] According to the introduction to the Code, only the standards are to be treated as strictly binding. Guidelines are for assistance, but breach of a guideline may not automatically constitute a breach of the Code.

[25] The Authority is established under Part 3 of the Act. It has wide ranging functions as set out in s 21. One of its functions relates to complaints. Another is to encourage the development and observance by broadcasters of Codes of Broadcasting Practice in relation (among other things) to fair and accurate programming, and procedures for correcting factual errors (s 21(1)(e)(iii)). Another function is to approve such codes so that they will have binding effect under s 4(1)(e).

[26] The Authority is made up of four members appointed by the Minister of Broadcasting. They must include a legally qualified Chairperson, an industry representative, and a NGO representative. It has certain of the powers of a commission of inquiry including the power to receive any evidence, investigate on its own account, summon witnesses and so forth.<sup>1</sup>

[27] According to s 13 if a complaint is upheld, the Authority can:

- a) Direct the broadcaster to publish a statement approved by the Authority – usually, I assume, a correction and apology;
- b) Take the broadcaster off air or ban advertising for up to 24 hours;
- c) Refer the matter back to the broadcaster with directions;
- d) Order compensation of up to \$5,000 for breach of privacy.

[28] In addition, the Authority can award costs<sup>2</sup> and enforce such orders.<sup>3</sup>

[29] I understand that the Authority receives about 200 complaints a year and upholds on average about 40 to 50 of them. Of the complaints upheld, the Authority does not issue a further penalty than the decision itself in about half of its cases. Where a remedy is granted, the remedy is usually a requirement that the broadcaster broadcast a statement and, if the breach is serious, pay a fine by way of costs to the Crown. Damages for breaches of privacy are relatively rare. The most draconian remedy available – taking advertising or the broadcaster itself off air for up to 24 hours – has only been imposed three times since the Authority's inception. Thus the process under the Act may be seen as a somewhat softer and more accessible system than proceedings in the ordinary courts, but there can be no doubt that the Authority has teeth even if the longer and sharper ones are not often used.

---

<sup>1</sup> Section 12.

<sup>2</sup> Section 16.

<sup>3</sup> Section 17.

[30] It is appropriate to acknowledge at this point the very real assistance I have derived from an article by Geiringer and Price.<sup>4</sup> The background information in the previous paragraph is drawn from that article but more importantly it has been of material assistance in the development of my approach to this appeal.

### **Application for leave to appeal**

[31] This appeal was filed 20 days out of time. Under s 18, appeals must be filed within one month of receipt of the decision. The decision was delivered on 21 December 2009, and the appeal was filed on 10 February 2010.

[32] The appellant says it made a genuine error in that Mr Bignell, Radio New Zealand's complaints co-ordinator, mistakenly proceeded on the basis that the period commencing 25 December 2009 and ending 15 January 2010 could be excluded for the purpose of calculating the one month appeal period.

[33] Rule 14 of the old High Court Rules provided as Mr Bignell had thought but it has been repealed. The new High Court Rules (r1.3(1)) excludes the Christmas holiday period only if the time for giving notice of appeal is expressed in "working days".

[34] For his part Mr Bolton does not allege any specific prejudice in the appeal being allowed to proceed apart from the expected additional stress and anxiety of being involved in legal proceedings. That of course should not be downplayed.

[35] For its part the Authority does not oppose leave. The Authority acknowledges that guidance on the appropriate approach to the interpretation of Standard 5 may be useful in the future deliberations of the Authority. As far as I am aware there has been no previous judicial interpretation of its meaning.

[36] On balance I consider that leave to appeal should be granted accordingly.

---

<sup>4</sup> Claudia Geiringer and Steven Price "Moving from self-justification to demonstrable justification – the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (Lexis Nexis, 2008) 295.

## **Substantive arguments**

[37] Mr Tizard advanced three arguments in support of the appeal but on the approach I take, it is necessary only to deal with the first of them. Mr Tizard argued that the Authority had misdirected itself by applying the ‘reasonable efforts’ test in Standard 5 without having first determined whether Dr Hamilton’s statements were inaccurate. He argued that the whole purpose of Standard 5 as reflected in s 21(1)(e)(iii) is to ensure that programmes are accurate and that there are procedures for correcting factual errors if they are not. He argued that the Authority does not have jurisdiction under Standard 5 to make any determination at all unless it first finds that the relevant statement is inaccurate. This, he argued, was an interpretation consistent with the right to freedom of expression guaranteed in s 14 of the New Zealand Bill of Rights Act 1990 (BORA).

