Supreme Court of New Zealand
I Te Kōti Mana Nui

SC 57/2021

Between:	**Malcolm Bruce Moncrief-Spittle** *First Appellant*
And:	**David Cumin** *Second Appellant*
And:	**Regional Facilities Auckland Ltd** as trustee of Regional Facilities Auckland *First Respondent*
And:	**Auckland Council** *Second Respondent*

APPELLANTS' SUBMISSIONS ON APPEAL

22 October 2021

FRANKS | OGILVIE
COMMERCIAL & PUBLIC LAW

Level 5, Wakefield House
90 The Terrace
PO Box 10388
Wellington 6140

Tel +64 4 815 8050
Fax +64 4 815 8039

Solicitor:	Stephen Franks	(stephen.franks@franksogilvie.co.nz)
Counsel:	Jack Hodder QC	(jack.hodder@chambers.co.nz)
	Philip Joseph	(philip.joseph@canterbury.ac.nz)
	James Tocher	(james.tocher@chambers.co.nz)

TABLE OF CONTENTS

1. INTRODUCTION 2

2. BACKGROUND 3

Key events 3

3. THE APPELLANTS' CLAIMS AND THE APPROACHES OF THE COURTS BELOW . 5

First ground of review – irrationality / perversity 6

Second ground of review – failure to act consistently with NZBORA 7

Standing 7

This appeal 7

4. REVIEWABILITY OF THE DECISION 8

The approach is one of substance over form 8

The Decision was made in the exercise of a "public power" 9

The Decision was not a "commercial" one that requires deference 11

Other grounds for reviewability 11

5. FIRST GROUND OF REVIEW: THE DECISIONS WERE IRRATIONAL, PERVERSE AND ARBITRARY 12

Freedom of speech and the "heckler's veto" 13

Heightened scrutiny 15

Decision uninformed and ill-considered 16

Axiomatic's conduct not relevant 19

6. SECOND GROUND OF REVIEW: FAILURE TO ACT CONSISTENTLY WITH NZBORA 21

Rights engaged 21

NZBORA applies to RFAL 21

Proportionality 22

Ill, deleterious effects 25

Prescribed by law 26

7. CONCLUSION 30

May it please the Court –

1. INTRODUCTION

1.1 To the best of counsel's knowledge and research, this is the first case to come before this Court in the modern era of attempts to achieve suppression of opinions by the "heckler's veto" or "deplatforming" – and, more directly, of public authorities' responses to such attempts. Such suppression is pernicious: it erodes public discourse, narrowing the boundaries of what can be said and heard — not least, if that is unpopular or misguided.

1.2 The essence of this appeal involves: (i) the importance of freedom of expression (and associated freedoms), in a practical context; and (ii) the related constraints on the use of public powers to abet or permit a 'heckler's veto'. The short point which the appellants seek to have this Court uphold is that such a veto is presumptively unlawful and cannot justify the supportive exercise of public powers without a well informed and objectively justifiable assessment of all the circumstances.

1.3 If that point is accepted, the Court of Appeal's judgment is inconsistent with it and should be reversed. Conversely, and contrary to the Court of Appeal's approach, the appeal should not be concerned with the conduct of the organisers of the event in, although not charged to do so, not signalling at the outset the risk of a "security issue".[1]

1.4 The concept of a "heckler's veto" is not new. The common law jurisdictions have long had to engage with situations where there are attempts by one group, with actual or implied violence, to deny a public forum for another whose views are regarded with hostility by the group.[2] The term "heckler's veto" appears to have acquired judicial recognition in the context of hostility to black civil rights events in the United States in the 1960s.

1.5 On this appeal, the appellants submit that the respondent authorities' response aided and abetted such a veto and was unlawful; and that the High Court's and Court of Appeal's reasoning and conclusions to the contrary were erroneous.

1.6 The essential points underpinning this appeal may be succinctly summarised as follows:

(a) First, the respondents control access to publicly provided facilities for indoor community/public/political meetings in Auckland City and the

---

1 *Moncrief-Spittle v Regional Facilities Auckland Limited* [2021] NZCA 142 (**CA Judgment**) at [124] and [127] **[[101.0351]]**.

2 For example, *Beatty v Gillbanks* (1882) 9 QBD 308.

control of such access involves powers that are in substance "public", and may, as here, have important public consequences, and are subject to both common law review and the New Zealand Bill of Rights Act 1990 ("**NZBORA**").

(b) Second, the denial of access to the relevant facility on this occasion plainly engaged the fundamental freedom of expression (including the imparting and receipt of information and opinions) and related freedoms long established under common law – and affirmed by NZBORA.

(c) Third, the RFAL decision to deny access to the facility for the particular event was unlawful on orthodox public law principles, as well as for breaching the provisions of NZBORA.

2. BACKGROUND

2.1 The appellants take little issue with the Court of Appeal's general summary of relevant events. A detailed chronology is included with these submissions. There is also a more comprehensive narrative of the factual background set out in the appellants' High Court submissions, which are included in the case on appeal.[3]

Key events

2.2 The litigation concerns the propriety of RFAL's decision to cancel a venue-hire agreement in respect of a proposed event at the Bruce Mason Centre, Takapuna (the "**Decision**"). The key events are as follows:

(a) In June 2018, an Australian company called Axiomatic entered into the venue-hire agreement with RFAL relating to the Bruce Mason Centre.[4] The purpose was to host a 3 August 2018 event (the "**Event**") featuring two keynote speakers: Stefan Molyneux and Lauren Southern (the "**Speakers**").[5] Axiomatic was organising an Australasian tour by the Speakers.

(b) In early July 2018, after the Event was publicised, RFAL began to receive complaints from members of the public, the Mayor's office, and an Auckland Councillor about the Event and the Speakers' views.[6] The general

---

3 Appellant's HC submissions from [2.1] **[[101.0068]].**

4 Affidavit of D Pellow (18.7.2017) at [37] **[[201.0023]]**. See venue-hire agreement from **[[301.0074]].**

5 Axiomatic described Molyneux as "a renowned philosopher and author", and Southern as "a documentary filmmaker and best-selling author": email from Axiomatic to W Pafalani (13.6.2018) at **[[301.0064]].**

6 See, for example, affidavit of G Crighton (23.7.2018) at [15]–[25] **[[201.0077]]**, Facebook complaint by "Eris Tottle" at **[[302.0216]],** email complaint by H Kennedy-Smith **[[302.0222]]**, telephone call from A Suh noted at **[[302.0244]]**, Facebook comment of P Gordon **[[302.0226]],** Ticketmaster complaints at **[[302.0230]],** complaint email from G Lolesi **[[304.0823]],** complaint email from V Morse at **[[302.0249]].**

theme of the complaints was that the Speakers were perceived to be "alt-right", "fascists" or "racists".

(c) On 6 July 2018, at 9:02 am, a group called "Auckland Peace Action" issued a press release threatening to blockade the entry to the venue in order to stop the Event.[7]

(d) Later that morning, between 9:10 am and 11 am, RFAL's relevant director (Mr Macrae) made the Decision. He has said this was "in the interests of safety and security".[8] (The evidence was, however, that there was no prior investigation into the existence of an actual security threat, nor any inquiries with the Police, nor any Police notification of security threats, nor any contact with Axiomatic about its security capabilities, nor had RFAL applied its own health and safety protocols that provide for such occasions.[9])

(e) Between 11:25 am and around 2 pm, Mr Macrae communicated with a staffer from the Mayor's office to "match up timing" regarding a public announcement about the Decision.[10] At 2:13 pm, the Mayor tweeted:[11]

> @AklCouncil venues shouldn't be used to stir up ethnic or religious tensions. Views that divide rather than unite are repugnant and I have made my views on this very clear. Lauren Southern and Stefan Molyneux will not be speaking at any Council venues.

(f) At 2:15 pm Mr Macrae called Axiomatic to inform them about the Decision. In that conversation he said RFAL had "talked with our security people here, we've had some early conversations with the police" (which the appellants say is not true). He rejected the possibility of there being any options allowing the Event to go ahead as planned, including when offered assistance from Axiomatic's own security officer.[12]

(g) At 3:08 pm the Mayor tweeted again:[13]

> Let me be very clear, the right to free speech does not mean the right to be provided with an @AklCouncil platform for that speech.

