NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION.

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 57/2021
[2022] NZSC Trans 4

BETWEEN **MALCOLM BRUCE MONCRIEF-SPITTLE**
First Appellant

DAVID CUMIN
Second Appellant

AND **REGIONAL FACILITIES AUCKLAND LTD**
First Respondent

AUCKLAND COUNCIL
Second Respondent

AND **HUMAN RIGHTS COMMISSIONER**
Intervener

Hearing: 21-22 February 2022

Coram: Winkelmann CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: J E Hodder QC, P A Joseph and J A Tocher for the Appellants (via AVL)
K Anderson and A S Butler for the Respondent (via AVL)
J S Hancock for the Intervener (via AVL)

CIVIL APPEAL

PLEASE NOTE: ***The transcript for 21 February 2022 has been transcribed from poor quality sound recording. The accuracy of the content cannot be guaranteed. Dialogue which is unable to be transcribed is indicated by (inaudible) and the time stamp.***

MISSING AUDIO FROM APPROXIMATELY 14:16 TO 14:23

… won't be wanting to make any kind of comment about the time allocation unless you're (inaudible 14:24:00) somebody's time in that allocation Mr Hodder.

MR BUTLER:
No your Honour. Yes, Ms Anderson's going to speak to these (inaudible 14:24:08)

WINKELMANN CJ:
Ms Anderson.

MS ANDERSON:
Thank you your Honour. Yes, in terms of the late arrival of authorities received on Friday, we accept, of course, that the Court will have an interest

in what is (inaudible 14:24:23) but in the interest of fairness I think we can approach that on the basis that the respondents' do oppose that late delivery on Friday of those authorities, and to the extent that prejudice does arise, perhaps we can come back to that later in the hearing to whether we might, in fairness, require an opportunity to respond in writing to anything new that's arisen in relation to those authorities in the hearing, but I think we can probably safely park that for the moment and come back to the point later on if the Court is in agreement with that approach.

WINKELMANN CJ:
Yes.

MS ANDERSON:
Thank you. And in relation to the late affidavit of Dr Cumin, we do oppose the entry of that affidavit. We're concerned that it's distracting and irrelevant to the issues before the Court, and we feel our position is to oppose again the latency of that and what Mr Hodder said to you in relation to that affidavit is he said, it's his words not ours, that there's a difference of view between the parties as to what the respondents' position is, which has always been that in relation to the hire of venue, that is a commercial activity which is part of the RFAL unit. We've never contended for the proposition that it's entirely commercial. So we see the additional I think 177 pages of that affidavit as likely to be distracting and unhelpful.

WINKELMANN CJ:
Right.

MS ANDERSON:
So again the position there, your Honour, would be that if the Court is minded to introduce it to the extent it's relied upon by the respondents in the course of this hearing, of course we don't quite know yet where they're going to anchor it in relation to their submissions, that we might come back to that and require an opportunity to respond if the Court is minded to allow that evidence.

WINKELMANN CJ:

We will receive that on the basis de bene esse, I think it's section 14 of the Evidence Act on the basis that we further decide whether it's admissible. I imagine, as is often the way, it won't be a collective argument in any case, but we can see what happens at the end. That last point of yours, I take it your happy with the time allocations indicated by Mr Hodder, but do you have a desire to have a break?

MS ANDERSON:

No, we simply wanted to signal to the Court that due to the difficulties with AVL, and the fact that counsel for the respondents are not co-located, so in addition to any difficulties relating to the AVL we might need to seek the indulgence of the Court to perhaps take some (inaudible 14:27:13) short breaks during the course of tomorrow. We don't anticipate that that arises at all in relation to today.

WINKELMANN CJ:

That's fine. You can just deal with it as it arises.

MS ANDERSON:

Thank you your Honour.

MR HODDER QC:

As your Honours please, I think that takes us to our submissions.

WINKELMANN CJ:

Yes, go ahead Mr Hodder.

MR HODDER QC:

So firstly can I say that counsel for the appellants perceive this as an important and also very interesting appeal, and we hope that the Court finds the latter part the case, and pending the grant of leave indicates the former has some traction as well. Can I indicate that if the Court has my road map that we sent through at about half past 12 today, then the plan for me is to

follow through and deal with one, which is introductory, part 2, which is reviewability where to a large extent we were simply saying the Court of Appeal got that entirely right. Thirdly, common law review, which is subject that I will deal with and then the last section on page 3 is the New Zealand Bill of Rights Act, and Mr Joseph will be dealing with that, and that, I think we may just get t the end of the day, all going well. So if it's convenient, that is the way in which I was proposing that we approach it.

WINKELMANN CJ:
Yes, go ahead Mr Hodder.

MR HODDER QC:
Thank you. So I appreciate the Court will have familiarised itself with the judgment below, and the submissions, and some of the material at least, then what we say in our road map at 1.1, is we think the heart of this case is about the extent to which those exercising control of public forum have public responsibilities to protect an event which features public dialogue and discourse which is lawful, including in the place of a risk of a blockade to stop the event, which is unlawful, and that involves, as the Court appreciates from the causes of action or grounds of review that were pleaded, firstly, common law judicial review and secondly, the Bill of Rights Act. What we say is that both areas should yield the same outcome. The freedoms involved in public discourse on a public forum are paramount considerations. They can't be allowed to be easily snuffed out by the threat of violent opposition, and they must be understood and supported as much as possible by those who control public venues where public discourse et cetera takes place.

Conversely, and the reason we're here, is we say the Court of Appeal judgment encourages the idea that in practice those freedoms of expression and assembly and et cetera merit no more than lip service, they can be trumped simply by an initial concern that opponents of the event may cause health and safety risks and possible consequent prosecution of those who control the venue or the forum. So in essence what we are looking for from this court is confirmation that a public venue controller such as RAFL has

suffered the public law obligation to provide clear and principled guidance where the relevant freedoms are in issue. To explain what that means I have given the reference to the document of 101.0055, which is the merged pleading, and appreciating that the Court may be familiar with this, but this pleading, it's at page 101.0055. It's at item 7 in terms of the tab numbers if we go down a bit further. I wanted paragraph 37 please. So this is the preliminary, it's in the end of the preliminary section of the statement of claim, before the first ground of review, which is the common law grounds, and what we are looking for is really in terms of paragraph 37 that: "RAFL and the Council were and are required to facilitate rights to freely express lawful speech and opinions without those being denied or eroded by potential health and safety risks associated with possible physical protests against such speed and opinions where such risks are not founded on cogent and informed evidence following proper investigation and consultation."

I'll explain a bit more of the background to that when I get to section 3 of this set of submissions, but that's the essence of what we wish to say, that there are public law obligations involved and that in our paragraph 37, or close to it, is an appropriate formulation of it, and obviously the Court sees that on the other side, that is simply denied, and reference is made back to paragraph 35, a couple of paragraphs above, which says this is essentially a commercial arrangement not a public function. So that is, we say, at the heart of the appeal.

Still dealing with the point about the fact that we're talking about two different areas of public law, how different they are is obviously a matter for discussion and thought, but what we say in 1.5 of the road map is that when one goes back into the case law and the general jurisprudence, one finds continuing reference to what are effectively the same factors and legal values and we've listed them out there as freedoms of expression and assembly, public space/public agency control, and violent opposition expectations and safety issues associated with that, and lastly tolerance.

Now those featured in a number of cases. The reference I've given is to this court's decision in *Morse v Police* [2011] NZSC 45, [2012] 1 NZLR 1, which the current court, Justice Young and Justice Glazebrook were in the Court of Appeal, but in a sense, as I apprehend it, the Supreme Court of the day took a different views than the courts below and decided the matter in that way. So within this case, and I suspect members of the Court have had to deal with this case in various forms various times, but it does deal with each of those four matters, the freedoms, for example, are discussed, and I've given a reference to Justice McGrath's judgment relevantly starting around paragraph 108. So paragraph 108 just indicates the Court's familiarity with the importance of the right to freedom of expression, and the idea of protests, a not untopical topic, and explains that those matters, in the context of what was an ANZAC Day protest, being: "Protest against government policies is an aspect of freedom of speech which is of particular importance in our society, as is the right to protest in an effective way."

What we see as being an issue on this appeal are the limits that can be imposed in relation to freedom of expression, and what we identify from the Court in this case is that there are limits and those limits do not include toleration for violence, the threat of violence. So in paragraph 106 on the same page, just a couple of paragraphs up, Justice McGrath refers to, in the context of generally offensive behaviour as was the case there, that there's an issue: "… confined to sufficiently serious and reprehensible interferences with rights of others. Such conduct is objectively intolerable." And what we are suggesting to the Court is that that material goes to the point where the limits of this come in and therefore the threat of violence doesn't get a weighting in terms of a legal value and a similar reference to the idea of violence is in Justice Anderson's judgment at paragraphs 126 through to 128, talking about behaviour which might affect public order, that might have a likelihood of dissuading others from enjoying their rights to use that place, which is clearly what violence would do, and then his Honour provided a second category, that the conduct may have a reasonable propensity to cause violence against persons or property. The underlying –

WINKELMANN CJ:

It's quite a different context though, isn't it? It's to do with criminalising speech effectively.

MR HODDER QC:

Of course, your Honour is right, that is the context for this particular case, but what we are suggesting is that it indicates values and factors that are in the mix, whether it's a criminal scenario or a public law scenario, and the fact that there is a freedom of expression which everybody understands is subject to some kind of limits at common law and under the Bill of Rights Act. The question is what are the limits of the limits, if I can put it that way, and in that area what I'm referring to is the fact that indicated in this, albeit criminal law context, is the idea that if it gets to the point of serious and reprehensible interference with people, and unreasonable reactions including violence or the threat of violence, that's outside the scope of what is tolerable in our society.

So the *Morse* case is concluded by the judgment of the Court in that case. As the Court probably appreciates, Ms Morse makes an appearance in this case in a rather influential way, ands the point that I just want to address, which is really an elaboration of 1.5(C) is that when the respondents and their employees and officers are speaking about health and safety, they are really talking about the threat of violence, implicit or explicit, mostly implicit, and we see that, for example, in their submissions at paragraph 2.22, so you are talking about the risk of violence, the prospect of violence, and then that effectively goes on to the discussion that leads into the fact that that was what the health and safety concerns were, and what we are objecting to, and it underpins this part of the submissions, is that insofar as the reliance on health and safety is really a reliance on the fact that there was a risk of violence caused by other than those who are wishing to exercise their rights of expression and assembly then it is not a factor that can have weight in public law.

It may be convenient at this point if I, and I appreciate the Court will have had the chance to get reasonably familiar with these materials, but to just talk

about some of the, engage with some of the material that goes to the background of what caused this decision, and I was going to start with Mr Macrae's affidavit.

GLAZEBROOK J:

Can I just, the submission that the fact that there might be violence, or even that there will be violence, is irrelevant to a decision-maker, because there are health and safety issues related to the people operating the venue and indeed the people, the public attending. I don't think that's your submission is it?

MR HODDER QC:

No it's not that it's irrelevant, it's just that it triggers the obligation that we pleaded in paragraph 37 of the statement of claim, that there should be an attempt to facilitate and if there is going to be an issue around the risk of violence it requires cogent and informed evidence following a proper investigation and consultation. So it triggers that obligation if there is an attempt by a decision-maker to cite health and safety, which in effect means a risk of, a fear of violence by those opposed to the intended expression of views.

GLAZEBROOK J:

Well then I don't really see, I think I probably have the Chief Justice's issue with *Morse* being an authority that's very helpful in that particular context.

