

I Te Kōti Mana Nui o Aotearoa
In the Supreme Court of New Zealand

SC 10/2025

between

MICHAEL JOHN SMITH
Applicant

and

ATTORNEY-GENERAL
Respondent

REPLY SUBMISSIONS FOR APPELLANT

28 July 2026

Counsel for the appellant certify, to the best of their knowledge, that these submissions contain no suppressed information and are suitable for publication.

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REPLY SUBMISSIONS FOR APPELLANT

May it please the Court:

What the claim is not

1. The respondent's written submissions advance the proposition that the plaintiff's claim involves "invitations for judicial intervention designed to achieve judicial commentary on, and criticism of, Parliament's policy choices and legislative settings in response to climate change... designed to have Parliament enact different climate change legislation in accordance with the appellant's desired policy settings. The separation of powers and every notion of comity run against that political objective."¹
2. These propositions are advanced by the respondent as "self-evident,"² but they appear nowhere in the claim, evidence, submissions, or judgments of the lower courts. The reason for that is simple: they are not propositions the plaintiff advances.
3. The plaintiff's claim is that his rights have been breached at common law, under Te Tiriti—New Zealand's founding document—and under the New Zealand Bill of Rights Act 1990 (**BORA**). The constitutional function of the courts is to adjudicate on that claim. At common law the courts have been the protectors of fundamental rights against state encroachment since before *Entick v Carrington*. That role is an essential part of the rule of law, as recognised by Parliament itself in s 28 of BORA. BORA expressly applies to acts of the legislative, executive, or judicial branches of government.³ It is parliament that has determined that the courts must adjudicate, when requested, on claims that require determination of whether acts of parliament or the executive are consistent with the BORA. As the Court of Appeal has held:⁴

¹ Respondent's submissions at [6].

² At [6].

³ Section 3(a).

⁴ *Child Poverty Action Group Incorporated (CPAG) v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [92].

In that context, the term “deference” as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away from or shirk that task. Rather, it is a question of recognising the respective roles of the courts and the decision maker, here, the legislature.

4. The proposition that the courts should not adjudicate on claims that legislation is inconsistent with fundamental rights is dangerous:⁵

Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.

5. Adjudicating on claims that the legislature or executive have breached rights is a (if not the) fundamental democratic function of the courts.⁶ Comity calls for that fundamental role to be respected.
6. The need for judicial independence in adjudicating on claims is not diminished at critical inflection points for society: “in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.”⁷ It is at times of critical risk to the polity that the fundamental mandate of the courts to protect the things fundamental to democracy is most heavily engaged.
7. Article 9 of the Bill of Rights Act 1688 is, in contrast, not engaged at all.⁸ Article 9 allows democratically elected members of parliament to engage

⁵ *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 (EWCA) at [54] cited in *A v Secretary of State for the Home Department* [2004] UKHL 56 (“the Belmarsh case”) at [41] per Lord Bingham. In the cited quote Simon Brown LJ was using the phrase “judicial activism” in the pragmatically functional sense of adjudicating on a matter, or not. Whether “judicial activism” is a phrase with any useful content beyond that is questionable.

⁶ At [42], per Lord Bingham, citing with approval Professor Jowell in the context of the Human Rights Act 1998 (UK): “The courts are charged by Parliament with delineating the boundaries of a rights-based democracy”.

⁷ At [41] citing *Korematsu v United States* 584 F Supp 1406 (ND Cal 1984).

⁸ *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84, [2019] 1 NZLR 116 at [107]–[108]. This is not a case about conduct in the house. The draft amended statement of claim pleads the introduction of bills as executive acts, a context where the scope of Art 9 falls for consideration; however, the bills pleaded have since been enacted. At [78(d)] and [82(c)(xxi)] the draft 3ASOC pleads introduction of the

freely in debate without threat of court sanction for doing so.⁹ Article 9 does not act as a shield against judicial consideration of claims of breaches of rights by the legislature and executive outside that narrow context. Kirby J’s response to a claim that Article 9 prevented the courts determining claims about the validity of an exercise of a legislative power is apt:¹⁰

To designate all matters having political or partisan implications as non-justiciable would be to withdraw judicial supervision (and the rule of law) from an intolerably broad class of conduct. It would lead to a conclusion that a mere claim of privilege by a House of Parliament expelled the courts from holding whether the privilege, in law, exists. And that is not the law.