---

7 Auckland Peace Action *Harae Atu, Fascists – "alt-right" not welcome in Aotearoa* (press release, 6 July 2018) **[[302.0250]].**

8 Affidavit of R Macrae (19.6.2019) at [70] **[[201.0071]].**

9 See email D Kidd to Police (6.7.2018) **[[302.0220]]** (investigation and contact with Police only after Decision made); Letter NZ Police to M Moughan (26.8.2018) **[[304.0719]]** (Police received no security threats relating to Event); Regional Facilities Auckland: Event Health and Safety Policy **[[304.0731]]**, see especially process **[[304.0738]].**

10 See affidavit of M Burgess (23.7.2018) at [19]–[20] **[[201.0071]].**

11 Tweet of Phil Goff at **[[301.0037]].**

12 Transcript of telephone conversation at **[[304.0776]].**

13 Tweet of Phil Goff at **[[301.0039]].**

(h) Four days later, on 10 July 2018, the Mayor was interviewed about the Decision on Radio New Zealand's "Morning Report" show. In that interview, the Mayor indicated that *he* made the Decision (not RFAL), and that the Decision was made because of the Speakers' views.[14]

(i) On 10 July 2018, RFAL formally cancelled the venue hire agreement.[15]

(j) By 18 July 2018, Axiomatic had approached more than six alternative venues. All declined to host the Event.[16] Venues' connections with the Mayor or Auckland Council hindered Axiomatic's search.

(k) All of the Australian events proceeded on the planned days, with varying degrees of protest.[17]

(l) Axiomatic eventually, after 30 July 2018, secured the PowerStation venue in Auckland for the Event.[18] But the PowerStation owners cancelled the Event on 3 August 2018, hours before it was scheduled to start, without giving reasons to Axiomatic.[19]

2.3 Ultimately, no public Event featuring the Speakers was able to go ahead in Auckland.

3. THE APPELLANTS' CLAIMS AND THE APPROACHES OF THE COURTS BELOW

3.1 The litigation was initially commenced as both a breach of contract claim (by Axiomatic) and as a judicial review (by Axiomatic, and the appellants). Axiomatic fell by the wayside and the matter proceeded to trial, on the third amended statement of claim, as a judicial review by the appellants.

3.2 As the respondents' evidence and submissions in the High Court indicated that (contrary to his claims) the Mayor did *not* in fact make or dictate the Decision, he did not feature in the appeal before the Court of Appeal and does not feature in this appeal.

3.3 The first appellant describes himself as, politically, "a classical liberal", was familiar with the Speakers' views, and acquired a ticket for the Event.[20]

---

14 Transcript of Radio New Zealand interview at **[[301.0041]].**

15 Letter from RFAL to Axiomatic (10.7.2018) at **[[201.0030]].**

16 Affidavit of D Pellowe (18.7.2018) at [97] **[[201.033]]**.

17 Affidavit of D Pellowe (15.5.2019) at [5]–[24] **[[201.0134]]**.

18 Affidavit of D Pellowe (15.5.2019) [25]–[27] **[[201.0137]].**

19 Affidavit of D Pellowe (15.5.2019) at [30] **[[201.0138]].**

20 Affidavit of M Moncrief-Spittle (18.7.2018) at [6] **[[201.0002]].**

3.4 The second appellant is a prominent member of the Jewish community in Auckland, concerned about the maintenance of access to Auckland Council venues for speaking events, and the "heckler's veto". He is not a supporter of some of the Speakers' views or personal positions, and was not attending the Event.[21]

3.5 The High Court dismissed the proceeding in its entirety. The Court of Appeal found in favour of the appellants on several points. Each relevant ground of review, and the approach to it by the courts below, is summarised below.

First ground of review – irrationality / perversity

3.6 The first ground of review was that the Decision was irrational, perverse and arbitrary ("unreasonable"). In short, this was because the Decision was made on the basis of inadequate information (including RFAL failing to follow its own procedure) in circumstances where the common law right to freedom of speech was engaged and where the Decision was improperly based on a "heckler's veto".

3.7 The High Court rejected this ground of review without considering its substance. This is because it held that RFAL exercised no public power in deciding to cancel the Event, meaning RFAL could not be reviewed for any contended irrationality or perversity.[22] In other words, the decision was not amenable to judicial review.

3.8 The High Court's reasoning appears to have been anchored to its interpretation of the specific trust structure in which RFAL operates. Specifically, the Court concluded that the Auckland Council had "devolved" its powers to RFAL through the trust deed, and that RFAL provided services on the Council's behalf.

3.9 The Court of Appeal found that the High Court's focus on the wording of the trust deed and establishing order "obscured an important aspect", namely that the overall scheme of the local government legislation contemplates that "some local government decision-making will be undertaken by CCOs".[23]

3.10 That must be correct. If RFAL made the decision while acting on behalf of the Council and while exercising a "devolved" power, then it must follow that RFAL's decisions should be subject to the same scrutiny on judicial review as the Council's decisions would be, had the Council made the Decision. The supposed devolution is immaterial. It would also be wholly unprincipled if a public body could create a "judicial review-free Alsatia", and avoid the Court's scrutiny, by simply conferring

---

21 Affidavit of D Cumin (20.7.2018), generally **[[201.0046]].**

22 *Moncrief-Spittle v Regional Facilities Auckland Limited* [2019] NZHC 2399, [2019] 3 NZLR 433 (**HC Judgment**) at [46] **[[101.0222]].**

23 CA Judgment at [45] **[[101.0325]]**.

their powers and functions onto other entities which they wholly own and over which they exercise significant control.[24]

3.11 The Court of Appeal accepted that the Decision was in substance public and reviewable on ordinary principles but rejected the claim that it was unreasonable.

Second ground of review – failure to act consistently with NZBORA

3.12 The second ground of review alleged that the respondents failed to act consistently with the appellants' rights guaranteed under NZBORA, including freedom of expression, thought, association, and freedom from discrimination on the basis of political opinion.

3.13 For similar reasons to its conclusion on reviewability, the High Court rejected the claim that NZBORA applied to RFAL: the cancellation of the Event was not done in the performance of a "public function, power or duty" in terms of s 3 of NZBORA. Accordingly, the High Court did not consider the substantive issues on this ground.

3.14 The Court of Appeal accepted that freedom of speech and assembly were engaged (and appeared to accept those rights were breached) but concluded that those rights were justifiably limited.[25] The Court of Appeal rejected the claim that freedom of thought and association were engaged and did not substantively address freedom from discrimination.[26]

Standing

3.15 The High Court went on to observe that neither Mr Moncrief-Spittle nor Dr Cumin had standing to bring the proceeding.[27] That proposition was squarely rejected by the Court of Appeal and has not been put in issue by the respondents before this Court.[28]

This appeal

3.16 In this appeal, Mr Moncrief-Spittle and Dr Cumin challenge the Court of Appeal's conclusions dismissing both the first and second grounds of review. The

---

24 See *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component and British Columbia Teachers' Federation* 2009 SCC 31, [2009] 2 SCR 295 at [22]. See also Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [33.8], and *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 (Full HC) at 611: "If the Crown is subject to the law - as it is - then, a fortiori, a delegate body of the Crown must likewise be subject to it."

25 CA Judgment at [111] **[[101.0347]]** and [127] **[[101.0352]]**.

26 CA Judgment at [112]–[115] **[[101.0347]]**.

27 HC Judgment at [66] **[[101.0227]].**

28 CA Judgment at [128]–[132] **[[101.0352]]**.

respondents seek to resurrect the High Court's conclusions on reviewability, which were rejected (correctly, it is submitted) by the Court of Appeal.[29]

4. REVIEWABILITY OF THE DECISION

4.1 The appellants support the conclusions of the Court of Appeal on reviewability. The High Court engaged in, and was distracted by, an unduly technical emphasis on the particular trust structure surrounding RFAL. As a result, it failed to properly apply the principles as to the reviewability of decisions made by entities exercising powers or functions which are in substance public or have important public consequences.

4.2 That error was corrected by the Court of Appeal, which recognised that RFAL "stands in the shoes of the Auckland Council" in relation to the assets it holds.[30] The Court of Appeal correctly found that "the proper context in which to view RFAL's decision" was that it was "made pursuant to a core statutory function and would directly affect the BORA rights of members of the public".[31] The Decision "ought not to be treated as merely a commercial decision subject to the same limitations for review as apply to ordinary commercial decisions that have only commercial consequences".[32] In short, the Decision was in substance public.

The approach is one of substance over form

4.3 The general approach to reviewability is settled. This Court confirmed in *Ririnui v Landcorp Farming Ltd* that, as a starting point, New Zealand courts have the power to review all exercises of public power, whatever the source of the power exercised.[33] The Court of Appeal has also confirmed, across several cases, that even decisions made by private organisations can be amenable to judicial review, including where the exercise of the power has "public consequences". In *Royal Australasian College of Surgeons v Phipps*, the Court of Appeal explained that:[34]

> Over recent decades Courts have increasingly been willing to review exercises of power which in substance are public or have important public consequences, however their origins or the persons or bodies exercising them may be characterised … The Courts have made it clear that in appropriate situations, even though there may be no statutory power of decision or the power may in significant measure be contractual, they are willing to review the exercise of the power.

---

29 Respondents' notice of intention to support judgment on other grounds **[[05.0008]]**.

30 CA Judgment at [50] **[[101.0326]]**.

31 At [67] **[[101.0333]]**.

32 At [67] **[[101.0333]]**.

33 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [1] and [89]; see also *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [51].