MR HODDER QC:

Well I don't want to overstate, the reason I took your Honours to *Morse* is that my argument includes the proposition that in the various countries and various decisions that your Honours have had referred to you in the three sets of submissions, those factors are relatively constant throughout. *Morse* includes those factors, it doesn't resolve those factors, but it recognises them is the only submission I'm really wishing to make in relation to the Court's earlier decision in *Morse*.

GLAZEBROOK J:

They're the factors that you've got at 1.5 are they? But violence isn't part of that.

MR HODDER QC:

The idea of violent opposition expectations is the point that I'm kind of leaning from as I go into the, as I was going to go into the evidence. So it's a feature of various cases that there is an expectation that there might be opposition, that opposition might be accompanied by a violence that creates, that's an expectation that might occur. That then is transformed into a safety issue and in the cases we have it, and we say from the Court of Appeal judgment, that seems to become a controlling factor, and we respectfully say that can't be right and this court should rule otherwise.

ELLEN FRANCE J:

You come to it when you look at the evidence but there are issues also about what I assume is covered by (B) public space, thinking about the references to the traffic control and so on. Is that where that would be – is that the heading that sort of thing would come under?

MR HODDER QC:

When I was using the phrase in the cases I had been reading before I put it in that form, was simply drawing, repeatedly drawing a distinction between public space and private space and, for example, I think in the Canadian cases recently there's been a discussion of government-owned property, which isn't the space for freedom of expression because it's effectively used as an office or a cafeteria that doesn't have a public space dimension to it, and it was to distinguish those kinds of spaces from others as one of the factors where these freedoms manifest themselves and are warranting protection, and one of the features of them is, is that they have a public agency to control it, and that, of course, goes back to the very debate between the parties on reviewability but that was the underpinning of proposition (B) in 1.5, or factor B.

So coming to the evidence I made, the Macrae evidence, the first affidavit by Macrae is at 201.0093. So as the Court appreciates I imagine Mr Macrae was the senior executive who made the decision that we are concerned with in this case. He starts, if I can start at paragraph 31, he refers to experience in 2016 when the Auckland Peace Action Group, and that experience appears to be what is being described. If we can go perhaps to 302.0227, so we'll come back to the affidavit after that.

For those members of the Court who haven't focused on this, this is the press coverage of the 2016 incident that Mr Macrae is referring to in his paragraph 31, and the concern was that the protest which was an attempt to blockade a Defence Industry Conference in central Auckland had resulted in scuffles and violence, and that just provides the background to what is being said in his paragraph 31. It also provides background for the next document that might be referred to, which is at 304.0818. This is the day before the decision to cancel was made, the 5th of July, and it's an email sent about 8 pm that evening to Mr Macrae by Ms Morse of the Auckland Peace Action, and what she is wanting to do is talk about the intended public event, in the first line, confirming in there they were talking about public discourse, and then the essence of it after expressing views strongly critical of the speakers, comes in the bottom couple of paragraphs, "While we understand that the cancellation of any event is a significant undertaking, in this case, there is simply no other choice but to refuse the use of the venue….".

And that's what Mr Macrae refers to in his paragraph 23, that also takes account of the top paragraph we can see: "Please note that… may be a breach of the New Zealand Bill of Rights Act… You may be held accountable as a party to offences…". So the focus was going onto Mr Macrae suggesting he personally may be accountable as a party to offences.

The follow up to that, that came in in the following morning, the press release at 9.02 am, is at 302.0250. now the sequence of this is that it was dated 6 July, the day of the decision. It was timed at 9.02 am. Mr Crighton, who I'll come to, received that and was familiar with it by the time he got to the

meeting that he attended with Mr Macrae that started somewhere between 9.15 and 9.30 am on the same day. Mr Macrae talks about having it sent to him by email about 10 o'clock that day. But in any event, if we go down towards the bottom half of the press release we see the sentence beginning: "We are concerned that right-wing extremism is reaching into our communities," and then the next sentence: "It is imperative that this type of racism is given no room to be promoted and encouraged." So no room to be promoted is consistent with the email of the previous evening.

WINKELMANN CJ:
Mr Hodder, are you asking as to revisit the findings of fact that this is not, that this is, as to how the decision was taken, which was a health and safety basis? Because I'm just wondering why we're going into the detail of the, of this colour, colour of the material.

MR HODDER QC:
What I am submitting is that you can't distinguish between health and safety and the threat of violence in this case. The only health and safety issue was the threat of a blockade to stop this event. There was no other suggestion of a health and safety issue.

WINKELMANN CJ:
Yes, but how peace action was seen it doesn't seem to be critical. What's critical is the threats they made.

MR HODDER QC:
I agree, and I'm sorry if I look as if I'm focusing on something else. So the point is, no room to be promoted, and in the next paragraph these speakers must be stopped, is the essence of the paragraph, and then the last sentence: "We are preparing to take action to stop their public event." So the sword "stop" and the idea of, in effect, creating a blockade is the point that is clearly dominant in the thinking of Mr Macrae as he proceeds, and he identifies at paragraph 38 of his affidavit, there is a potential for violence. That was –

ELLEN FRANCE J:

If you go back, Mr Hodder, he does at paragraph 30 talk about the location of the Bruce Mason Centre, and the impact on things like access to emergency vehicles and so on.

MR HODDER QC:

Yes, your Honour, he does. I must say I had read that as being related to paragraph 29, that those issues would arise if there was some kind of protest. I didn't understand 30 to be talking on a standalone basis saying, irrespective of any protest we thought there was an issue about safe evacuation of the centre, and we simply said it gets used all the time, or used to be used quite a lot of the time.

ELLEN FRANCE J:

My query is that appears to me to be a different issue from violence. It's not talking about violence there, it's talking about the practical effect of a blockade which may raise issues about safe evacuation et cetera.

MR HODDER QC:

I acknowledge, your Honour, that's a possible reading of it. I must say I had seen it as being mostly triggering by what would happen if there had been an incident where there was difficulties. So I had seen, and I acknowledge your Honour's reading of 30 is available, but I had seen paragraph 38 as governing what was the concern that they had.

GLAZEBROOK J:

There obviously are issues in any venue with safe evacuation if there's an emergency like a fire or something of that nature, and also if somebody has taken unwell, nothing to do with violence outside or the blockade in terms of emergency vehicle access. So I must say I read it in exactly the same was as Justice France. That the blockade itself could create those difficulties. Obviously we all know the layout outside the Bruce Mason Centre, and one can understand some of those issues.

MR HODDER QC:

Yes, your Honour, it's true that the layout has, there will always be some issues around most any layout I can think, unless it's something in the middle of an open space.

GLAZEBROOK J:

Well I'm just thinking the Aotea Centre has quite a space in front of it, which the Bruce Mason Theatre doesn't. For instance.

MR HODDER QC:

Yes, your Honour, I'm not, I have some knowledge of it, but not enough familiarity to even wish to debate your Honour, if there's any point in doing so, so, yes –

WINKELMANN CJ:

That's fine Mr Hodder, don't feel the need to debate the architectural design of the outside space.

MR HODDER QC:

So the point that your Honours are making to me, is that this was somehow a, to be read, and I acknowledge that the reading wasn't one that had occurred to me, that they were talking about safety unrelated to the threat of violence, and that is –

GLAZEBROOK J:

Well to the blockade, which would be the protest rather than a violent protest, just a protest in itself. Or a protest that causes a blockade, is a blockade.

MR HODDER QC:

Yes, your Honour. I think the way I need to perhaps leave it so I can move on is to say that that maybe so, but it doesn't detract from what was really being said by Mr Macrae at paragraph 38. That was really the point that he was concerned about. Potential for disruption and violence at the event. That disruption and violence wasn't likely to come from those who were going

to the vent. It was those who were wishing to stop the event as they had threatened to do, very explicitly in the material we've just been looking at.

O'REGAN J:
Wouldn't it be both? Presumably people would, if the protesters were in the hall and disrupting it, the threat of the violence could come from either side, couldn't it?

MR HODDER QC:
Possibly but I have to say I – until the issue of these materials from Peace Action came into the frame for the RFAL personnel, that didn't seem to be their concern. Their concerns arose only in relation to these and the timing becoming significant. They are some distance away from having to have a health and safety plan from Axiomatic. They have set in train the process of asking for some security advice and then this email comes in at 9 o'clock in the morning on the 6th, and by 11 o'clock they decided to cancel it, Mr Macrae has decided to cancel it. It isn't clear from anything that is said here, or anywhere else, that what happens in that period is related to the general issues of access, as opposed to specific concern that Peace Action will be operating in a way described by Mr Macrae in paragraph 38.

WINKELMANN CJ:
So anyway you probably don't need to – your argument remains open to you on either analysis. It's Peace Action's blockade and/or violent process that is causing the issues at the Centre, and your point is that there, this heckler, yes.

MR HODDER QC:
Thank you your Honour, yes, and then that is what we say underpins the point at paragraph 43 where Mr Macrae says in the last sentence: "Health and safety must be paramount…". This is after he said I looked at some university websites about facilities for speakers and says after he'd taken into account his obligations under the Health and Safety at Work Act, that he needed to balance competing views and the right to peaceful protest with the health and

safety of our staff, patrons, protestor. Health and safety must be paramount. And again I confess I have seen that as being mostly driven by the fact that what he was talking about at paragraph 38, and at the very least that factor, and the factors at paragraph 30, we accept they are different in the way that your Honours have introduced them to me.

So the paramountcy that the decision-maker gives to health and safety is, at least in significant part we say, based on what Mr Macrae says at 38, is the concern that Peace Action are capable of and may well use, in effect, physical means to stop this event proceedings, and that is what underpins –

WINKELMANN CJ:
And you would, I imagine, accept that health and safety is paramount, that you'd just say that when you weigh freedom of speech into the balance you must explore very fully alternative ways of meeting that health and safety obligation?

MR HODDER QC:
Yes, I'm not sure I go so far as to say it's "paramount". I mean clearly health and safety is a key consideration, but the risk is of, is that very veto risk the Court is familiar with from the submissions.

WINKELMANN CJ:
The problem I see with that argument then is if you went through every exercise, and it was incredibly, the freedom of speech would be given a great deal of weight and you go through your exercise and you come to the point where you can't eliminate quite a substantial health and safety risk, or one that's not negligible, you'd still have to err on the side of health and safety, wouldn't you? I don't think the American authorities would go so far as to say you don't. You don't risk, create substantial risk to life and limb for the purposes of freedom of speech.

MR HODDER QC:

Well at the very least we would say you have to go through a process that requires, I don't want to keep banging on about it, but our paragraph 37 formulation about having a very well-founded conclusion, not one that's effectively come to a conclusion a couple of hours after the press release from Peace Action, because the other side of the equation, if I can put it loosely that way, is that the alternative is that any time a press release goes out by an organisation that has some track record in vigorous physical protest, then health and safety trumps everything else. That is the problem that we see with the way the matter was left at the end of the Court of Appeal's judgment and that, in a sense, is why we are here.

So in terms of the legislation about health and safety, that talks about taking reasonable steps, that looks at exploring suitable means to deal with a matter. Those matters do require careful consideration and to be properly informed, and at one point that's what the RAFL personnel were seeking to do. But as the Court, I think, is familiar with, Mr Macrae was particularly concerned about health and safety. So paragraph 48: "Uppermost in my mind was the workplace safety law…". Then at paragraph 50 he says, as he does also at 44, he was concerned about being personally prosecuted. Then that is the way in which it is described in various iterations of the decision that follow including to Axiomatic itself when there's a telephone discussion, I won't take the Court to it, but you'll find it at 304.0776, and it also features in the cancellation letter which is 302.0210.