[38] For the Authority Ms Sophocleous appeared to assist rather than take a strictly adversarial approach. This was of assistance given that the respondent appeared on his own behalf. She pointed to the plain words of Standard 5. She argued that the standard requires broadcasters to use “reasonable efforts” to ensure factual accuracy in their programming. She said the standard had been drafted this way by the industry and approved by the Authority because it was felt that an absolute accuracy requirement was too harsh. That was why the focus was on the effort made to achieve accuracy rather than accuracy itself. She said that the view of the industry at the time the standard was drafted was that the focus should shift from the speaker in the broadcast to the steps taken by the broadcaster.

[39] The Authority accepted that the Bill of Rights was relevant (as it did in the decision itself) and that Standard 5 was a limitation on the freedom of expression in s 14. Rather the Authority argued that it was a demonstrably justifiable limitation in terms of s 5 of BORA.

[40] Mr Bolton who appeared without counsel argued simply that Dr Hamilton’s statements about which he had complained were all inaccurate and the Authority was entitled to reach the conclusions it did. Mr Bolton also accepted that the Bill of Rights was applicable in this case but argued that the right to free expression should

not be read so widely as to absolve the broadcaster from allowing lies and attacks on the reputation of others to be broadcast.

### **Analysis**

[41] In my view a finding of inaccuracy is a threshold requirement of Standard 5 insofar as it relates to the complaint procedure. I take that view for three reasons:

- a) It is consistent with the terms of s 21(1)(e)(iii);
- b) It is implicit in the terms and purpose of Standard 5 and Guideline 5c;
- c) It is consistent with ss 5, 6 and 14 of BORA.

[42] I turn now to address each of these reasons.

### *Section 21*

[43] Section 21(1)(e) provides that it is a function of the Authority to encourage the development of codes of broadcasting practice and the observance of those codes by broadcasters. One of the code categories is provided in paragraph (iii) as follows: “Fair and accurate programmes and procedures for correcting factual errors and redressing unfairness.”

[44] According to paragraph (g) where such codes are developed, the Authority may approve them. Once approved broadcasters are obliged under s 4(1)(e) to comply with the standards contained in them and complaints can be made in accordance with the Act’s procedures for breach of them.

[45] Thus, codes under paragraph (iii) are both preventive and corrective. They are preventive in the sense that broadcasters are encouraged to produce fair and accurate programmes so that there are no justifiable complaints. And they are corrective in that, where a breach is made out, it must be remedied. The preventive aspect is reflected in the fact that the code is agreed by the industry as a benchmark

for all to achieve. One expects each broadcaster will put systems in place both to ensure compliance with the standard it has signed up to and to minimise breaches. It is important in my view to distinguish between these preventive and corrective functions. The complaint procedure under the Act, at least insofar as it relates to fair and accurate programmes, is a corrective process. It necessarily requires either factual errors or unfairness to have been proved before the actions of the broadcaster are put to the test. In the absence of actual error or unfairness, what would there be to complain about?

*Standard 5*

[46] Prior to the current Code, the 2006 edition applied. The 2006 iteration of the accuracy standard was contained in Principle 6 of that former Code. It provided:

In preparation and presentation of news and current affairs programmes, broadcasters are required to be truthful and accurate on points of fact.

[47] As Ms Sophocleous submitted, this principle was redrafted to the current format in Standard 5 at the behest of the Radio Broadcasters Association (on behalf of commercial broadcasters) and Radio New Zealand. The reason for the change does indeed appear to have been a desire to shift focus from what the speaker said, to what the broadcaster could reasonably have done about it. The motivation for this was concern expressed both by broadcasters and the Authority about the absolute nature of the old standard. Any error was actionable no matter how immaterial and no matter whether the broadcaster could reasonably have done anything to prevent it being broadcast.