34 *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11-12. See also *Wilson v White* [2005] 1 NZLR 189 (CA) at [21] (cited in *Ririnui* at [89]).

4.4 The base question for this Court is whether the Decision involved the exercise of a "public power in substance" and/or whether it had "important public consequences". The appellants submit that this question was correctly answered in the affirmative by the Court of Appeal.

The Decision was made in the exercise of a "public power"

4.5 The background to RFAL is outlined in the Court of Appeal's decision,[35] and was further detailed in the appellants' submissions before the Court of Appeal.[36] In short, RFAL is a council-controlled organisation ("**CCO**") with objectives defined under s 59 of the Local Government Act 2002.[37]

4.6 In the courts below, the respondents submitted that RFAL was merely acting in a commercial capacity when it made the Decision, meaning the scope of review should be restricted to "fraud, corruption, bad faith or analogous circumstances".[38] That proposition relied, by analogy, on the limited grounds of review available for decisions made by SOEs or commercial procurement decisions by government agencies.[39]

4.7 The Court of Appeal rejected the respondents' claim that a narrow approach to review was appropriate. The appellants support that conclusion and highlight six aspects of the Court's reasoning that they submit capture its essence:

(a) Although the immediate context of the cancellation was commercial, "beyond the contract itself, the wider context is not comparable to the cases in which the narrow approach to the availability of judicial review has been taken".[40]

(b) "RFAL is not required to administer its assets on a competitive commercial basis (as was the position with the state-owned enterprises in *Mercury Energy* and *Ririnui*)".[41] To this the appellants add that, unlike SOEs,[42] CCOs are not necessarily required to pursue commercial objectives.[43] Although RFAL has to operate on a "prudent commercial basis", this sits alongside its

---

35 CA Judgment at [33]–[50] **[[101.0320]]**.

36 Appellant's Court of Appeal submissions at [5.4]–[5.12] **[[101.0238]]**.

37 The scope of these objectives is wide and includes "both commercial and non-commercial" objectives, such as the object to "exhibit a sense of social and environmental responsibility by having regard to the interests of the community in which it operates".

38 Respondents' High Court submissions at [5.1] **[[101.0134]]**.

39 See *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 391; *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776; and *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470.

40 CA Judgment at [61]–[62] **[[101.0331]]**.

41 At [62] **[[101.0331]]**.

42 See State-Owned Enterprises Act 1986, s 4.

43 Local Government Act 2002, s 59(1).

wider, social objective of "[e]nriching life in Auckland by engaging people in the arts, environment, sport and events".[44]

(c) RFAL receives significant funding and subsidies from Auckland Council (constituting around 30 per cent of its operating revenue) and "not all of RFAL's venues are operated with the same degree of commerciality".[45]

(d) In comparison to the commercial tender processes in *Lab Tests* and *Problem Gambling*, the hiring out of venues "is not collateral to RFAL's core statutory function of management the assets vested in it but part of that core statutory function … and the usual way of achieving that is by hiring them out".[46]

(e) The effect of cancelling a venue-hire agreement "is not limited to those directly interested in the contract", it also affects members of the public who are planning to attend the Event.[47]

(f) "RFAL's statutory function of providing venues for live performances engages rights protected at common law and under BORA".[48] "Society places a high value on freedom of expression and RFAL has the power to control public assets that are used for many forms of expression".[49] It is "incontrovertible that the right to freedom of expression was engaged when RFAL decided to cancel the event".[50]

4.8 The appellants invite this Court to endorse the above reasoning. In short, the Decision was made by a CCO, directly in the exercise of its functions, on behalf of a local authority, and relating to the provision of a service that local governments in New Zealand have provided for decades (i.e. town hall and event venues for public meetings and debate).

4.9 RFAL exercised powers as the statutory agent of a local authority to control access to a publicly funded venue sought for an indoor political meeting. The *Phipps* tests are well met.

---

44 Deed of Trust (Regional Facilities Auckland) at cl 3.2(e) **[[303.0528]]** and cl 3.1 **[[303.0527]].**

45 CA Judgment at [62] **[[101.0331]]**.

46 At [63] **[[101.0332]]**.

47 At [63] **[[101.0332]]**.

48 At [64] **[[101.0332]]**.

49 At [67] **[[101.0333]]**.

50 At [65] **[[101.0332]]**.

The Decision was not a "commercial" one that requires deference

4.10 Where a CCO is not charged with acting commercially, and is instead closely aligned with advancing a Council's policy objectives, there is a reduced impetus for deference to the CCO's own decisions about commerciality, and an increased need for scrutiny to ensure that the devolved functions are exercised in a lawful way.

4.11 The Decision lacked any real degree of commerciality that necessitates the deference that would normally be afforded to a commercial decision challenged by way of judicial review.[51] The Court is not here concerned with an invitation to interfere with a business's decision to allocate its resources for its commercial purposes. Unlike the applicants in *Mercury Energy, Lab Tests,* or *Problem Gambling,* the appellants are not disappointed commercial parties attempting to use judicial review to address prejudice to their commercial prospects.[52] Instead, the appellants brought these proceedings *because* of the public interest concerns raised by the Decision. Hence, the appellants only seek declaratory relief.[53]

4.12 There was also a high level of governmental involvement in RFAL's decision to cancel the venue-hire agreement. Mayor Goff and Mr Town (Auckland Council CEO) both contacted RFAL about the Event on multiple occasions in the 24 hours leading to the Decision, including asking RFAL to respond to complaints.[54] On 6 July, the Mayor's Office was also in continuous contact with RFAL to "match up timing" of their respective communications.[55]

Other grounds for reviewability

4.13 The appellants say the Decision is also reviewable on the bases it had "important public consequences" or through analogy with the ancient common law doctrine of "common callings".[56] The Court of Appeal found it unnecessary to consider these

---

51 Such deference could be explained as a manifestation of the business judgment rule, which acknowledges that the courts have no role in second guessing profit-motivated decisions. Those concerns do not apply to a CCO making decisions about the allocation of a public forum for the advancement of the public good.

52 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC); *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZHC 385, [2009] 1 NZLR 776; *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 409, [2019] 2 NZLR 470 at [43] and [53] (the identification of the applicant as a disappointed commercial party was a key factor driving the Court of Appeal's conclusion that only a narrow scope of review should apply to the Ministry of Health's tendering decisions).

53 See Affidavit of M Moncrief-Spittle (18.7.2018) from [7] onwards **[[201.0002]]**; and Affidavit of D Cumin (20.7.2018) at [49] **[[201.0059]]**.

54 Email from J Sutherland to R Macrae (6.7.2018) **[[304.0845]]**.

55 See affidavit of M Burgess (23.7.2018) at [19]–[20] **[[201.0071]]**. See also text messages at **[[301.0147]]**.

56 Under this doctrine, businesses who provide important services to the public in the pursuit of their own interests have a duty not to exclude people unreasonably or arbitrarily, and can be subject to judicial review. The doctrine recognises that some ostensibly private decisions can engage public law elements. See *Wu v Sky City Auckland Ltd* [2002] NZAR 441 (HC) at [16] (per Chambers J, as to whether a casino is a common calling), affirmed on this aspect but overturned on different grounds in [2002] 3 NZLR 621 (CA) at [34].

points because of the conclusion it reached on the public nature of the power.[57] These arguments were addressed in more detail in the appellants' submissions before the Court of Appeal.[58]

4.14 In brief, the Decision related to the availability of a venue (akin to a "town hall") to discuss topical political ideas and was considered to be so consequential that it warranted extended comment on a number of occasions by the Mayor.[59] RFAL is also engaged in the provision of a key service for the Auckland community, both generally and in terms of fostering Auckland's democratic culture, and holds a significant share of the Auckland market for seated event venues.

5. FIRST GROUND OF REVIEW: THE DECISIONS WERE IRRATIONAL, PERVERSE AND ARBITRARY

5.1 The first ground of review was based on common law irrationality, perversity and arbitrariness – essentially "unreasonableness". With its endorsement by the Court of Appeal in *CREEDNZ*, an important formulation of this ground involves the question:[60]

> Did the decisionmaker ask themself the right question and take reasonable steps to acquaint themself with the relevant information to enable them to answer the question correctly?

The appellants submit that the chronology of the key events yields a simple "No" answer.

5.2 The appellants also rely on the formulation by Lord Radcliffe in *Edwards v Bairstow* – that is, "there is no evidence to support the determination" or "the evidence is inconsistent with and contradictory of the determination" or "the true and only reasonable conclusion contradicts the determination".[61]

5.3 At a broader level, the appellants also rely on the underlying point, recently restated by the Supreme Court of Canada in the *Vavilov* case, that the rule of law and institutional legitimacy require public decision-making to be "transparent,

---

57 CA Judgment at [69]–[71] **[[101.0334]]**.

58 Appellant's Court of Appeal submissions at [5.17]–[5.19] **[[101.0241]]** and [5.23]–[5.24] **[[101.0242]]**.

59 Compare *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC), where the (wholly private) television station's exclusion of a minor political party from an election debate was amenable to review on the basis that the station's decision had public consequences.