But what, we suggest, is quite striking about this, emerges more from Mr Crighton than from the two around that, so Mr Crighton says, and his evidence is at page 201.0073. at paragraph 21, on page .0079, he says on the day before he sent his email to Mr Kidd, the Manager of Safety and Security, to let him know that this event appeared to be controversial, and the exchange that Mr Kidd and the police had we find at 302.0220, and we see that sequence later on page 220 at the bottom, an email to somebody at the police from Mr Kidd following the communication from Mr Crighton, copied to Mr Crighton, and says what they're looking at, want to talk to local police to

check whether the event is on your radar and if so what threat rating it might have. "We are conducting a risk assessment of this event ourselves and would typically want to check whether this event is on your radar and if so what threat rating it might have. We are conducting a risk assessment and would typically staff this with a robust security plan.. I would welcome a chance to meet with you.." and you'll notice the date of the email and the time, it's 6 July at 3.49 pm. That is approximately five hours after the decision was made to cancel the event.

So back on the previous page at .0219 you see somewhat later there's a reference to the fact that Mr Kidd catches up with the idea that the event has now been cancelled. The police individual Mr Young says: "Easiest way to resolve it I guess." That, in a sense, indicates the problem.

So that, together with the fact that the OIA response from the police says there was no communication or concern that the police were aware of at the time. They go to the point that there hadn't, we say, been cogent and informed evidence applying proper investigation and consultation, and that is the essence of what this was, and the safety issues that had been set out to be done by Mr Kidd, weren't allowed to take their course. Mr Macrae decided by 11 am that day that the most significant thing that preceding that had been the Peace Action threat to blockade, that the event would be cancelled, and by midday, or thereabouts, he was talking to Axiomatic telling them just that.

So again that is where we submit captures the underpinning of the decision, and that underpinning, although framed consistently by RFAL as being based on health and safety, in our submission is at least materially based on the threat of violence, as we'll come to that, it's outside the range of the legal values awaiting, are given various jurisdictions and should be in this one as well.

GLAZEBROOK J:
Just returning to the submission that you said you weren't making. So I'm just really puzzled as to what this submission is in respect of that. That if there's a

threat of violence, freedom of expression trumps, so threat to life is lesser than freedom of expression, but that, I'm sure is not your submission.

MR HODDER QC:

No your Honour. The submission, if I keep going back to it, is framed in our paragraph 37 of the statement of claim, that in the circumstances where that becomes an issue, then what has to be done is to undertake a proper investigation, and form fully informed evidence. The obvious thing to do –

GLAZEBROOK J:

That wasn't what you just said is your submission. You said that health and safety, that threat to life and violence is not to be considered, or at least – as I heard that last submission. But you're now saying, you're confirming again that's not the submission, it's the paragraph 37 submission.

MR HODDER QC:

I'm not making a submission that in every case freedom of expression trumps health and safety, no. I'm concerned that the alternative is what is left at the end of the Court of Appeal judgment, and the resolution that I am suggesting to the Court works in terms of public law considerations and principles, is the one I articulated at 37 of the statement of claim. That it requires sound evidence and proper investigation, and the reason for taking you to the police and the security inquiry, or lack of them, is to indicate that that is the kind of problem that one has here. So, in effect, what you get is deplatforming by email press release and the question is, well how does one respond to that? Well the answer, we say, in 37 is there needs to be cogent evidence following a proper investigation and consultation. Consultation with the police and with the promoters themselves in this case, neither of which happened. That's as far as I wish to go in relation to that, and in our submission that's a perfectly legitimate approach for public law and the common law judicial review to take, and then the question would become in more detail and a case by case basis where what happened is irrational or perverse. So this appeal and the proceeding itself was always focused on the decision made at the time it was made, and it was made at 11 am on the 6th of July 2018.

ELLEN FRANCE J:

So are you saying in this type of situation there always has to be consultation with the police?

MR HODDER QC:

Unless there's a good reason not to, yes, if it's a public order issue then knowing what the police's reaction is, or intelligence about it, we would say would be fundamental considerations.

WILLIAM YOUNG J:

Your position, to put it colloquially, is the decision was made on the fly?

MR HODDER QC:

Yes.

WILLIAM YOUNG J:

Without proper assessment, without taking into account the views of the promoter, the police or anyone, any other people who might have something to say that's useful to the assessment required.

MR HODDER QC:

Yes. The bare bones proposition that we say comes out of the evidence is that Peace Action had previous form as it were int his area. They fired off an email which suggested that there would be a blockade and physical means used to stop the event that was planned. There was reference to the idea that Mr Macrae personally might be liable under either the Human Rights Act or the health and safety legislation, and he decided that was enough. The easiest way out was to just cancel the event and that, we say, is an entirely unsatisfactory state of affairs, but that is where the Court of Appeal judgment leaves us.

WINKELMANN CJ:

So you could say this is, I know you're going to go look at all these ideas, but the alternative analysis is that Mr Macrae had familiarity with these people and

knew that they were people who carried through on their actions. They were an organised action group, that seems to be the evidence. They were very experienced in the management of commercial status. His assessment was that steps that could have been taken earlier to manage the very risk we're now, the cat out of the bag, and the risk couldn't be managed. So the information the police are going to give wasn't going to change the situation nor could the others. So that's the other, that's the respondents' position I suppose, isn't it?

MR HODDER QC:
It is. It's a bit like that famous phrase of Justice Megarry about consultation of natural justice, that something material does turn up when we actually ask people to find out what might go on, and what might be done, and I am obviously not in a position to speculate about what might happened, it's an entirely unhelpful and inappropriate way to proceed.

WINKELMANN CJ:
Well I was going to ask you, what do you say they could have found out, if they had made further enquiry?

MR HODDER QC:
We don't know, is the short answer, because it never got that far.

WINKELMANN CJ:
Yes.

MR HODDER QC:
What they could have found out is that, whether or not that is a matter that had widespread concerns, whether or not the police took it seriously, whether or not Axiomatic's arrangements in Australia might have had some relevance of what could be done here. They simply didn't know any of that, at the point that they made the decision to cancel.

GLAZEBROOK J:

Well the trouble with the Australian arrangements was that they weren't able to be done once the venue was clear, wasn't it?

MR HODDER QC:

That's true but then we don't actually know whether or not that meant that there was no knowledge of that venue or whether the protest occurred anyway, and how those protests are dealt with. I mean the events did go ahead and I believe there were protests, I think it's referred to in Mr Pellowe's affidavit that the events did go ahead with protests, but the police were involved in dealing with the protest. So the big unknown perhaps, if I can respond again to your Honour's question, is that we don't know what the police would have said. If the police were going to say, well we're not interested in helping you on this, and that takes you in one direction, if the police were to say, and we don't know, well we understand that it's possible to kind of keep people at a distance from the venue so that those concerns mentioned in both paragraphs 30 and 38 of Mr Macrae's affidavit could be addressed, then that would take it in a different direction. There's simply no information.

WINKELMANN CJ:

So did Axiomatic say that they could've helped, that they had ideas?

MR HODDER QC:

Axiomatic say, and they said so in the telephone conversation that took place an hour or so after the decision was made, that they had secured the experts and they offered them to Mr Macrae, if they were having a conversation it would be useful, and the basic proposition was the decision had been made. All that's set out in the transcript, which I think I mentioned is at 304.0776. The detail of what that would be is not given, but they were keen to offer some assistance or some insight and that didn't happen either.

ELLEN FRANCE J:

Well in terms of, if you were right that the concern was in relation to violence, I'm not quite sure what the experts were going to be able to do in that context.

MR HODDER QC:

Nor am I, your Honour, I regret to say, but the same point arises in relation to what the police would do. It depends on how they felt they would go about it, whether they could collaborate with the police, whether there was some way of dealing with the speakers, or dealing with the attendees in a way which minimised some risks there might otherwise be. Whether there were some barriers that could be contributed to by Axiomatic in theory, we simply don't know that. The enquiries were never made.

O'REGAN J:

Is it relevant that there was also a high cost in providing security?

MR HODDER QC:

It may well have been at the point where one got to a stage of saying I need to weigh up all the factors, all the intelligence I've got, and I think there's going to be a cost which is going to be worn by somebody, then the question is, who would wear that, and if they wouldn't, they would change the dynamics.

O'REGAN J:

You're not suggesting that the respondent was obliged to make a loss on an event by being paid $5,000 for the hire of a hall and spending $30,000 on security?

WINKELMANN CJ:

You do seem to submit that towards the end of your submissions I think.

MR HODDER QC:

No I don't think I am suggesting that your Honour. We didn't quite get that far but that's…

O'REGAN J:
That seems a difficult proposition. Why should the ratepayers of Auckland pay for an Australian commercial enterprise on a profit-making venture? Have we lost him?

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES (15:17:05)

O'REGAN J:
We're all back together again.

MR HODDER QC:
I confess I can't recall what the last thing I said was.

WINKELMANN CJ:
You were being asked about the costs –

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES (15:17:46)

COURT ADJOURNS: 3.19 PM

COURT RESUMES: 3.23 PM

WINKELMANN CJ:
I apologise to counsel for that. I understand it was something that affected nationwide the Ministry of Justice's internet connection at that particular point in time. Mr Hodder you were just answering questions to you about what is the relevance of costs in this analysis that you – the structure and –

MR HODDER QC:
I accept that the costs would have to be a relevant consideration, but it would be one of the relevant considerations in the overall exercise that we contemplate in our paragraph 37 formula. Whether the figure is $30,000 or something else again, we don't know, and as I think we say in our

submissions there are a range of possibilities, the police, private security, RAFL's own security, Axiomatic providing it's own security, but again none of that was explored because a decision was made in the rapid speed which I indicated earlier.

So if the Court pleases I am inclined, because the half-day is rapidly expiring, and I was hoping to finish in time to allow Mr Joseph to start this afternoon, theoretically there is a lot of work that we can go through in terms of the road map, unless the Court wishes me to proceed the point further to simply say we agree that the Court of Appeal judgment on reviewability, and this is a case that sits within the *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) analysis, that these are, in substance, public operations and we resist the proposition that the Council is somehow or other deeply removed from what is going on with RAFL, and can I just give a handful of references that go to the, updating evidence that go to that point in addition to what's in our written submissions both here and the Court of Appeal. So your Honours will recall that the Cumin affidavit attaches, and most of it complies with the review report dated in July 2020, which is almost the same time as the Court of Appeal argument, and if I can draw your Honours' attention to pages 1, 9, 20-30, and in particular 23 and 29. Among other things what the review indicates is that the options they considered, having been instructed by the Council, included all CCO activities in-house. So it goes to the point that RAFL is, to a degree, standing in the shoes of the Council. And also the common goal, page 29, benefits the ratepayer. That's the exercise that all parties are engaged in, together with the idea that this is, that CCOs are most certainly not commercial entities.

The minute, which is the second document, items 10 and 11 of those minutes, the first is the receipt of the review report and says the matter is to be (inaudible 15:26:54) progressed by the Council's chief executive. The second item number 11 is the merger of RAFL and ATEED. Again that is delegated to be actioned by the Council's CEO.

Then in the statement of intent can I offer references to pages 3, 6-8 and 11-12, where there is much about CCOs operating as part of a council family, and then measured against their performance in terms of the Council's own plan and objectives. We say all that reinforces the point that is set out in the Court of Appeal's judgment that we identified and in our submissions that goes to that.