[48] I certainly accept that the wording of Standard 5 is very different to the old Principle 6. I accept also that accuracy appears to have been reduced in significance in order to make room for the reasonable efforts test. But in the background material provided to me<sup>5</sup>, I detected no intention in the Authority or the broadcaster that under Standard 5 accuracy could now be treated as irrelevant for the purpose of complaints. Frankly it would make no sense to apply the standard in that way. As I

---

<sup>5</sup> Counsel for the appellant attached to his submissions two memoranda from the Authority dated October 2006 and 3 September 2007. No issue was taken with either their relevance or admissibility.

have said the complaint procedure is corrective, not preventive. Section 21 seems to make that clear. And Guideline 5c provides that if a material error of fact has been broadcast it should be corrected at the earliest appropriate opportunity. The point of the complaint process is to highlight such errors and address them. That is true whether the complaint is to a broadcaster under s 6 or the Authority under s 8.

### *Bill of Rights*

[49] Section 14 of the Bill of Rights says that “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”

[50] This is a broad based protection of all forms of speech – even false speech.<sup>6</sup> True or not, what Dr Hamilton said is prima facie protected by s 14.

[51] Section 6 of BORA directs that if s 21 of the Broadcasting Act (and therefore Standard 5) can be given a meaning consistent with s 14, then that meaning must be preferred to any other meaning.

[52] Section 5 describes the limitations that may be placed on the s 14 right. It provides that, subject to the court’s inability to strike down legislation:

... the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[53] This provision requires the court to assess whether Standard 5 as applied by the Authority is a reasonable limit that is demonstrably justified in our free and democratic society. This is the proportionality test. It requires me to be satisfied that the limitation on free speech contained in Standard 5 is a proportionate restriction on the broadcaster’s right of free expression in light of the policy objectives of the Broadcasting Act. It requires me to reconcile the interests of free speech on the one hand and accuracy and fairness in broadcast programming on the

---

<sup>6</sup> See discussion in Geiringer and Price at 325.

other. This is not an assessment of the merits in this case. That is for the Authority. Rather it is a question of construction.

[54] As I have said, in my view, the objective of the Broadcasting Act insofar as the complaint procedure is concerned is corrective rather than preventive and the Authority misdirected itself when it proceeded to uphold the Bolton complaint in the absence of an accuracy finding. I consider that this approach also represents the least limitation on the s 14 right and so is a more proportionate interpretation of Standard 5 than the approach of the Authority. It means that the zone of case by case decision-making within which the Authority is required to balance the interests I have mentioned is reduced to the minimum necessary to achieve the statutory objective of factual accuracy in relevant radio programming. In other words it minimises the area of potential conflict between s 14 and Standard 5. That is consistent with the proportionality directive in s 5. The Authority's interpretation on the other hand would not be justified under s 5, because it limits freedom of expression more than is necessary to achieve the purpose of the Standard.

[55] I would conclude therefore that the interpretation I have adopted here is in accordance with the direction in s 6 of BORA.

[56] For completeness, I note that on normal interpretation principles and for the reasons discussed above, I am satisfied that this is the correct construction of s 21 and Standard 5 even if there were no BORA issue. Unlike the situation envisaged by *Hansen v R*<sup>7</sup>, here the plain meaning of the text read in light of its purpose and context is consistent with BORA.

## **Conclusion**

[57] It follows that the appeal must be allowed. The complaint is referred back to the Authority with a direction that it reconsider the complaint on the basis that it must reach a finding of inaccuracy on one or more of the subject statements before proceeding to consider whether reasonable efforts have been made to ensure the

---

<sup>7</sup> [2007] NZSC 7; [2007] 3 NZLR 1.

inaccurate statement was accurate. I realise this places an extra burden on the Authority to consider making further investigations if necessary or to conclude, perhaps unsatisfactorily, that the complaint is unproved. That is an inevitable consequence of my conclusion that correction is the point of the complaints process.

[58] In light of the difficulty which Radio New Zealand itself created for the Authority due to the paucity of explanatory material provided to the Authority after the complaint, I do not consider this to be an appropriate case for an award of costs.

---

**Joseph Williams J**