60 See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 197–198 per Richardson J, citing Lord Diplock in *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 (HL) at 1065. And Cooke and Richardson JJ each cited Lord Diplock's point that the decisionmaker must properly directed themself in law: at 184 and 197.

61 *Edwards v Bairstow* [1956] AC 14 (HL) at 36; and *Wu v Sky City Auckland Ltd* [2002] NZAR 441.

intelligible and justified".[62] The appellants submit that RFAL's Decision fell conspicuously short of the standards required of public decisionmakers.

Freedom of speech and the "heckler's veto"

5.4 The decision to cancel the venue-hire agreement, and consideration of whether it was irrational, arbitrary and perverse, cannot be divorced from the common law rights of free speech held by the Event organisers and the ticketholders (affirmed by NZBORA), which were at risk of being unduly eroded. The venue was a publicly available platform, but RFAL's decision deprived the Speakers and the ticketholders of the ability to seek and impart information based on what others had predicted the content of the expression at the Event would involve.

5.5 The common law tradition reflects strong presumptions of the full range of freedoms.[63] In *Attorney-General (SA) v Corporation of the City of Adelaide,* French CJ in the High Court of Australia cited considerable authority, going back to Blackstone, when stating that "[f]reedom of speech is a long-established common law freedom", and is accorded "paramount" consideration.[64] In the same case, Heydon J also observed that "[t]he common law right of free speech is a fundamental right or freedom falling within the principle of legality".[65]

5.6 Hastily cancelling the venue-hire agreement on the basis of a purported (and unsubstantiated) threat by a protest group creates a perverse incentive: what Dr Cumin calls the "thug's veto",[66] and what is better known as the "heckler's veto".[67] Capitulating to such a threat, on the grounds of health and safety, lends legitimacy to the adoption of such strategies to undermine the exercise of freedom of speech

---

62 *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65, [2020] 2 LRC 393 at [14]–[15]. See also Lord Woolf and others *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at 54, n 234 on a "Culture of Justification".

63 *R v Copeland* [2020] UKSC 8, [2020] 2 WLR 681 at [28].

64 *Attorney-General (SA) v Adelaide City Corporation* [2013] HCA 3, (2013) 249 CLR 1 at [43] and n 165, citing "Blackstone, Commentaries on the Laws of England (1769), bk 4, 151–152; *Bonnard v Perryman* [1891] 2 Ch 269 at 284 per Lord Coleridge CJ; *R v Commissioner of Metropolitan Police; Ex parte Blackburn [No 2]* [1968] 2 QB 150 at 155 per Lord Denning MR; *Wheeler v Leicester City Council* [1985] AC 1054; *Attorney-General (UK) v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 203 per Dillon LJ."

65 At [151]–[152]. *Halsbury's Laws of England*, while recognising that it was "traditionally seen as a residual right" traverses the areas where the common law right to freedom of speech gained prominence, including in relation to defamation, open justice, and Parliamentary privilege: see *Halsbury's Laws of England* (5th ed, 2018, online ed) vol 88A Rights and Freedoms at [464].

66 Affidavit of D Cumin (20.7.2018) at [37] **[[201.0057]].** See also, including on "the assassin's veto", in Timothy Garton Ash *Free Speech: Ten Principles for a Connected* (World Atlantic Books, London, 2016) at chapter 2 – in particular (at 130): "The generic evil underlying so many illegitimate abuses of and curbs on free speech turns out to be the real or attributed threat of violence".

67 Attributed to Harry Kalven Jr *The Negro and the First Amendment* (Ohio State University Press, Columbus, 1965) at 160: "If the police can silence the speaker, the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get the law to silence any speaker of whom they do not approve."

by all New Zealanders. Perverse implications for a fundamental freedom protected by the common law are relevant considerations for any public decision-maker.

5.7 Related to the "heckler's veto" is the principle that people who assemble for a lawful object not intending to break the peace do not constitute an unlawful assembly, despite the fact a breach of the peace may occur because their meeting could be protested by others.[68]

5.8 Consideration of the "heckler's veto", and the imperative of protecting unpopular speech, is more developed in United States jurisprudence. The landmark Supreme Court judgment in *Terminiello v Chicago* established the general proposition that, as the right to speak freely and to promote diversity of ideas is central to the validity of civil and political institutions, and even if this might result in stirring some people to anger, free speech could not be pre-empted because of the risk of unrest or disturbance.[69] *Terminiello* has been applied in a "heckler's veto" series of 1960s civil rights decisions, and more recently.[70] Similarly, a line of cases following the Supreme Court decision in *Brandenburg v Ohio* has recognised that a high threshold — namely the intended encouragement and imminent use of violence or unlawful action — must be crossed before the right to freedom of expression will be limited on public safety grounds in order to manage the disruptive actions of third parties.[71]

5.9 Those United States decisions do reflect the constitutional status of freedom of speech there. Nevertheless, the underlying principles and public policy reasoning do not diverge from the Commonwealth common law position, articulated above.

---

68 *Beatty v Gillbanks* (1882) 9 QBD 308. While this decision was later described as "somewhat unsatisfactory" by Lord Hewart CJ in *Duncan v Jones* [1936] 1 KB 218 (DC), Lord Carswell in the House of Lords said the same criticism could be made of the latter case; see *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55, [2007] 2 AC 105 at [99]. And compare the significance extended to freedom of expression in *Morse v Police* [2011] NZSC 45, [2012] 1 NZLR 1.

69 *Terminiello v City of Chicago* 337 US 1 (1949).

70 *Edwards v South Carolina* 372 US 229 (1963) (the Supreme Court overturned convictions of a group of peaceful black protesters who were arrested for breaching the peace after failing to follow police orders to disperse that were justified by the fear that a group of onlookers would cause a disturbance); *Cox v Louisiana* 379 US 536 (1965) (the Supreme Court overturned the conviction of the leader of a group of students who were arrested for protesting segregation because the sheriff deemed the speech to be "inflammatory" as it led to "muttering" and "grumbling" amongst a group of white on-lookers); *Brown v Louisiana* 383 US 131 (1966) (conviction for breach of peace arising from a silent protest in a segregated public library overturned; "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence"); *Dunlap v City of Chicago* 435 F Supp 1295 (N D Ill 1977) at 1297 (City of Chicago was ordered to "provide police in such numbers as in their professional judgment are required to afford adequate protection" to a pro-Martin Luther King Jr march that faced a violent response each year); and *Ovadal v City of Madison* 416 F 3d 531 (7th Cir 2005) at 537 ("The police must preserve order when unpopular speech disrupts it; '[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.'").

71 *Brandenburg v Ohio* 395 US 444 (1969); and *Bible Believers v Wayne County* 805 F3d 228 (6th Cir 2015).

5.10 In Canada, courts have discussed the heckler's veto in a situation where a university required a pro-life group to pay a large security fee before holding an on-campus event, which would have certainly been protested. The fee meant the group was unable to run the event. Although the Court was not required to resolve the question, the Court was clearly concerned that the University's action of placing the full burden of security costs onto the group amounted to a heckler's veto.[72]

5.11 In New Zealand, no less than in any free and democratic country, placing those who wish to peacefully assemble for lawful purposes at the mercy of protestors (or rumours of protestors) misplaces power in the hands of the protestors. Such a situation has a particularly harmful potential, reflected in the evidence of Dr Cumin, in relation to (as an example) New Zealand's minority communities. He explains that public events about Israel and Jewish life, though innocuous, are frequently protested and threatened with disruption, sometimes violent disruption.[73] But on RFAL's logic, any of these events at a RFAL venue could (perversely) be liable to cancellation based on a threat of protest.

5.12 The Court of Appeal accepted (correctly) that the concept of the "heckler's veto is one that has general application, including in the New Zealand context".[74] Yet it declined to substantively engage with the concept.[75] The appellants submit that was an error. The underlying North American concerns about the invalidity of the heckler's veto are cogent and directly applicable to a decision to cancel a venue-hire agreement. RFAL was required to take that into account when making its decision. Had it properly done so – that is, asked itself the right questions **and** taken reasonable steps to provide an informed and correct answer – it could not rationally have cancelled the venue-hire agreement in the hasty manner it did.

Heightened scrutiny

5.13 As just described, RFAL was faced with making a decision involving public law elements and with the potential to severely impact on fundamental freedoms. The New Zealand courts have for some time recognised the need for heightened scrutiny of public decision-making where fundamental rights are engaged.[76] The language and conceptual framework remain a matter of debate amongst the

---

72 *UAlberta Pro-Life v Governors of the University of Alberta* 2020 ABCA 1 at [180]–[189]. See also *Fleming v Ontario* 2019 SCC 45, [2020] 1 LRC 408 at [66]: "Where a police action prevents individuals from lawfully expressing themselves because their expression might provoke or enrage others, freedom of expression […] is also implicated."