I deal briefly at 2.6 with what I understand to be a floodgates argument inherent in RAFL's submissions, but what we say is to date RAFL has assumed it's able to operate unhindered by any public law obligations. If that view were to be changed, we could readily tweak its procedures for the very few cases where the heckler veto scenario is, in fact, credible, and where the obligation that we are talking about in our paragraph 37 of the statement of claim becomes relevant.

WINKELMANN CJ:
Sorry, Mr Hodder, I don't think I followed what you said, could you repeat that? You said you were meeting the floodgates argument?

MR HODDER QC:
The floodgates is suggesting that every single piece of activity that RAFL has to undertake, and each hiring it undertakes, would have to go through a rigorous process of public law testing, and we say no, that isn't what is required at all, and we say that probably is due to the fact that RAFL as (**inaudible** 15:28:50) has no obligations. The obligation we contend for, as you know, is one that says if an issue about something akin to a heckler's veto arises, then there is a requirement for a proper investigation, putting it at its simplest. That isn't, we say, either onerous or universal. It's only going to arise infrequently and doesn't give rise to any legitimate floodgates.

WINKELMANN CJ:
I was going to do this at the end, but it might be the point to mention to you that something we are interested in hearing from you on, I was going to do this at the end of the day, but perhaps now is the time just to mention it. I'm

not asking you to address it now but just to take a note. The notion that obligations considered freedom of expression in a public and commercial space and how that weighs in decision-making, and how, in particular, it weighs generally because you're talking about cancellation, or limiting your point to heckler's veto really I think. Well what about freedom – if RAFL is required to take into account freedom of expression how does that weigh when deciding to take a booking and how does the consideration weigh with commercial considerations? Because I mean I don't think you can just check to say it's just the heckler's veto that applies, that heckler's veto issue only arises if freedom of expression considerations come into play, and so some of those points are made against you by the respondents, so we are interested at some point in hearing from you on them.

MR HODDER QC:

Thank you. I'll pick up that in part at least when I come to respond to the submissions which I do over the page in terms of the road map. Given the timing, and given that your Honours will have the ability to follow through on the case law, can I move reasonably quickly, through the first part at least, of my section 3. As we've indicated this is really based on the idea of the *Secretary of State for Education and Science v Tameside Borough Council* [1997] AC 1014 (HL) analysis, we've given the reference in the right-hand column, from both Lord Diplock and Lord Wilberforce, that we need to avoid fundamentally misconceiving what the role of the decision-maker is. Needs a proper direction to make sure the right question is being asked, and it requires enough information be obtained to correctly answer the right question. Those are composite requirements and they were adopted by the Court of Appeal in *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA). We've given the reference to Justice Cooke and Justice Richardson's judgment. Again I suspect I don't need to spend time in relation to the importance of freedom of expression at common law. On one level the common law freedom is that you can do anything that is unlawful, but freedom of expression has had a hallowed place, and the authorities going back to (inaudible 15:31:59) usefully collected by Chief Justice French in the *Attorney-General (SA) v Adelaide City*

Corporation (2013) 240 CLR 1 case, which I won't take the Court to, and I've also given a reference to Justice Heydon's discussion in the same judgment.

At 3.4 we say the relevant values are fundamental in a democratic society. It may not be that this is an issue, I don't apprehend that they are, but just in case they are let me explain the reference to be given. *Terminiello v City of Chicago* 337 US 1 (I1949) appears to be the fundamental case that follows through into more recent jurisprudence. *Terminiello* is a product of the McCarthy era, and these are, it's a group, a strongly anti-communist speaker addressing meeting and encountered a difficult crowd outside, and that was the issue that arose, and in the course of the Terminiello judgment there's a, as in the reference at page 4, there is the statement of why freedom of speech has its significant importance for civil and political institutions. It goes to government responsiveness and to peaceful change, and again I don't imagine the Court needs that point to be laboured.

Likewise in *Ward v Quebec* 2021 SCC 43, a relatively recent case, one of the new ones we've given reference to, and among other things that case is of interest because it defines freedom of expression, particularly in terms of a public good rather than simply personal rights, and that articulation is made by reference, among other things, to Raz's 1991 article in the Oxford Journal of Legal Studies. Again we've given you the page references, and the general ideas that lie behind free speech is a good, set out, among other places in the Garton Ash material we've given again there to parts of that.

The point that's perhaps more significant is where does threatened or actual violence fit in in relation to those, and if I can I'll take the Court to two authorities, which are the *City of Montreal* 2005 SCC 62, [2005] 3 SCR 141 case, and then I'll go to *Ziegler* [2021] UKSC 23, [2021] 3 WLR 179. So the *City of Montreal* is a case about nightclubs setting up loud speakers that advertise their wares to patrons passing in the street and is a form of expression that was regarded as expressive content, and it was regarded as not inconsistent with the values that underline free expressions as guaranteed in the Charter of Rights. But it's of interest to us in the submissions to

the Court, because of this discussion of where violence might fit in relation to this, and that particular exercise is covered in paragraph 60, that is a reference to the cases saying: "… violent expression is not protected by the Canadian Charter," and at paragraph 72: "Expressive activity should be excluded from the protective scope… only if its method or location clearly undermines the values that underlie the guarantee... violent means and methods undermine the values that s. 2(b) seeks to protect."

That is the reason why there's a weighting exercise. The idea that somebody might be using or contemplating violent means doesn't attract legal weight in that way.

The same point is made by reference to European jurisprudence in the British Court of Appeal's British UK case of *Ziegler* –

WINKELMANN CJ:
Is this, it's not, do you just want to articulate of the harm principle, the limits of free speech and when it starts to incite violence, et cetera, which also is in the *Morse* case.

MR HODDER QC:
It's analogous. It's really the reason I mentioned it, the same ingredients that we find in *Morse* are perhaps more directly and specifically addressed in relation to these cases in the US, in Canada and indeed in Europe. So I think in essence your Honour I'm agreeing with you if I can put it that way.

WINKELMANN CJ:
Because I wouldn't have framed it as you've framed it here, because this is not really comparable, it's not about the heckler's veto situation, it's actually where, it's the limits that exist on the expression itself.

MR HODDER QC:
Well, there's a degree of that. So can I take the Court to the *Ziegler* case. That is a judgment about obstructing the highways during an arms fair, some

resonance with the 2016 Peace Action activity here, but if one goes to around about paragraph 68, and I think my learned friend Mr Joseph will deal with *Primov v Russia* ECHR 17391/06, 12 June in more detail, but what it says in the quote at the bottom of page 202 at paragraph 68 that any large-scale gathering is inevitably going to create inconvenience, and so there has to be some degree of tolerance, and tolerance is one of those values I mentioned at the outset, and so the general proposition is there has to be tolerance of some degree of disruption.

Then the key point which I think comes back to why this is different to the point your Honour the Chief Justice was just putting to me, is at the end of 69 there's a quote from the *Kudrevicius* (2015) 62 EHRR 34 (GC) case from the European Court of Human Rights: "… does not cover demonstrations where the organisers and participants have violent intentions. The guarantees… apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society."

We've given the reference to *Kudrevicius* in 91 and 92 making it very clear that freedom of expression and freedom of assembly are the foundations of a democratic society. So that, I think is coming closer to the point that says if this is setting up by way of a counter-demonstration, then as those values are to be assessed but if they don't contribute to the foundations of a democratic society, then they really can't have much weight in terms of the balance that has to be undertaken. Then Garton Ash, as we've noted, says that the generic evil underlying most constraints on freedom of expression is, in fact, the implicit or express threat of violence. He, in fact, is talking about the assassin veto as opposed to either a thug's veto or a heckler's veto, but the general dynamics of a veto remain unchanged.

So 3.6 I've covered. 3.7 likewise. 3.8 we say that the Peace Action communication threatening a blockade were obviously central to the decision, and then in terms of the Court of Appeal judgment's reasoning, we then turn to that and suggest that, with respect, that the fact there was no police was

important because in the ordinary course there is an expectation and if there was a threat to public order then that's one of the reasons why the police are there. Likewise in the absence of engagement Axiomatic, there wasn't an opportunity that was offered wasn't taken to find out if there was more that could be said, and then although the Court discusses the heckler's veto, it really doesn't go very far (inaudible 15:40:49) apart from saying, or suggesting I think that it would be unprincipled to treat such an outcome as necessarily perverse. Now obviously there are a whole lot of considerations that go into the limits of freedom of expression but on the balance between violence on the one hand, and freedom of expression on the other, we would say a too easy yielding to the latter is perverse. That is the real problem that brings us to the Court today.

Then the Court – so the Court in a sense, if I apprehend what the Court below is doing, is saying the heckler's veto is sort of an idea that's developed in the US and we don't really need it here because it can all be sorted out under the Bill of Rights Act. We say that, in fact, the common law freedoms are effectively affected, the methodology is different, but the end result is that if RAFL proceeded as it did, on the basis it didn't have to consider the obligations we claim arose, then it was misdirecting itself on law, that its actions were, in fact, premature and, in fact, are as they were decisive but premature, they were perverse.

On the countervailing factors we refer to at 3.9 the Court of Appeal says well there is, this is a regime that was based on agreement. That's as the Court recognised elsewhere in the reviewability discussion, that simply happens to be the way that people hire venues. The same would be true of a town hall or possibly any other venue. There's nothing magical about agreements, or in particular about the fact that something is commercial. That one can still have freedom of expression while it's commercial, whether it's a form of koha, whether it's a form of nominal ticket, whether it's a form of expensive ticket, the basic idea is still there's freedom of expression both to impart and receive opinions, and to assume all for that purpose.

Then lastly under this heading of, or this number 3.9, Axiomatic's conduct. Now we see really does come into the play here. The basic criticism is Axiomatic should have said at the outset that there were issues in Australia and may Axiomatic had some knowledge that there would be risks of protests. In our submission it doesn't follow. The conduct that should be focused on is that of the decision-maker. The decision-maker is the one that was sort of making investigations. In fact it didn't have the opportunity to discuss security issues with Axiomatic. So that, in a sense, we say was where none of those matters raised by the Court of Appeal are sufficient to avoid the outcome which we say should have followed.

Dealing briefly with the RAFL submissions insofar as they affect the common law aspect of the case, they firstly say the *CREEDNZ* test was inapposite because that was a lot of statute. We say that's a distinction, that's a difference not a distinction. We're talking about the proper approach to public decision-making on whatever basis. Some enquiries, yes, but not of the police and Axiomatic. No material fact disregarded, well, it is incomplete information generally. US caselaw about coercive public powers and can be disregarded. The point that –

WINKELMANN CJ:

Can I just ask you a question about that Mr Hodder. You say that it was incomplete information. The question I'm asking you is how you say that fits into our analysis. Are we just to be left to speculate or is it appropriate for us to know the information, or is it appropriate for us to consider all the relevant information that is to be taken into account, or just is it simply enough, on your analysis, that they didn't go through the proper process?

MR HODDER QC:

Because we don't know, your Honour, the answer is the latter and that, again, goes back to my formulation. It's simply a cliché I know, but they don't know what they don't know, they don't go through the process, and I don't want to re-traverse what I said before about what might or might not have come up, it's only speculation, but they certainly would have expected that something,

material would have emerged in a conversation with the police or Axiomatic. It may have confirmed the original impression, we don't know, because it just didn't happen.

ELLEN FRANCE J:
So in that approach we ignore, for example, what we now know about what happened in Australia, is that the submission?