What the claim is

8. The plaintiff makes a claim that his rights have been breached. He seeks declarations and in respect of the BORA claim a reporting back obligation. The role of the court is to consider and adjudicate on those claims, without fear or favour. The plaintiff’s claims concern acts of the legislature and the executive.
9. The respondent seeks to frame the claim as being solely about decisions made under the Climate Change Response Act 2002 (**CCRA**), framing that statute as enabling, as the Court of Appeal did, decisions consistent with BORA and Te Tiriti.

Climate Change Response (2050 Target and Other Matters) Amendment Bill – this was passed under urgency and received Royal Assent on 16 December 2025. [78(c)] and [82(c)(xvii)] similarly plead the Climate Change Response (Emissions Trading Scheme Agricultural Obligations) Amendment Bill, now enacted, received royal assent 25 November 2024. [05.0124] [05.0128]

⁹ “As the Privy Council pointed out in *Prebble v Television New Zealand Limited*, it is important to avoid confusion between the right to prove the occurrence of parliamentary events and the prohibition on questioning their propriety, as for example, suggesting that a member had misled the House or acted wrongly or from improper motives. Like every statutory provision, Art 9 of the Bill of Rights, in its application to New South Wales, has a purpose. It is to defend, relevantly against legal inquiry or sanction in a court, the freedoms belonging to a House of Parliament. ... Whilst each [side of the case] doubtless has political criticisms to make of the other (as illustrated by the Hansard Debates) such were not in any way the questions for the courts. Their only concern has been with the legality of what had occurred.”: *Egan v Willis* [1998] HCA 71 at [133].

¹⁰ At [133].

10. This misunderstands the plaintiff's case, which concerns a range of conduct outside the CCRA. Within the four corners of the CCRA, the plaintiff pleads that the greenhouse gas emissions reduction targets in the CCRA are incompatible with the rights at issue.¹¹ Decisions under the CCRA are required to be directed at meeting the statutory targets. If the plaintiff is correct about the incompatibility of the targets with his rights, then even decisions that could theoretically result in the statutory targets being met cannot meet the claim. Putting theory to one side, the plaintiff says that decisions actually being made under the CCRA are incompatible with even those targets.

International law

11. Adjudicating on a claim of breach of rights informed by obligations under international treaties and customary international law does not, as the respondent submits, involve some impermissible application of an inconsistent international framework.¹² It is simply the common law method, application of which determines also the extent to which customary international law obligations are given effect to.¹³
12. The question of whether there is an inconsistency between customary international law obligations and domestic legislation is not agreed. The ICJ rejected submissions that international climate treaties delimited states obligations with respect to climate change. It identified a customary international law obligation to prevent significant harm to the environment applies to the climate system, requiring states to exercise strict due diligence to prevent such harm while applying the precautionary principle in light of the best available science.¹⁴ The CCRA does not negative the obligation the ICJ identified.

¹¹ Draft 3ASOC at [65(a)], [66], [67] and [13]–[15]. [05.0104] [05.0121]

¹² See Respondent's submissions at [107], [108].

¹³ Respondent's submissions at [68] do not accurately reflect the appellant's submissions on this issue. The acts of courts can engage state responsibility at customary international law, which is the point made at [40] of the appellant's submissions.

¹⁴ Appellant's submissions at [23]–[27].

The nature of the relief sought

13. It is for the courts to determine whether the pleaded rights have been or will be breached. That will involve assessing accepted scientific evidence about the effects that likely have occurred and likely will occur based on the acts and omissions in the claim, and whether that amounts to a breach of the claimed rights.
14. In seeking a reporting back obligation in relation to the BORA claim, the plaintiff does not call for the Court to dictate how Parliament or the executive meets a determination that rights have been or will be breached.¹⁵ The relief sought is outcomes focussed, not directive as to how outcomes ought to be reached.

Dated 28 July 2026

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¹⁵ See to similar effect the orders made in *New Zealand Māori Council v Attorney-General* [1987] NZCA 60, [1987] 1 NZLR 641.