73 Affidavit of D Cumin (20.7.2018) at [37]–[49] **[[201.0057]].**

74 CA Judgment at [107] **[[101.0345]]**.

75 See [108]–[109] **[[101.0346]]**.

76 See, for example, *Wolf v Minister of Immigration* [2004] NZAR 414 (HC).

judiciary and academy and the issue has yet to receive definitive appellate consideration by this Court.[77]

5.14 Heightened scrutiny has been described by the Court of Appeal as requiring the court to "ensure the decision has been reached on sufficient evidence and has been fully justified".[78] The court is "entitled to subject the [decision-maker's] reasoning process to anxious or heightened scrutiny", which requires "consideration of whether materially relevant information … had been considered".[79] In short, greater justification is required.

5.15 It has been suggested that, rather than describing the intensity with which the court scrutinises a decision, heightened scrutiny arises because the law imposes greater constraints on the exercise of discretion where fundamental freedoms are engaged.[80] That exposition of the principle explains well why the decision-maker itself, and not just the court on review, is obliged to undertake a robust decision-making process.[81]

5.16 In any event, the underlying point is that the courts are not required to, and should not, refrain from heightened scrutiny of administrative decisions that affect fundamental freedoms. Given the serious implications for free speech of empowering a heckler's veto, this Court should require an exacting standard of reasoning and information before concluding the Decision was a reasonable exercise of public power.

5.17 Further, RFAL cannot avoid the relevant scrutiny by structuring its public function through private contractual arrangements. In providing a public venue for an event with political overtones, RFAL was carrying out an important public function.[82]

Decision uninformed and ill-considered

5.18 Despite the serious impact on freedom of speech and other fundamental freedoms, RFAL made its decision in the absence of evidence and without making proper inquiries. The learned authors of *De Smith's Judicial Review* observe that "a material mistake or disregard of a material fact in and of itself renders a decision

---

77 This Court recently declined to consider the issue in *Minister of Justice v Kim* [2021] NZSC 57 at [51].

78 *Kim v Minister of Justice of New Zealand* [2019] NZCA 209, [2019] 3 NZLR 173 at [45].

79 At [45]–[46].

80 *New Zealand Council of Licensed Firearms Owners Incorporated v Minister of Police* [2020] NZHC 1456 at [84]–[85] per Cooke J.

81 See also *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395 at [54] ("… both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis").

82 See paragraphs 4.10–4.12 above.

irrational or unreasonable".[83] The key facts indicating this form of irrationality are that:

(a) At 9:30 am on 5 July, RFAL "flagged" the Event to its security team. At 11:37 am, its head of security (Mr Kidd) advised they will "gather further intelligence", and then advise of three things: "findings", "risk rating" and "mitigation strategies". Yet RFAL cancelled the Event within the next 24 hours. Seemingly unaware, Mr Kidd was attempting to gather intelligence at 3:49 pm on 6 July (hours after the Event had been cancelled).[84]

(b) When Mr Macrae (from RFAL) informed Axiomatic about the Decision, he said "we've had some early conversations with the Police".[85] But there had been no conversations with the Police at this stage,[86] and the evidence shows that the Police did not receive any threats in relation to the Event, whether directly or indirectly.[87]

(c) On the afternoon of 5 July, Mr Crighton remained of the view that the complaints "were not out of the ordinary for an event that involved political discussions, but that it was prudent to find out more about the tour".[88] Yet Auckland Peace Action then threatened to blockade the Event on the morning of 6 July, and RFAL made the decision to cancel the venue-hire agreement less than two hours after that. So, in less than 24 hours, RFAL's position changed from having minimal concerns about the Event, to cancelling it. The Decision did not demand this level of urgency.

(d) RFAL reached the view that health and safety risks could not be managed 18 days before Axiomatic was required to return their risk management form (24 July 2018), which would have provided it with highly relevant information regarding Axiomatic's ability to manage any security risks.

(e) RFAL engaged in no real consultation with Axiomatic about its own ability to manage the Event before making the decision to cancel the venue-hire agreement. And, RFAL refused to engage with Axiomatic when Axiomatic indicated that it had its own, skilled security personnel. This too led to RFAL not having essential information ahead of making the Decision.

---

83 Lord Woolf and others *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [11-051]; and compare the *CREEDNZ* formulation noted at paragraph 5.1 above.

84 Affidavit of G Crighton (7.7.2018) at [22] **[[201.0079]],** and email D Kidd to Police (6.7.2018) **[[302.0220]].**

85 Transcript of phone call (10.7.2018) **[[304.0776]].**

86 See email D Kidd to Police (6.7.2018) **[[302.0220]].**

87 Letter NZ Police to M Moughan (26.8.2018) **[[304.0719]].**

88 Affidavit of G Crighton (23.7.2018) at [26] **[[201.0080]].**

5.19 The evidence of RFAL's Mr Macrae indicated a dominating concern with his liability — especially his personally being prosecuted —under health and safety legislation.[89] That should have reinforced the need for fuller information and advice. Also eloquent of a striking failure to ask the right questions was Mr Crighton's evidence of comfort that "the decision had nothing to do with freedom of speech".[90]

5.20 The Court of Appeal focused on two factors, the "failure to wait for input from the police" and the "failure to engage with Axiomatic about its ability to manage the event".[91] It said those failures did not make the Decision unreasonable. But that assumed the Decision was otherwise reasonable. There was no basis for that assumption. There was no urgency to cancel — the Event was weeks away — yet the Decision was made with unwarranted haste (in a matter of hours) and without appropriate and responsible consultation. The appellants say that, when important freedoms were at stake, such a truncated process was not reasonably open to RFAL.

5.21 Moreover, the absence of engagement with the Police is itself significant. It meant that RFAL failed to inform itself of the role Police would play in restraining unlawful behaviour and maintaining order should protesters have attempted to disrupt the Event. Had RFAL been properly informed, it might have better understood the Police's duty to uphold the lawful exercise of fundamental freedoms by those attending the Event.[92] The common law has long recognised that the Police have a duty to prevent reasonably apprehended breaches of the peace.[93]

5.22 The Court of Appeal concluded that "RFAL was entitled to make its own assessment of the risk and of the practical steps that would be required to manage that risk".[94] Yet the evidence shows that RFAL had not even received its own internal findings and mitigation strategies from Mr Kidd. Any assessment made by RFAL in those circumstances was simply but invalidly uninformed. How was RFAL to weigh its decision to cancel against the available alternatives when it had not sought or obtained the relevant information to understand what those alternatives might entail?

---

89 Affidavit of R Macrae (23.7.2018) at [43]–[44] and [50] **[[201.0102]].**

90 Affidavit of G Crighton (7.7.2018) at [34] **[[201.0082]]**.

91 CA Judgment at [92]–[93] **[[101.0340]]**.

92 See Policing Act 2008, s 9(a) and (b) — "The functions of the Police include … keeping the peace … maintaining public safety". See also the constable's oath set out in s 22(1): "… I will, to the best of my power, keep the peace and prevent offences against the peace …".

93 See *Minto v Police* [1987] 1 NZLR 374 (CA) at 378 per Bisson J; and *Kavanagh v Hiscock* [1974] QB 600 (DC) at 612 per Boreham J.

94 CA Judgment at [93] **[[101.0340]]**.

5.23 RFAL also failed to consider its own detailed health and safety procedures before deciding to cancel the venue-hire agreement on health and safety grounds.[95] In *Chiu v Minister of Immigration*, the Court of Appeal held that the New Zealand Immigration Service's failure to properly interpret its own manual meant its decision was unreasonable.[96] Here, the Court of Appeal considered that RFAL was entitled to depart from its policy "[i]f, on reasonable assessment, compliance with [its health and safety] obligations required departure from the policy".[97] Yet there is no evidence that RFAL made any assessment that departure from its policy was necessary. The policy was not considered at all.

5.24 In the absence of adequate information upon which an informed decision could have been made, the obvious inference is that the Decision was based on the potential for violent protests — crystalised in the Auckland Peace Action threat: the heckler's veto. It was the *threat* of protest that caused RFAL to act. It was not mere coincidence that the Decision was made only hours after the Auckland Peace Action threat. For that reason, it was necessary for RFAL to fully consider the implications for fundamental freedoms of capitulating to such a threat.

5.25 By cancelling the venue-hire agreement against a backdrop of unsubstantiated security concerns, RFAL, without proper justification, acted arbitrarily and inconsistently with the common law rights of freedom of speech held by the Event organisers, the Speakers, and prospective attendees such as Mr Moncrief-Spittle. They were denied both the right to hold and attend the Event at the venue, and the ability to openly engage with political ideas through discussion and debate — not only with the Speakers, but with others who would be attending — because of the viewpoints that RFAL understood would be expressed at the Event.