MR HODDER QC:
Yes your Honour. It sounds a bit brutal, but yes. What we're talking about is the validity of the decision at the time it was made. What happened in Australia is discussed in, I think, one of the Pellowe's affidavits. Those things went off but there was obviously disruption at them and various disorder, but they did, in fact, proceed, which is itself perhaps material in the matters we've been discussing.

ELLEN FRANCE J:
Well I suppose though if you're looking, for example, at the discussion about Melbourne, I mean we don't need to look at that now, but there Mr Pellowe talked about at least 100 police officers, riot police, mounted police and an overhead helicopter. But you say, well, that –

MR HODDER QC:
Again, your Honour, I can't do much more than speculate about how far that would be relevant to the circumstances that might have obtained here if the event hadn't been cancelled. So I appreciate that it does seem that there were, in Australia there were groups that were determined to try and disrupt these events, and there was a cost to them, I agree. But I don't know whether that takes us anywhere particularly in New Zealand, and without knowing what the New Zealand Police's position was.

I'm sorry to keep on underlining the same point. The unattractive aspect, can I suggest, in all this is that this cancellation by email threat is really what

underpins this because we don't know any more than that and, with respect, nor did RAFL know any more than that.

WINKELMANN CJ:

Well they did know, didn't they Mr Hodder, they knew that Axiomatic's own assessment was such that they entered into this unusual arrangement in Australia where people were going to be notified of the venue last minute.

MR HODDER QC:

Yes your Honour. We don't know whether that was a result of police advice to them or something else. Whether there was an alternative that they had come up with. Again we're lacking that.

WINKELMANN CJ:

Okay. Does that mean – sorry, carry on Mr Hodder.

MR HODDER QC:

I was going to say and we would resist criticism, in fact, that we don't have evidence of what might have happened because, in a sense we're talking about the decision-makers capacity to make a valid decision.

WINKELMANN CJ:

So it really is focused on process, isn't it, because you're saying the nature of the process means you're deprived of the information they might have come out with through their process.

MR HODDER QC:

Yes Ma'am, and we say that's the appropriate way for balancing. In the end there's a major cost, major risks that have been exhaustively, not exhaustively, but have been properly investigated and consulted on, then at that point, in the common law terms anyway, then *Wednesbury* to a greater or lesser degree would come to the aid of RAFL. But not at the point where they haven't undertaken the work that the *CREEDNZ*/*Tameside* questions require, and they never got there on our analysis.

Your Honours can obviously read what I've said at 3.10. Mr Collins' evidence, and Mr Collins' evidence comes in much after the event and the decision has been made and says, well I wouldn't have done it any different. But that's a classic example of backfilling to which there's no sensible response to be made by other parties, and in our respectful submission that should be disregarded. The focus needs to be on what was known at the time and happy to accept that being described as the process requirements.

Dealing with health and safety legislation, your Honour has raised that with me earlier. It's probably useful to go to the Health and Safety at Work Act if we can get that up, just very briefly. So working our way back, and the Court again I suspect is familiar with this, but what we're actually talking about are not in quite absolutes. So if we go to section 30 please. There's no doubt that there were duties imposed on those in charge of the facilities we're concerned with. Section 30 talks about a duty and what it was required to do, and the duty is to eliminate risks so far as is reasonably practicable or to minimise those risks so far as is reasonably practicable. So there's an exercise in informed discretion and judgement required in relation to those, but doesn't say that health and safety is always going to prevent an event, prevent some spectacle taking place. It simply what is reasonably practicable.

Then what is reasonably practicable. Again as the Court may know, it's at section 22, and section 22, subsection – sorry, just before we get to paragraph (a), what was reasonably able to be done in relation to ensuring health and safety, so that's the first qualification, taking into account and weighing up all relevant matters including likelihood, degree of harm et cetera, and then (d) the availability and suitability of ways to eliminate or minimise the risk. So the question that has been what could reasonably be done to minimise the risks that RAFL were concerned about. They weren't required, as we read this, to eliminate them, but they were required to take steps that might reasonably minimise them, and in our submission the same points I've been making apply. They had to be properly informed to get to that point, and they didn't.

The last point partly goes to the question, I think, at least I've identified, thought about it as part of the question your Honour the Chief Justice was raising with me a few minutes ago. Isn't this different because there are tickets and profit-making. This isn't a classic town hall meeting which is free entry et cetera. In our submission the answer is no. The expression is extremely wide as a concept, it's an expression of content and the recent example is the *Ward v Quebec* case is an example of how wide that may be. That was a professional comedian who mocked somebody who had a disability. So it was a matter of outrage and concern but in the end the Court is satisfied that it is expressive content, and it was protected. Now the fact of that might be done in the course of a tickets only multi-hundred dollar evening event doesn't make any difference, in our submission, it just simply happens to be that it's expressive content which has some degree of limits on who is in the audience by economic means. But it doesn't change the dynamics of having on the one hand the freedom of expression in assembly and on the other whatever constraints there might be on that, and it attempts to try and stop it by virtue of what has been described in our submissions to heckler's veto are unsound.

So in the end what we say and we say the Court is entitled to think about the language used by the Supreme Court of Canada in *Vavilov* 2019 SCC 65. The decisions are valid and reasonable if they are transparent, intelligible and justified. That those adjectives, in our submission, can't apply to the decision RAFL made around 11 am on the 6th of July 2018 about this matter.

My learned friend Mr Tucker has reminded me of a reference to *Fitzgerald v R* [2021] NZSC 131, which I've got in the penultimate point in 3.10 and the Court will be familiar with *Fitzgerald* of course. Can I just give the references, this is where legality and the recognition of freedoms as a matter of common law, as well as under the Bill of Rights et cetera, are addressed by this court, and I had in mind your Honour the Chief Justice's judgment at 52, 53 and 57, and Justice O'Regan and Justice Arnold's judgment at 207 to 209, and if I run it

sort of lightly, agreement broadly with that from your Honour Justice Glazebrook at 251 in relation to those matters.

GLAZEBROOK J:
I doubt it actually because I was very careful not to talk about the common law but…

MR HODDER QC:
I'm sorry about that your Honour. There's a reference to the principle of legality in that paragraph that led me to include it, but I don't imagine it's going to assist your Honour if I spend more time on it. The general proposition being that it does indicate that when one is getting into these areas, rights are relevant, and at least as far as some of your Honours were concerned, then those rights included common law rights, references made, for example, to property rights.

Now your Honours we've got to about seven minutes to four, according to the timepiece that I have access to. Is it convenient if Mr Joseph starts?

WINKELMANN CJ:
Before he does –

MR HODDER QC:
I'm sorry, I wasn't trying to duck questions.

WINKELMANN CJ:
No. I have no question but I just thought before I do that I just wanted to give you an indication that we're very interested to see, you've really attempted, I think, in part of your submissions to limit this and say what we're really saying is they just had to, that RAFL had to sort of take into account the, to make sure they didn't allow heckler's to veto freedom of expression, but once you say that RAFL has to take into account freedom of expression in its decision-making, we're interested to know how you see that, how that would operate in practice when it's general operation, and I've identified some of the things

earlier, so if, so we want to hear you on the broader principles. I appreciate you probably want to deal with it tomorrow, but certainly it's just a part of the case made against you, so what I'm saying to you is not news to you.

MR HODDER QC:

No. I'm happy –

WINKELMANN CJ:

And the other point that we'd like to hear you on significance really a lot of these cases pre – led that base of a notion as language that's often used in some of the older cases, the marketplace of ideas et cetera. The cases also make clear that the availability of alternative venues weight. We've got that here and that's part of the argument made against you. What people don't really engage with in the argument is the new environment where there are so many platforms for people to speak, and I know that, Mr Moncrief-Spittle talks about that he wants to see them in person, but we'd also like to hear you on the new environment and how that is factored into, how we should think about this right.

MR HODDER QC:

Yes your Honour. Can I deal with that last point, and again somewhat on the fly, I may have more to say after I think about it overnight, but the general proposition is that it depends on what access, what the venue we're concerned with is for, and what's remarkable about this particular asset is it is built with public funds for the use of the public for expressing exercises. It wasn't otherwise in that so it is to be used for that very purpose, and so that means that it should be used for those purposes, and if it's going to be used for those purposes, it should be able to be used in a way that isn't constrained by illegitimate threats, but that's the logic of it, and in our submission that doesn't change. The fact that there are private venues outside that, in a physical sense, we say, doesn't change that. The fact that there might be some other private venue doesn't change the obligations if these are indeed public functions being carried out by what is effectively a public agency, and

the same would apply to media that are in the hands of people other than public agencies.

So the fact that one may go on to any number of the new media to express views and shared views is, no doubt, significant in the overall politics of the country, but it doesn't change the fact that freedom of expression is what these public assets were designed for, and that should be persevered in the ways that we're suggesting. That's my response to the last point. In terms of practicality I said something but I might reserve my position to come back tomorrow if I may.

WINKELMANN CJ:
So any questions for Mr Hodder before we move onto Mr Joseph. Well it's actually 10 minutes so. You might want to stretch out what you're going to say, Mr Joseph, and we'll be all the better to receive your arguments in the morning. But you don't have to. Are you happy to adjourn?

MR JOSEPH:
We're happy to adjourn your Honour.

COURT ADJOURNS: 4.00 PM

COURT RESUMES ON TUESDAY 22 FEBRUARY 2022 AT 10.01 AM

WINKELMANN CJ:
Mr Joseph, are you there?

MR JOSEPH:
Yes, I'm here, your Honour.

WINKELMANN CJ:
Justice Glazebrook is joining us by VMR today as well. People have probably already noticed that. Are you ready to address?

MR JOSEPH:
Am I ready? Yes.

MR HODDER QC:
Your Honour, could I just get the Court's assistance? I was asked two questions by your Honour yesterday on behalf of the Court. I'm happy to address those after Mr Joseph or before, whichever the Court prefers.

WINKELMANN CJ:
Probably before, Mr Hodder.

MR HODDER QC:
All right, if that's convenient then let me do that and hopefully relatively briefly. The first question was about practical implications and I apprehend that's on the basis that if our argument were upheld, and in particular in relation to the common law matter our paragraph 37 formula were to be endorsed, what would be the consequences of that in practical terms. That is to say, the premise is that there are some public obligations on RFAL in its control of these venues. That is in addition to the contractual position, and at one level can I say that's not particularly unusual. The Court, I anticipate, will be familiar with a line of cases that includes (**citation** 10:03:22) *Bank* whereby

there are limits on contractual discretions even if they are expressed in absolute terms. That's all discussed, for example –

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES (10:03:35)

MR HODDER QC:
I was mentioning the line of contractual cases that imposed limits on what appeared to be unfettered discretions. They're discussed in *Chitty on Contracts* 33rd Edition at paragraph 1-059. So as I say, nothing unusual about that. As I understand what the RFAL submissions amount to, they say that if the obligations we say should apply were there, they would be constrained in day-to-day operational and contractual decisions. For example, they couldn't cancel and they couldn't charge access fees and they would be disadvantaged compared to private venues. So in response to the last point, the Court understands our position is they're a public agency controlling public assets that have been historically used for public discourse and they are distinguishable from public, private venues.

In our submission, this is only a limited area of concern. It's about attempts to control content. If there is nothing that goes to the question of content then there is no issue that's going to arise in practice and so what we say is that where there are content-neutral requirements by RFAL which will be most of its operational and contractual decisions, this issue simply does not arise.

The concept of content-neutral is discussed, among others, in the Supreme Court of Canada's *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 - L'Heureux-Dubé J case from 1991, a case about distributing leaflets in an airport. It's also discussed in the US Supreme Court's decision of *Forsyth County v Nationalist Movement* 505 US 123 (1992) from 1992. The essence of the Canadian case is that content-related requirements will be usually impermissible. The position in *Forsyth County*, which may go further than we need to go here, is to say that

where the matter relates to the reactions of others that cannot be content neutral, and that case is a slightly extreme case where there are about –

WINKELMANN CJ:
So that cannot be – I missed the words there. That cannot be, where it relates…

MR HODDER QC:
It cannot be content neutral. So they define "content neutral" to exclude matters that are results or reactions to others than those who are exercising their rights of expression. The reference is –

WINKELMANN CJ:
That's *Forsyth*, is it?

MR HODDER QC:
That's *Forsyth*. So the reference is, if your Honours please, pages 130 and 134 of *Forsyth County* and pages 238 to 240 of *Committee for the Commonwealth of Canada*.

As part of responding to this particular question I went back to re-read the venue hire agreement which the Court will find commencing at page 301 – sorry, the first page for the driver of the equipment is 301.0052 and the document itself, the agreement itself, starts at 301.0074. If I can just touch on a handful of matters that relate to that, in our submission this contract requires only a couple of tweaks to work in practice with the obligations that we are talking about.

So if we move on to page 301.0082 which is page 9 of the document. At the bottom of the page we get to 3.1. There's a provision there about event description and event details, and over the page it goes on to explain at 3.1(c) there are a number of things that have to be provided 10 workings days before the commencement date, and as I imagine the Court recalls, 3.1(c)(iii) requires a written health and safety plan for the event that complies with the

Schedule 2 and current health and safety legislation. As we know, we never got to that in this particular case but it wouldn't be difficult to imagine that this draft or standard agreement could be reorganised so there was a longer period involved and there was provision for more information about not just the event but about any security concerns that were known at that time to those who were seeking to hire the venue. Those would be, we suggest, entirely content neutral.

One of the things that is meant to be disclosed under the contract is objectionable activities. We find that in clause 9.1(a), and those are defined in the definitions which are at page 0094. Those are really focused on what the hirers are doing but again there's no reason why the matter couldn't be tweaked to ask for any details known of what might be provoked by the exercise in question.

But the key document in this exercise is the event plan which follows the security plan which – under 3.1(c). Then 4.1 is when RFAL considers that and prepares an event schedule which will include the question of any additional matters for any additional services that are required in 4.1(a) on page 83. Those services are defined in the definitions section to include security, and we would say that under what we are proposing there would need to be a proper assessment about security matters, the kind of assessment that Mr Kidd was tasked to undertake but never got around to doing, and then once that were done then matters would be able to be considered on their merits, and a question of cancellation under clause 13 of the document would arise. It's not the case that there could not be a cancellation in these circumstances. The question would be whether the cancellation was for content neutral reasons and whether or not it could be described as reasonable in common law terms, whether that's Wednesbury or some variant of *Wednesbury* or it was proportionality under the Bill of Rights Act regime.

So we say all of those matters would be able to be worked through without any great difficulty. The world would be by no means coming to an end for

RFAL. It would simply be an acceptance that it did have obligations to be properly informed about security matters which patently it wasn't in this matter in our submission.

WINKELMANN CJ:

Mr Hodder, your submission is that it's not for content, it's not treated as content-neutral reasons if the cancellation is a reaction to threats or whatever from hecklers?

MR HODDER QC:

No, I don't think I can go that far, your Honour. That would be the American position which I don't think I can contend for. If there were –

WINKELMANN CJ:

What did you cite *Forsyth* as authority for then?

MR HODDER QC:

I'm mentioning it to – our position would be that the Canadian discussion which is less rigid is more helpful to the Court. *Forsyth County* I'm simply giving the background because it's another case that discusses the concept of content neutral. I don't need to adopt that for the purposes of my submission. In my submission the question of whether that is sufficient justification would come in at a later stage which would be the question of proportionality or reasonableness. I don't say it's an absolute bar.

WINKELMANN CJ:

Well, because you could say this was a content-neutral reason to cancel it which was simply health and safety concerns.

MR HODDER QC:

Yes, your Honour, although that, my response would – I would, as you would expect, qualify that. The health and safety concerns are ones that are generated by the content in a sense, or the reactions of others to the content. So to categorically say it's absolutely content neutral may be going too far one

way. To say it can't possibly be content neutral is going too far the other way, and in our suggestion it comes through into the assessment that gets reflected in the event plan that RFAL has to put together, or the events schedule, and then that would be judged if the matter arose by reference to either reasonableness or proportionality.

The last practical implication would be that there would in fact be a mindset change. That is to say that RFAL would recognise that it is actually engaged in public activities (**inaudible** 10:15:32) relevant consequences. So that's –

ELLEN FRANCE J:
Just following on from that. So is the logic of your approach that RFAL has to enter into a contract?

MR HODDER QC:
Is it obliged to enter into a contract, your Honour?

ELLEN FRANCE J:
Yes.

MR HODDER QC:
If it has facilities and its reasons, put it the other way round. No, it doesn't have to. If it doesn't have a facility available on the time, no, obviously not. If it has – if somebody can't pay the fees, no, that – those will be again content-neutral matters. But if the requirements are met then the question would arise as to whether what is being refused is on some discriminatory basis or some content basis of not. If it's not content-based for reason then it may be that the contract could be refused at the outset.

ELLEN FRANCE J:
If though, for example, the contract is tweaked in a way that would allow RFAL to require, for example, the health and safety plan to come in at the start, let's say, are you saying even if that raised alarm bells for RFAL in terms of health

and safety issues they'd have to accept the contract, all other things being equal?

MR HODDER QC:

As I – I think we'll probably, at that stage, will be part of a contract. The contract, there'll be a contractual obligation to provide, as they do now, a security plan. That's the 3.1 obligation. That would –

ELLEN FRANCE J:

Yes, but let's assume they would require, for example, Axiomatic to have explained what the position was in Australia, ie, we keep the venue confidential until 24 hours beforehand or whatever. Is it your position that nonetheless RFAL has to go ahead and sign them up, all other things being equal?

MR HODDER QC:

I don't think they have to sign them up, your Honour. I think we would say that if that issues arises, if the issue of security and the risk of violent opposition arises then a proper inquiry is required whether it's precontractual or contractual.

ELLEN FRANCE J:

Well, that would seem to only make sense if they then had an obligation but I understand your position.

MR HODDER QC:

Yes, your Honour, we'd say the obligation in that case doesn't arise, well, in neither case are the obligations I'm talking about arising from a contract itself. Our position is that there are superimposed public law obligations on a contract if one exists. Even without the contract the public law obligation in terms of refusal would remain, but only in a relatively few number of cases is that going to arise and where it does a proper investigation is required.

GLAZEBROOK J:

Can you explain to me what happens after that investigation? So if in this case the investigation said, well, the only way this can be held safely is to do something along the lines of what's done in Australia at a cost of $30,000.

MR HODDER QC:

Then that would be judged against the criteria of either rationality or proportionality.

GLAZEBROOK J:

Well, can you tell me what the result would be?

MR HODDER QC:

If the matter were a major expenditure, just to take an example, in *Forsyth County* I think the security costs were three-quarters of a million dollars or USD 700,000 back in 1990-something to police a protest against Martin Luther King Day. I think at that stage we'd concede that that was, a proportional response was to not go ahead, and in this case a point that emerges in part response to your Honour's question is that the real question is how much the police will take on. If the police take nothing on then I accept that there is an issue about asking RFAL to respond as if it were providing the police force or even requiring the hirer can provide it. That's why we say it's so important to understand where the police would go in relation to these matters.

GLAZEBROOK J:

But the police is not at no cost, is it? In fact I understand with the private events often the police do require payment. But even if they don't they still are costs that takes the police away from other activity that might be more important.

MR HODDER QC:

Well again that, we would say, is a matter that one ought to have direct information from RAFL should have had direct information –

GLAZEBROOK J:

No, I understand that. I'm just trying to understand your position on what happens if you had had full information. That was the point of my question.

MR HODDER QC:

If I can further respond your Honour. I think the practical response is if the police said we're going to sit on our hands, and it's all over to you, then that would be fairly strong evidence that the response of cancellation would be hardly irrational and likewise it might not be proportional. But again it depends on what the intelligent is about the size of the protest. Is there enough intelligence to say it's 10 people, 100 people, 1000 or 10,000. That's the sort of exercise Mr Kidd was going to embark on, as I read his email back to Mr Crighton, but never did. But to be clear, we're not saying this is a *Forsyth County* situation where RAFL has to wear hundreds of thousands of dollars of costs to run an event which the police are not enforcing. Or not patrolling.

O'REGAN J:

And as a matter of commercial operation they're not obliged to incur a loss. Is that your position? So if the cost of policing is higher than their normal hire fee, they're entitled to charge more.

MR HODDER QC:

And they do that under the current venue hire agreement, your Honour, they're entitled to add on the costs of security under the clauses of the contract we say, 3.1, 4.1 et cetera, and so 4.1 effectively says, there will be additional services provided and you will be paying for them, and then that will be the question. Either the hirer wants to carry on, on that basis, or if it wants to contest that those are effectively are restraint on content in some disguised form, they might want to challenge it.

O'REGAN J:

But as a matter of principle if they are genuine costs, and they are genuinely required to be incurred, you accept that there's no obligation on the public body to incur them and not be reimbursed.

MR HODDER QC:

Yes your Honour. I think we have to accept that the, it's asking RAFL to incur extraordinary costs that are, would be problematic, and that the ordinary provision they've got in the agreement that says you can add security costs in the ordinary course follows, and would be the same that would apply to another venue. Then it gets more complicated in terms of the analysis where that becomes the easy way for the sorts of events to be cancelled, but that requires, at the very least, the analysis we seek, that is a proper assessment of the costs, at $30,000 as your Honour mentioned, has a valid, rational analysis or not.

O'REGAN J:

And also is it entitled to get the cost of the assessment.

MR HODDER QC:

Well that question is whether that's built into their original fees or not, but the answer I guess would be yes.

O'REGAN J:

Right.

MR HODDER QC:

So as your Honours will appreciate the submission is not asking for the impossible. The submission for the appellants is asking for there to be a proper and full investigation when this issue arises, which is going to be relatively rare. But it still needs to be dealt with on a principled basis and starting off in terms of the *Tameside*/*CREEDNZ* questioning to get to the right answers or to get enough information to have credible answers on the

questions about how much security is required and how much it will cost. It just didn't get there.

Your Honours, the second question that was left with me was the question of alternative media and one may – I think it operates perhaps at two levels. One is it simply says you can't ignore the fact that there are now multiple ways in which people can impart and receive ideas online, everybody knows that, it's kind of a fact you can't ignore. The other one, which is perhaps more profound, is the one that says, well, if that's right, then maybe the traditional value we've placed on the combination of freedom of expression and assembly might have to be reconsidered. That traditional value is discussed, for example, by the Supreme Court of Canada in the *Ward* case at 59 to 60 and 64. In terms of the first proposition, again we're not here to deny the existence of other means of communication, although they are private means of communication, and in our submission that is one of the responses, but what we have here are alternative media that are in private hands, at least to date they're not subject to public law obligations, and they're not, the regulation of them is not part of our argument. It's not an issue that we're raising, and they are not, on the face of it, governmental and arguably authoritative in the sense that what the private media do or say about something doesn't have its own, as it were, public credibility. That's one of the points that the Raz article that I referred to yesterday makes, the page reference is 312, 313 and 320. It draws a distinction between private commentators who are expressing a private opinion, in effect, which might include whether a private platform denies access, as against those who are exercising public responsibilities, whether it's the government or some lower level authority, where they may be seen as flexing some sort of authority on behalf of all or part of society.