Axiomatic's conduct not relevant

5.26 The Court of Appeal's conclusion on reasonableness seems to have been heavily influenced by the point that "when Axiomatic made the booking, it did not disclose the controversial nature of the event and the steps taken in Australia to avoid advance publicity".[98] The appellants say that this was an irrelevant consideration.

5.27 Axiomatic were not contractually obliged to make any such disclosure until submitting the risk management form, which was not due for another 18 days. Nor did RFAL enquire about the nature of the Event when Axiomatic made the booking.

---

95 Regional Facilities Auckland: Event Health and Safety Policy **[[304.0731]].** See especially **[[304.0738]].**

96 *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 550.

97 CA Judgment at [96] **[[101.0341]]**.

98 CA Judgment at [93] **[[101.0340]]**. See also the similar comments at [127] **[[101.0352]]**: "It is apparent that most of the problems with this event arose from Axiomatic's decision not to share what it knew about the security risk associated with the event when it made the booking".

It could easily have done so if it considered that to be material information for accepting a booking. The Court of Appeal found that the booking was made "in accordance with RFAL's usual practices" and that only "generic information about the nature of the event" was sought and obtained by RFAL.[99] The respondents provided no evidence that it was usual practice for RFAL to expect an applicant to highlight that a booking might involve a controversial event.[100]

5.28 The Court of Appeal also recorded that "Axiomatic had not been asked for a bond to cover security or damage costs".[101] Again, RFAL could have but chose not to raise this with Axiomatic at the time of booking or before the Decision. There is also no evidence that RFAL sought to obtain a bond from Axiomatic after it realised that one might be required.

5.29 The reasoning involved a double standard. When finding that the appellants' NZBORA rights were justifiably limited, the Court of Appeal observed that "RFAL's structure necessarily operates on the basis of enforceable contractual arrangements" and that "[w]eight must be accorded to those arrangements".[102] Yet when it came to Axiomatic's conduct, the Court of Appeal (without justification) imposed expectations greater than its contractual obligations required.

5.30 More importantly, the appellants say further that Axiomatic's conduct is irrelevant as a matter of logic and principle to the public interest claim brought by the appellants. Axiomatic's conduct is not rationally connected to the question of whether the Decision was unreasonable, which concerned a future event, not past conduct. If anything, the absence of information necessitated more engagement with Axiomatic, not less.

5.31 From a public law perspective, the key factors are unchanged: important freedoms are still engaged; and RFAL chose not to seek and obtain relevant information that was still available.[103] Instead, RFAL's personnel spent their time on 6 July 2018 co-ordinating political communication of the Decision with the Mayor.

---

99 At [61] **[[101.0331]]**.

100 In fact, Mr Crighton's evidence was that RFAL does "not have a practice of undertaking client checks as to the nature of the event at [the booking] stage": Affidavit of G Crighton (7.7.2018) at [8] **[[201.0076]]**.

101 CA Judgment at [92] **[[101.0340]]**. The United States courts have recognised that the cost of security measures is not an excuse for shutting down provocative speech. See *Forsyth County v Nationalist Movement* 505 US 123 (1992) at 134–135: "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob". See also *Church of American Knights of Ku Klux Klan v City of Gary, Indiana* 334 F 3d 676 (2003).

102 At [123] **[[101.0351]]**.

103 Nor should some undefined level of voluntary disclosure be a prerequisite for enjoying the protections afforded by freedom of speech, a right frequently relied upon by outsiders to the orthodoxy who are commonly untrusting and fearful of the establishment and authorities. Imposing such an expectation could have a serious chilling effect on the free exchange of ideas.

6. SECOND GROUND OF REVIEW: FAILURE TO ACT CONSISTENTLY WITH NZBORA

Rights engaged

6.1 Independently of the first ground, the appellants say that RFAL did not act consistently with NZBORA when it cancelled the venue-hire agreement (and thus the Event). They say that RFAL's Decision engaged and contravened the protected rights of freedom of expression, thought, assembly and association, and freedom from discrimination on the basis of political opinion.[104]

6.2 The Court of Appeal's ruling on the pleaded rights (accepting some were engaged but not others) was arbitrary and illogical:[105]

(a) freedom of assembly necessarily imports freedom of association (the two are joined at the hip);

(b) freedom of expression necessarily imports freedom of thought (one must think to speak); and

(c) public bodies exercising control over public speaking venues (such as RFAL) thwart freedom of speech if they capitulate to others' discrimination on the basis of political opinion.

6.3 Acceptance that all five protected rights were engaged – and unjustifiably breached – places this appeal in its rightful context. All five protected rights go to the essence of individual human personality. That all five rights were unjustifiably breached emphasises the gravity of this appeal. Each right was arbitrarily "shut down" when RFAL precipitately cancelled the venue-hire agreement. There were several options available to RFAL, none of which were explored to avoid the intrusion on the appellant's rights.[106]

NZBORA applies to RFAL

6.4 RFAL is an entity affected by a public interest and is clearly subject to the disciplines of NZBORA. Its Decision was an act done pursuant to the "public functions" limb of NZBORA, s 3(b): it was an act done "in the performance of [a] public function, power, or duty conferred or imposed on that person or body by or pursuant to law".

6.5 The appellants adopt the reasoning of the Court of Appeal on this point, as set out in paragraphs 4.1–4.12 above in relation to reviewability.[107] RFAL satisfies eight of

---

104 New Zealand Bill of Rights Act 1990, ss 13, 14, 16 and 19(1).

105 The Court of Appeal's ruling is described at paragraph 3.14 above.

106 See paragraphs 5.17–5.24 and 6.9 of these submissions.

107 CA Judgment at [68] **[[101.0334]]**.

the 10 indicative criteria set out in the leading decision to identify public functions.[108] RFAL is: constituted under statute; exercising extensive or monopolistic powers; wholly publicly owned; materially publicly funded; under the direction and control of the Council; the Council's alter ego in delivering services; acting in the public interest; and capable of affecting personal rights.[109]

6.6 Section 3(b) invites a "generous interpretation" of its scope.[110] The question is whether the power, function or duty is "'governmental' in nature".[111] No one would dispute that the Council is subject to the disciplines of NZBORA: so, too, must RFAL be subject to those disciplines in exercising the Council's devolved public functions. The Canadian Supreme Court has made the obvious point: "[A] government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity."[112]

Proportionality

6.7 Protected rights under NZBORA may be lawfully restrained only in accordance with s 5. Non-statutory limits on protected rights that fail the s 5 criteria are unlawful.[113] A party seeking to rely on the justified limits clause bears the legal onus to "demonstrate" that the limit on rights is justified.[114] Here, the respondent must establish a "sound evidentiary basis" that the limits are "reasonable", "prescribed by law", and "demonstrably justified in a free and democratic society".[115] That burden is difficult to satisfy in circumstances where RFAL made the Decision without considering (let alone evaluating) the range of options that were available to it. In other words, RFAL failed to equip itself to select the option that would "impair the right as little as possible".[116]

---

108 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) at 247–248. See also *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [25].

109 At 247–248. The two criteria RFAL does not satisfy are that it does not enjoy coercive powers analogous to those of the State, and it is not democratically accountable through the ballot box.

110 *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [24].

111 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) at 247; and *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [25].

112 *Greater Vancouver Transportation Authority v Canadian Federation of Students* 2009 SCC 31, [2009] 2 SCR 295 at [22] per McLachlin CJ, Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ (judgment delivered by Deschamps J).

113 Compare New Zealand Bill of Rights Act 1990, s 4, where legislation unjustifiably limits protected rights.

114 *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at 993. See also *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 283; *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (FC) at 60; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [163]; and *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569 at [109]–[110].

115 *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at 999.

116 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [126] per Tipping J, [2004] per McGrath J. See also *R v Oakes* [1986] 1 SCR 103 at [70].

6.8 In *Hansen v R*, this Court endorsed the Canadian Supreme Court decision in *R v Oakes* as the leading authority on the justified limits inquiry.[117] In *Re a Reference re public Service Employee Relations Act*, the Canadian Supreme Court formulated the *Oakes* test thus:[118]

> The constituent elements of any s [5] inquiry are as follows. First, the legislative objective, in pursuit of which the measures in question are implemented, must be sufficiently significant to warrant overriding a constitutionally guaranteed right: it must be related to "concerns which are pressing and substantial in a free and democratic society". Second, the means chosen to advance such an objective must be reasonable and demonstrably justified in a free and democratic society. This requirement of proportionality of means to ends normally has three aspects: a) there must be a rational connection between the measures and the objective they are to serve; b) the measures should impair as little as possible the right or freedom in question; and c) ill, deleterious effects of the measures must be justifiable in light of the objective which they are to serve.

6.9 As outlined above, the hasty and precipitate nature of RFAL's Decision is plain.[119] RFAL opted for the "nuclear" option. It claimed its Decision was "in the interests of safety and security".[120] Yet, it had received no Police notification of a security threat and it took no steps to investigate the veracity of the threat. It made:

(a) no inquiries of the Police (the obvious and appropriate recourse);

(b) no engagement with Axiomatic about its security capabilities;

(c) no appraisal of RFAL's own security capabilities; and

(d) no inquiry as to enlisting private security services.

6.10 Mr Macrae deposed that he considered freedom of speech policies from overseas institutions before he made the Decision to cancel because he knew "that issues of free speech may be raised".[121] He claimed to have balanced "the right to peaceful protest with the health and safety of our staff, patrons, protesters and the wider community".[122] But, for him, it was an "all or nothing" choice: the Event would either go ahead or it would not. There is no evidence that RFAL considered any options to avoid the abrogation of protected rights: options other than cancellation of the Event were reasonably available and would have resulted in no or lesser impairment of protected rights.

---

117 *R v Oakes* [1986] 1 SCR 103.

118 *Re a Reference re public Service Employee Relations Act* [1987] 1 SCR 313 at 373–374.

119 See paragraph 2.2 above.

120 Affidavit of R Macrae (23.7.2019) at [49] **[[201.0103]]**.

121 At [42] **[[201.0101]]**.

122 At [43] **[[201.0102]].** Note that Mr Macrae did not say he balanced the free speech rights of the Speakers and ticketholders (as opposed to the rights of the protesters).

6.11 The appellants say that RFAL's response was disproportionate to the unsubstantiated security threat. Under the proportionality test, persons or bodies subject to NZBORA must act so as to avoid or minimise the impairment of protected rights (*Oakes*). RFAL failed that public law obligation to consider which response would avoid or cause least impairment to protected rights.

6.12 On any formulation of the proportionality test, RFAL's Decision demonstrably fails the *Oakes* test. Sometimes, other expressions have been preferred to "minimal impairment".[123] The courts have expressed the need to accord appropriate latitude to Parliament where the issue arises whether legislation is inconsistent with NZBORA.[124] However, no such need arises where an administrative decision unreasonably restricts NZBORA rights. In *Hansen v R* (which did concern legislative inconsistency with NZBORA), the question was asked: Was there an alternative but less intrusive means of achieving the desired outcome?[125] Here, there were several less intrusive means at RFAL's disposal.[126] None were explored.

6.13 This is not a case that calls for deference. The Canadian Supreme Court has cautioned that "[d]eference must not be carried to the point of relieving the government of the burden … of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable".[127] The appellants say that the Court of Appeal judgment was overly deferential to RFAL. It analysed the important rights at stake in five short, perfunctory paragraphs.[128] None of these paragraphs engaged with the substance of the rights or the nature of the limits placed upon them.

6.14 The appellants say that the Court of Appeal erred in its NZBORA analysis. It jettisoned a full *Hansen* analysis for a balancing approach involving an unstructured *Wednesbury*-style unreasonableness test.[129] This Court should endorse a more robust proportionality analysis, as discussed in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*.[130] The case involved an administrative

---

123 See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [79] per Blanchard J (whether the means "impaired the right as little as was reasonably necessary"), [126] per Tipping J ("[t]he court must be satisfied that the limit imposed … is no greater than is necessary to achieve Parliament's purpose") and [217] per McGrath J ("whether the measure intrudes … as little as possible").

124 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [126]. See also *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at [160] per McLachlin J.

125 See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [217] per McGrath J.

126 In addition to the steps outlined in paragraph 6.9 above, RFAL could also have considered initiating a discussion about changing the venue for the booking to address any health and safety concerns specific to the Bruce Mason Centre.

127 *RJR-MacDonald Inc v Canada (Attorney-General)* [1995] 3 SCR 199 at [136] per McLachlin J.

128 CA Judgment at [123]–[127] **[[101.0351]]**.

129 CA Judgment at [122]–[127] **[[101.0351]]**.

130 *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 at [34] per Lord Sumption, at [57] per Lord Neuberger, at [87] per Lady Hale and at [137] per Lord Kerr.

decision that engaged European Convention rights. Lord Sumption emphasised the need for judicial testing of: (i) the soundness of the factual basis for limiting rights, and (ii) the assessment of whether there may be less intrusive means of achieving the desired object. The Court of Appeal's unstructured unreasonableness approach failed to test either requirement.

6.15 The appellants say that the Court of Appeal erred when it emphasised that Axiomatic had not provided a security bond or health and safety plan.[131] These matters have no bearing on the issue of proportionality. The question is whether RFAL was justified in limiting the appellants' rights, not whether Axiomatic had conducted itself in a reasonable manner. The Canadian Supreme Court has repeatedly ruled that cost or inconvenience is not a justification for limiting rights:[132] "[G]uarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so."[133] The matters that apparently troubled RFAL – the cost and inconvenience of controlling a protest – are less serious than, say, the anticipated levels of violence that have featured in the United States' jurisprudence. The concerns that troubled RFAL warrant little or no weight in comparison to the important rights that RFAL unilaterally sacrificed.

Ill, deleterious effects

6.16 This appeal is a vitally important one. It bears directly on the health and well-being of our society. The third limb of the proportionality test resonates. Under the *Oakes* test, "ill, deleterious effects of the measures must be justifiable in light of the objective which they are to serve".[134] The Decision, the appellants say, has "ill, deleterious effects" for protected rights that define individual human personality: the rights to think, speak, assemble and associate without fetter of discrimination.

6.17 RFAL's decision establishes a disturbing precedent: public speaking events can be cancelled because views may be expressed that others do not want to hear. The appellants say that the NZBORA guarantee of freedom of expression must protect the right to promote views others may regard as offensive or even repugnant, and there is no right not to be offended:[135]

---

131 Under the venue-hire agreement, Axiomatic was required to submit a health and safety plan not later than 10 days before the Event (i.e. on or before 24 July 2018, 18 days after RFAL had cancelled the contract).

132 *Schachter v Canada* [1992] 2 SCR 679 at 709; *Egan v Canada* [1995] 2 SCR 513 at 609; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at [281]–[282]; *Nova Scotia (Workers' Compensation Board v Martin* 2003 SCC 54, [2003] 2 SCR 504 at [109]; and *Newfoundland (Treasury Board) v NAPE* 2004 SCC 66, [2004] 3 SCR 381 at [72].

133 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 at [281], quoting from *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177 at 218 ("utilitarian consideration[s]" will not justify limiting protected rights).

134 *Re a Reference re public Service Employee Relations Act* [1987] 1 SCR 313 at 374.

135 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (FC) at 59.

> What is guaranteed in freedom of expression is the right to everyone to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community.

6.18 Speech that is offensive or repugnant is not deserving of lesser protection than speech that expresses comfortable majoritarian views. The appellants contend that the opposite is the case. The right to express majoritarian views requires little or no protection; it is speech that others may regard as offensive or repugnant that requires protection. Otherwise, the right to freedom of expression counts for very little.

6.19 RFAL's Decision fails the proportionality test, under the second and third limbs of that test.[136] The relevant limbs are the requirement of minimal impairment, and the need to avoid "ill, deleterious effects". Under these limbs, RFAL's Decision was not a justifiable means of dealing with the unsubstantiated security threat. The appellants pursue this appeal in the public interest; they worry that RFAL's Decision will set a precedent that will shut down the right to propagate unpopular views. Public speaking events organised by the group "Speak Up For Women" have been cancelled following the RFAL Decision.[137] The "heckler's veto" trumped (at least initially) the rights to freedom of expression, thought, assembly and association.

6.20 The Court of Appeal devoted 13 paragraphs to discussing the heckler's veto. In the final paragraph, it held that whether a heckler's veto would be perverse would "depend on whether the limitation was reasonable for the purposes of s 5".[138] But the Court stopped there and did not rule whether the heckler's veto was or was not reasonable in this case. It proffered no NZBORA analysis. The appellants say this was inexplicable. This Court, the appellants say, must confront the ill, deleterious effects of condoning the heckler's veto and shutting down protected rights.[139]

Prescribed by law

6.21 Under s 5, justifiable limits on rights must be "prescribed by law". The appellants say any limits RFAL imposes on NZBORA rights are not prescribed by law. To qualify, a limit must be "identifiable, adequately accessible and sufficiently precise".[140] The law under which RFAL operates neither posits nor authorises such limits.

---

136 As set out in the quotation from *Re a Reference re public Service Employee Relations Act* [1987] 1 SCR 313 at 373–374 in paragraph 6.8 above.

137 See *Whitmore v Palmerstone North City Council* [2021] NZHC 1551 where the Palmerston North Public Library cancelled a public meeting. A Speak Up For Women public meeting to be held at the Christchurch Public Library was likewise cancelled after vocal elements objected.

138 CA Judgment at [109] **[[101.0346]]**.

139 The United States' jurisprudence on the heckler's veto is set out in paragraph 5.8 above.

140 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 63. See also *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272.