GLAZEBROOK J:

Can I just check. You're not suggesting that because you're at a public venue that there is some authority given, backing given by that public authority for what is being said, because that is clearly not the case. They're just using venue, and especially if a public authority is obliged, which has been the case,

to allow anybody expressing any opinion to use that public venue subject to proportionality et cetera, then I'm not sure about the distinction you're making.

MR HODDER QC:

Well I'm referring the Court to the Raz analysis, which I invite the Court to read with more urging than I'm able to go through it, but the general proposition is just what I've explained, that when government decides to censor something, for example, that has authority behind it, and it has an authority, as it were, associated with the credibility and legitimacy of government agencies. To some extent it came close to that here where the mayor of Auckland, I was saying that this was something that really shouldn't have happened in Auckland, speaking as a figure of authority. Now we accept that that wasn't the decision-making rationale that was actually used for the cancellation, but it gives a flavour of something that's designed as something more authoritative than if a private person expresses that view, or takes some steps in relation to a media that they control.

GLAZEBROOK J:

So you're really talking about the cancellation rather than allowing somebody to speak gives it an official imprimatur.

MR HODDER QC:

Yes your Honour. The focus is on the negative not the positive.

GLAZEBROOK J:

Thank you.

MR HODDER QC:

As I read Raz, yes. The second aspect is that these historical physical platforms continue. They haven't gone away. There are town halls and the like, they remain public assets, public spaces, and they have historically been used for public discourse. That's the point made in the *City of Montreal* case, and I refer the Court to paragraph 74 to 76, and we respectfully submit there's

no logical reason to relax the public law obligations that have historically attached to those venues.

WINKELMANN CJ:
Mr Hodder, you're equating a large performance venue with a town hall scenario, and it's said against you that they are quite distinct, this is a commercial, very large place which is used for shows et cetera, and it's not a town hall, it's not your standard town hall venue used for public discourse.

MR HODDER QC:
Well your Honour we would say that's a narrow view of public discourse which has been put forward by our friends. Public discourse and public expression is extraordinarily wide, including artistic performances and so satire, satiric comedy, the like, is all the same scenario, and the size of a town hall is going to vary depending on which location you're talking about. There is a case that the Court of Appeal refers to, the *Watch Tower Bible and Tract Society v Mount Roskill Borough* [1959] NZLR 1236 case of 1959, it's in the Court of Appeal judgment at 66. That was a, I seem to recall, the Mount Roskill War Memorial Hall and this issue there was somewhat analogous. Whether or not the Jehovah's Witnesses were entitled to have a meeting there. So we say there is no difference between that and the scenario we're talking about here. The tickets make no difference, and the nature of the speakers make no difference.

In a sense the next point really is the idea that alternative media diminished the obligations on physical existing media, or platforms, does tend to distinguish the freedom of assembly from the freedom of expression in a way that is effectively unprecedent because, as is said by the Court of Appeal in our case at 66, freedom of speech and freedom of assembly effectively go hand to hand. They are an aspect of individual liberty and that is traditionally what, to take the town hall meeting idea you have, but there are variations on the same idea.

Then that leads me to the last point which is that live events and interactions at live events remain important. I think one of your Honours' mentioned yesterday MR Moncrief-Spittle's comments at paragraphs 42 to 44 about wanting to be part of and to observe the interactions. Mr Cumin, Dr Cumin, sorry, talks abut events as being of significance and the risk to them, and his 41 to 43 and at 47, and Mr Du Fresne talks of their relevance for the media to assess what's going on I his paragraphs 25 to 30. So the submission is that notwithstanding the existence and the ubiquity of alternative media, live events and live interactions in public spaces remain an important feature of life and public discourse.

Your Honours that's probably a bit longer than I intended to take but I think those are things I can usefully say in response to those questions that your Honours left with me.

WINKELMANN CJ:
Thank you Mr Hodder, that was very helpful. Mr Joseph?

MR JOSEPH:
May it please the Court. I have three submissions under the second ground of review, which is failure to act consistently with the Bill of Rights Act. Now if your Honours agree I won't actually recite each of the submissions at this stage, I'll come to them sequentially as I complete each submission. This is in the interests of saving time, if that is acceptable your Honour.

WINKELMANN CJ:
Yes.

MR JOSEPH:
I'll move straight to my first submission, that RAFL discharges public functions and falls within the public function limb under section 3(b) of the Bill of Rights Act, so it is therefore bound by the Bill of Rights. I'll just take your Honours here to the statutory organisation of regional council, Regional Facilities Auckland, as a statutory foundation, and then I'll take you to the leading

decision, which is *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC), and we say that there is no doubt that RFA and RAFL as trustee are bound by the Bill of Rights Act.

So contrary to the respondents we say that RAFL was not acting in a purely commercial capacity when it made the decision, that is the cancellation decision, and I'm going to take your Honours to the establishment order in just a moment, Regional Facilities Auckland has regional community focused statutory objectives, I think that's important, and moreover the decision here, the cancellation decision engaged protected rights, as Mr Hodder has said at both common law, and as I'm going to suggest, or submit, under the Bill of Rights Act itself. So this makes it counterintuitive, we say, to argue that RAFL was acting only in a private commercial capacity. Let us look very briefly at the statutory basis of a council-controlled organisation such as Regional Facilities Auckland. RFA is legally constituted as charitable trust and of course it's trustee is RAFL. CCOs are governed by part 5 of the Local Government Act, and part 5 makes explicitly that CCOs like RFA undertake activities on behalf of local authorities.

So I just cite section 61. If we just go to the section heading, it is titled: "Activities undertaken on behalf of local authorities." So we can say that Regional Facilities Auckland carries out regional community functions on behalf of the Auckland Council. So RFA is really the Council's alter ego. It stands in the shoes of the Council in administering council-owned property. So we say that RFAL, which is the trustee, has a public mandate. It's a public mandate that brings it within the public functions limb of section 3(b). We entertain no doubt about that.

Now if I could just take your Honours to RFA's statutory objectives and if I can refer you to the establishment order. This is an order in Council of 2010. It's in the roadmap, referenced there. It's a hideously long title to the Order in Council. It's Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010, but it's

probably not necessary that I actually take you to the operative clause which is clause 9(3) of the Establishment Order.

Clause 9(3) lists several regional community-focused objectives of RFA, statutory objectives, because this was set up under an Order in Council, and these statutory objectives, they mandate RFA to promote community engagement. This is why we say RFA does not operate in a purely commercial plain. RFA must promote community engagement in, and I quote, this is paragraph (e) of clause 9(3), must promote community engagement in "the arts, culture, heritage, leisure, sport, and entertainment activities", and RFA is to do this, the order says, by applying a regional perspective. That's paragraph (b) of that same clause 9(3), a regional perspective. Not a commercial perspective but a regional perspective.

Now none of those statutory objectives, we say, is commercial. Of course, RFA and its trustee RFAL, they must be commercially prudent in discharging their functions. They administer public moneys. So like any public body they must be commercially prudent in the way they go about their functions. But we say that does not transform RFA's regional community-focused objectives into commercial ones. Quite the contrary, we submit.

Now this brings my submission to *Ransfield* which is the leading decision on the scope of the public functions limb section 3(b) and I think there's common ground there between the respondents and the appellants, and I refer your Honours to paragraph 69 of the judgment of his Honour, Justice Randerson. Again, I just don't think, unless your Honours suggest otherwise, that it's necessary I take you there, but Justice Randerson very helpfully identified 10 indicative criteria, 10 indicative criteria of a public functioning body, a public functioning body that clearly falls within the scope of section 3(b).

Now RFAL satisfy eight of those 10 indicative criteria, and we spell that out in our written submissions, eight of the 10 criteria, and this we say proves overwhelmingly that RFAL satisfies the public functions limb under section 3(b).

Now I don't propose to take the Court through each of those criteria to show how they apply to RFAL in this case. May I refer your Honours to paragraph 6.5 of our written submissions, because paragraph 6.5 of our written submissions explain briefly how each of these criteria apply to RFAL. Now the two indicative criteria that are not satisfied in this case are these. RFAL does not exercise coercive powers. This was one of the criteria identified by Justice Randerson. It does not exercise coercive powers analogous to those of the State, and, secondly, RFAL is not democratically accountable through the ballot box. Now they are the only two of those 10 criteria that are not satisfied. In all other respects the criteria that Justice Randerson identified are satisfied which means that RFAL squarely fits within the section 3(b) public functions limb.

Now just to conclude the submission very quickly, Justice Randerson reserved for himself a final question. This is at paragraph 69(f) of the *Ransfield* judgment, a final question. He simply asked this, is the function governmental in nature, or is it essentially of a private character. That is the final test. Now what one of RFA's statutory functions set out in the establishment order, is of a private character, not one. They're all community-focused, regional objectives set out in the establishment order. So RFAL, we submit, is a body that clearly satisfies the public functions limb. Now I'd be happy to answer any questions but if you have none I'll move on to the second more substantive submission. Thank you your Honours.

My second submission is that RFAL's cancellation decision disproportionately limited rights under the Bill of Rights. I want to concentrate firstly on the actual Court of Appeal decision, against which we're appealing, and then I want to take the Court to some Canadian developments, in particular concerning *Doré v Barreau du Québec* 2012 SCC 12, [2012] 1 SCR 395, which the respondents rely upon, and then to refer back to the Macrae affidavit to show how, in fact, Mr Macrae did not satisfy the requirements handed down in *Doré* and then take you to a Canadian decision, a recent British Columbia decision, which is almost analogous, almost perfectly in point here with this case where

it was held that the city when it cancelled a venue hire agreement, it trampled upon the right to freedom of expression, and finally I want to take you through a couple of recent decisions of the European Court of Human Rights which actually reaffirms basic principles of liberty which gives context to this appeal.

So the Court of Appeal's decision. The Court of Appeal held that the cancellation decision was a reasonable limit, a justified limit on the appellants' rights, and this was handed down under section 5, the justified limitations clause. Now we say that the Court asked itself the wrong question and applied the wrong test when it found the decision to be a justified limit. The Court of Appeal applied a rationality test to determine whether limits on protected rights are justified. Now this, we say, was in error. The Court held that RAFL's decision was a rational and reasonable one and was therefore a justified limit. Now if I can take your Honours to paragraph 127 of the Court of Appeal decision, it is document number 101.0310, and I can take the Court to paragraph 127, which is up on the screen now. The Court explained, and clearly, showing that rationality was the standard applied. The Court explained: "The decision to cancel was not inevitable and another decision-maker in like circumstances may have made a different decision. But in the circumstances outlined it cannot be said that the decision was not a rational and reasonable response. We therefore consider that RFAL's decision to cancel the event was a justified limitation on the appellants' BORA-affirmed rights…"

So rationality was the standard. Now that approach, your Honours, is apposite for judicial review. It's pure judicial review speak, but that approach is not apposite for rights adjudication under the Bill of Rights. Rationality and justification are not the same thing, far from it. The New Zealand Bill of Rights Act does not engage a rationality standard. So under the Bill of Rights, we all accept this, the decision-maker must pump for the least, or less rights -infringing outcome. That is the obligation on all public decision-makers when their decisions engage protected rights. To plump for the least or less rights-infringing outcome. So it's not enough to apply a rationality standard. It's not enough to say that the decisions within a range of decisions that the

decision-maker might reasonably make. In this case RFAL's decision was not the least or less rights infringing outcome, on the contrary it was the nuclear option for which I mean Mr Hodder has actually explained that and I'll come back to it. Because none of the options available to Mr Macrae, who was the officer who made the cancellation decision, were even considered, there was no pause for thought whatsoever, but I'll come to that when we look at the Macrae affidavit. In fact, I'll refer your Honours to paragraph 6.9 of our written submissions, I'm not going to actually recount the options there, but four are recounted. All I want to say at this point is that these options were not exclusive, there were four options, clear options, available.