6.22 The standard definition of the word "prescribe" is: "to lay down as a rule or direction; to give as an order … to limit, confine, set bounds to … to lay down rules".[141] "Prescribe" requires limits on protected rights to be fixed and ascertainable. In *Ontario Film and Video Appreciation Society v Ontario Board of Censors*, the Ontario Court addressed the requirement "prescribed by law" under s 1 of the *Canadian Charter of Rights and Freedoms*. The Court held: "Law cannot be vague, undefined and totally discretionary; it must be ascertainable and understandable".[142] An Ontario statute that authorised film censorship had not defined the discretionary functions of the censorship board. Consequently, the statutory limits on free speech were not "prescribed" and could not be saved under the justified limitations clause. The Court condemned the notion that limits on free speech could be left to the whim of an official.[143]

6.23 Statutory discretionary powers do not, themselves, limit rights; rather, limits are imposed by the particular exercise of the power. Nevertheless, limits are prescribed by law if legislation specifically authorises action that might limit rights. The Canadian courts have drawn a nexus between the source of power and the product of its exercise. In *Slaight Communications Inc v Davidson*, the Canadian Supreme Court held that the limit is "prescribed" if the statute supplies the power that authorises the infringement of the right.[144] Lamer J reasoned that public bodies can do only that which their statute allows them to do, and stated:[145]

> It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorises the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*.

6.24 The High Court followed *Slaight Communications* in *Attorney-General v IDEA Services Ltd*.[146] This Court did likewise in *New Health New Zealand Inc v South Taranaki District Council*.[147] O'Regan and Ellen France JJ held that the facts in *New Health* fell within situation one of the two categories identified by Lamer J in *Slaight Communications*.[148] Either the legislation in question, expressly or by implication,

---

141 *The Chambers Dictionary* (Chambers Harrap Publishers Ltd, Edinburgh, 1993) at 1353.

142 *Ontario Film and Video Appreciation Society v Ontario Board of Censors* (1983) 34 CR (3d) 73 (ONDC) at 83, affirmed *Ontario Film and Video Appreciation Society v Ontario Board of Censors* (1984) 38 CR (3d) 271 (ONCA).

143 *Ontario Film and Video Appreciation Society v Ontario Board of Censors* (1983) 34 CR (3d) 73 (ONDC) at 83.

144 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.

145 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1080–1081 (quoted with approval in *Attorney-General v IDEA Services Ltd* [2013] 2 NZLR 512 at [184]).

146 *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [182]–[185] (the impugned decision was a limit prescribed by law as it was reached under a statutory discretionary power).

147 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [108]–[110] per O'Regan and Ellen France JJ.

148 *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1079–1080. Although Lamer J was in dissent, the majority adopted his analysis at 1048 (as did Beetz J at 1058).

authorises the infringement of a *Charter* right, or the decision reached in exercise of a broad discretion infringed the *Charter* right. In *New Health*, O'Regan and Ellen France JJ held that the legislation in question authorised the limit on the right to be free from compulsory medical treatment (the fluoridation of water).

6.25 The law that applies to and governs RFAL does not, in terms, authorise action that might limit rights under NZBORA. CCOs are governed by Part 5 of the Local Government Act 2002. Part 5 contains machinery for the performance and accountability of CCOs. Its section headings illustrate its pith and substance.[149] The provisions of Part 5 are machinery that provide for the establishment and administrative organisation of CCOs. None authorises or empowers the performance of functions.

6.26 Nor does RFAL's constituent instrument authorise or empower action.[150] It simply sets out RFAL's objectives (inter alia "to … promote… the social, economic, environmental, and cultural well-being of [Auckland's] communities").[151]

6.27 Legislation will usually supply the requirement "prescribed by law".[152] But the common law might equally supply that requirement. Defamation law imposes limits on the right to freedom of expression, which the courts uphold as *reasonable*, *demonstrably justified*, and *prescribed by law*.[153] The law of contempt of court is another permissible limitation on freedom of expression.[154] Moreover, individuals may self-limit their rights as a matter of private law under contract. In *Low Volume Vehicle Technical Association Inc v Brett*, the Court of Appeal endorsed the contractual abrogation of protected rights where NZBORA is engaged.[155] Such

---

149 "Appointment of directors"; "Role of directors of council-controlled organisations"; "Decisions relating to operation of council-controlled organisations"; "Activities undertaken on behalf of local authorities"; "Prohibition on guarantees"; "Restriction on lending to council-controlled tradition organisation"; "Half yearly report"; "Annual report"; "Content of reports on operation of council-controlled organisations"; "Financial statements and auditor's report".

150 Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010, cl 9.

151 See cl 9(3).

152 See *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 208 per L'Heureux-Dubé J, citing *McKinney v University of Guelph* [1990] 3 SCR 229 at 386 per Wilson J (dissenting) ("These limits must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective.").

153 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [18]; and *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [34].

154 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 64; and *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [34].

155 *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [37]. See also *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 537 (FC) at 583–585.

rights might be abrogated "either unilaterally (by waiver) or consensually (by agreement) [and fall] within the description of a limitation 'prescribed by law'".[156]

6.28 However, the appellants say the respondents can reap no succour from the common law of contract. No contract existed between RFAL and the appellants to self-limit or abrogate the latter's rights. Rather, the only contract that existed was between RFAL and Axiomatic. Cancelling the venue-hire contract involved more than private interests: RFAL unilaterally deprived the appellants, the Speakers and attendees of their protected rights (rights to freedom of expression, thought, assembly and association, and the right to be free from discrimination on the basis of political opinion). Far from self-limiting or waiving those rights, the appellants seek to vindicate them through a formal declaration of this Court.

6.29 Nor, the appellants say, can the venue-hire contract between RFAL and Axiomatic supply the requirement "prescribed by law". That contract, which was binding at law, contained a cancellation clause in cl. 13.2. However, the limit on protected rights that the cancellation caused was not one "prescribed by law". Only the parties to that contract (RFAL and Axiomatic) were privy to that clause, and "law", as used in the expression "prescribed by law", must be accessible to all. Neither the appellants nor the patrons planning to attend the Event had access to, or knowledge of, cl 13.2.

6.30 It can be accepted that the role of RFAL was, in part, managed through venue-hire agreements. But that does not transform those agreements into legal prescriptions such that they enable RFAL to sidestep the requirements of NZBORA.

6.31 In *Committee for the Commonwealth of Canada v Canada*, Lamer and Sopinka JJ held that an airport's internal policies were not "law" for purposes of s 1 of the *Charter* as they were internal and not published, "and so are not known to the public".[157] In *Greater Vancouver Transport Authority v Canadian Federation of Students*, the majority of the Canadian Supreme Court repeated four times the need for limits to be "sufficiently accessible and precise".[158]

6.32 The need for limits to be accessible and precise also represents the law of New Zealand: a limit must be "identifiable, adequately accessible and sufficiently precise".[159] In *Ministry of Transport v Noort*,[160] the Court of Appeal quoted with

---

156 At [36]–[37].

157 *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 164.

158 *Greater Vancouver Transport Authority v Canadian Federation of Students – British Columbia Component and British Columbia Teachers' Federation* 2009 SCC 31, [2009] 2 SCR 295 at [64], [65], [72] and [73] per McLachlin CJ, Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ (judgment delivered by Deschamps J).

159 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 63.

160 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 272

approval a passage from the decision of the European Court of Human Rights in *Sunday Times v United Kingdom*.[161] The European Court stated:[162]

> 49. In the Court's opinion, the following are two requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.

6.33 The requirement of accessibility under s 5 has a distinct rationale. The law must be accessible, the European Court explained, "to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".[163] Persons may not foresee how the law will apply to and affect them if the law is inaccessible and unknown to them. Only the parties to the venue-hire contract had access to cl 13.2. The appellants, the Speakers (presumably) and patrons attending the Event were oblivious to that clause. The limit on the protected rights that the cancellation caused was not prescribed by law.

7. CONCLUSION

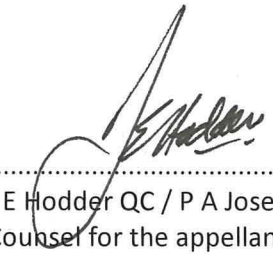
7.1 Accordingly, the appellants seek a judgment of this Court making orders:

(a) allowing the appeal;

(b) granting the relief sought in the third amended statement of claim dated 21 December 2018 as to the first and second grounds of review; and

(c) as to costs on this appeal, and in the High Court and Court of Appeal.

Dated 22 October 2021



.....
J E Hodder QC / P A Joseph / J A Tocher
Counsel for the appellants

---

161 *Sunday Times v United Kingdom* (1979) 58 ILR 491 (ECtHR).

162 At 524. See also *Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 164 (a government policy or internal directive not "law" as "[t]he government's internal directives or policies ... are generally not published and so are not known to the public").

163 *Sunday Times v United Kingdom* (1979) 58 ILR 491 (ECtHR) at 524.