GLAZEBROOK J:

Mr Joseph, can you go back to the tests that you say should have been applied? Because for myself, given that the facts are now moot, I'm more interested in the issues of principle than in the minute analysis of the particular decision that was taken, because that's what we're really going to be concentrating on.

MR JOSEPH:

Very well, your Honour. If one applies a rationality test then one can end up with a decision which does not –

GLAZEBROOK J:

Well, I understand that, I just want to know what you say the test is, and I suppose what I'm getting at is do you say this is a correctness standard which this Court has recently discussed at a relatively cursory fashion in the *Kim* decision because that wasn't in front of us?

MR JOSEPH:

No, it's not a correctness standard, your Honour, it's – I come back my proposition –

GLAZEBROOK J:

Right, so what exactly do you say the – and for want of a better word – the standard of review that the Court should engage in when looking at an analysis of these decisions?

MR JOSEPH:

Well, I'm going to come to the *Doré* decision, that's the Canadian Supreme Court decision, it was a unanimous decision of that Court, where the Court was at pains to emphasise that decision-makers such as RFAL must factor in and have regard to fundamental rights and the values that they enshrine. Now what we're saying here is that Mr Macrae did not do that, it was –

GLAZEBROOK J:

Well, I understand that, but now what I'm asking you is what does a Court do when looking at that decision and reviewing it, what is the standard or the way the Court reviews the decision? I mean, I totally understand the position that you're taking in terms of what Mr Macrae should have done, but what is the standard that the Court uses? You say the Court of Appeal used the wrong standard, so what should the Court of Appeal have used?

MR JOSEPH:

Well, the Court of Appeal should have used this standard, this benchmark, what was the least rights-infringing outcome that was open to the decision-maker at the time. I know you don't accept that, your Honour –

GLAZEBROOK J:

No, I'm not – I just want to know what you say the decision-maker, what you say the Court should have been doing. That sounds to me like a correctness standard that you're arguing for. I just want to know whether you are or you aren't.

MR JOSEPH:

Well, if it's a question of definition – well, okay, we'll call it a correctness standard. But what I'm saying is that, and this is what I'm going to come on –

GLAZEBROOK J:

So the Court should have said was this, if this is the submission, the Court should have asked whether this was the least rights infringing path that could have been taken…

MR JOSEPH:

Or less rights infringing, yes.

GLAZEBROOK J:

And substitute its decision for that of the decision-maker.

MR JOSEPH:

Yes. In *Belfast City Council v Miss Behavin'* Ltd [2007] UKHL 19, [2007] 1 WLR 1420 which we've got in our electronic bundle of authorities, the UK Supreme Court makes it absolutely clear – I beg your pardon, it was the House of Lords then, it was in 2007 – makes it absolutely clear that the Court must actually come to its own objective assessment as to the proportionality underpinning the decision, and that can only be informed by whether or not it was the least or less infringing outcome, because we must actually strive to uphold as best we can protected rights and give full measure to them, points that her Honour the Chief Justice made in *Fitzgerald.*

ELLEN FRANCE J:

I just am having difficulty as to how that works in this particular situation, because obviously cancelling is not, on its face, the least rights-infringing approach.

MR JOSEPH:

No, it's not. I'm going to take your Honours to the various options which were available to RFAL and my friend Mr Hodder has already touched upon these. You see, what we have here is an uninformed arbitrary decision, we don't have the information, because there was no investigation made of what was an unsubstantiated uncorroborated security threat, was Ms Morse simply

acting as a lone wolf or did she really have the authority of Auckland Peace Action, we just don't know, because none of these things were investigated.

ELLEN FRANCE J:

It just doesn't seem to me that that's a least rights infringing analysis, that looks to me like some other test…

MR JOSEPH:

Well, the least rights –

WINKELMANN CJ:

Just pause for a moment, Mr Joseph. Sorry, carry on.

ELLEN FRANCE J:

Sorry, it just doesn't seem to me to be a particularly helpful way of finding out whether or not this particular decision was consistent with the Bill of Rights or a justified limit.

MR JOSEPH:

Well, I think we can only reach that outcome, what was the least rights infringing outcome, if we go through the various options that were available to the decision-maker, reasonably available to the decision-maker in that situation. For example, the most obvious thing was for RAFL to do their own security assessment and risk mitigation strategy, which in fact Mr Kidd, the head of security in the organisation, was undertaking. He began that on the 5th of July and he was still undertaking that enquiry deep into the afternoon of July the 6th but, unbeknownst to him, Mr Macrae had already pulled the pin sometime between 10 past 10 and 11 o'clock that morning but he didn't even know about, that's what should have happened, and in fact to Mr Kidd's credit he was going about his task dutifully but –

ELLEN FRANCE J:

But in normal situation where you're looking at least rights infringing, for example if you're talking about legislation, you're talking about, let's say, if

you're talking about, say, you know, breath testing, you're talking about a range of options that could have been enacted in the legislation, one of which would be the least rights restriction. I'm just infringing, I'm just having a little bit of difficulty. It seems to me you're just reapplying your judicial review question when what you're really trying to work out is whether or not this was a justified limit.

MR JOSEPH:

Okay, your Honour. You mentioned legislation, that's the *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 situation, which actually enjoins an *R v Oakes* [1986] 1 SCR 103 test approach. Now I'll just go to *Doré*, if I might, *Doré v Barreau du Québec*, the 2012 decision of the Canadian Supreme Court. Now the respondents claim that *Doré* established in fact a more relaxed straightforward proportionality analysis when administrative decisions engage protected rights, and I would ask this Court to endorse that approach, an approach they claim is more relaxed and forgiving. In fact we reject that claim. But we do accept that the *Oakes* methodology is stilted and in act when applied to administrative decisions, we accept that. But the Canadian formulation of proportionality in this setting is not less demanding, it's not mortgage forgiving, and I draw the Court's attention to an important passage in the *Doré* decision, because what we've arrived at in the administrative law context really is more of a balancing exercise. Now the Court *Doré* was at pains to explain that it's not less rigorous than the *Oakes* analysis, it's just a different formulation of the proportionality test.

So if we could go to paragraph 5 of the judgment in *Doré*, this was a unanimous decision of the Canadian Supreme Court, the judgment was penned by Justice Abella, and her Honour pondered this question: how to maintain rigorous charter protection, how to maintain rigorous charter protection while at the same time taking account of what she called the "contours", the contours of administrative decision-making, and her Honour did this in two stages, at paragraph 5. First she acknowledged that a formulaic application of the *Oakes* test would not work in this context, because we're talking about the exercise of a statutory discretion, not a statutory limit,

as in *Hansen.* But, secondly, her Honour said this. "Distilling its essence," that is, the essence of the *Oakes* test, "works the same justificatory muscles: balance and proportionality," and her Honour dispelled any notion that this was a weakening of the charter protection. She explained at paragraph 5, and I quote: "I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection…we expect from an *Oakes* analysis."

Now what the Court engaged in there is more of a balancing exercise to determine whether or not it was a proportionate response because the *Oakes* test is too stilted, doesn't work in that context. We say that on any formulation of a proportionality test, *Doré* or *Oakes*, RFAL disproportionately and unreasonably limited rights under the New Zealand Rights Act because there are other things they could have done. Other things.

WINKELMANN CJ:

But they weren't – you're still – I think the point Justice France is making is that really this is a dichotomy between cancellation or going ahead. So you're not talking about degrees of restriction on the right. What you're doing is really still a classic judicial review analysis of whether they took into the relevant considerations, and you're saying I think that in the rights context they had to go very carefully through those considerations and Mr Macrae didn't do that. So it is still quite standard judicial review it seems.

MR JOSEPH:

Well, I suppose we've got to accept that in a way because at the end of the day, and given the circumstances, an organisation such as RFAL might be entitled to resort to the nuclear option of cancellation. All we're saying that in this case here we don't know because in fact the various options were not pursued. So I concede, your Honour, that it's a question of degree, and if there were a less rights infringing outcome available then that's what the decision-maker should have opted for.

WINKELMANN CJ:

Can I take you back to Justice Glazebrook's question which was whether we're applying a correctness standard? You're not really saying that we go through all the other options and form our own view. Aren't we really saying – it's really the same point that Mr Hodder made which is a process one. Your point is that they didn't look at alternatives. They didn't look at alternative processes and therefore it's a flawed decision-making process and perhaps that the Bill of Rights context made it place more emphasis for care in that.

MR JOSEPH:

Yes. The Court itself must actually come to an independent judgment on the proportionality issue, and I refer your Honour to, well, *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15, [2007] 1 AC 100, the House of Lords in *Denbigh* established this, but it was followed shortly thereafter by *Belfast City Council v Miss Behavin'*. If we could come to that decision, please, that would be most appreciated, and I'd ask to go to paragraph 31 of that decision. There, there is a dictum by her Ladyship, Baroness Hale of Richmond. This is at paragraph 31. If I can just read to you, your Honours, because there is a clear distinction in terms of methodology here in rights adjudication from that in judicial review and her Ladyship makes that very clear. She said: "The answer is that it is the" –

First of all she asks this question. Who decides whether a claimant's convention rights have been infringed, and we say whether the claimant's Bill of Rights Acts have been infringed. Well, she answers this in this way: "The answer is that it is the Court before which the issue is raised. The role of the Court in human rights adjudication is quite different from the role of the Court in an ordinary judicial review of administrative action. In human rights adjudication, the Court is concerned with whether the human rights of the complainant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."

So it's for the Court to make its own independent assessment, and so the viewpoint of the decision-maker is not determinative. But if I might move on

then to the *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 case which is in our bundle of authorities.

GLAZEBROOK J:
Can I just, there's certainly been at least very recent commentary that that sort of position that had been taken in some of those earlier Human Rights Act context and other contexts actually just generally in terms of judicial review in the United Kingdom has definitely taken a step back and certainly if you're looking at some of the torture or the other types of cases they were not really substituting their decision for that as the people who they considered had the information that made it – well I suppose we're coming to defence, although I hate that word, they use that word in Canada however as well, and the torture decisions in Canada have looked fairly heavily at deference as well.

MR JOSEPH:
I think there has been a pulling back in the United Kingdom courts in applying I think what is their section 3 under the Human Rights Act, our section 6. I think the case was (**citation** 11:00:53) or whatever it is, I can't remember, where there was a high point where the Court –

GLAZEBROOK J:
That was definitely the high point, yes.

MR JOSEPH:
Yes, essentially accused of rewriting the words to the section and so there's been a retreat, I concede that, but I don't know if the courts in the United Kingdom have retreated from the position from *Miss Behavin'* just read out from Baroness Hale's dictum. I might take the Court very quickly to the *Lord Carlile* decision, which is in our bundle of authorities. In particular to paragraph 67 where Lord Neuberger made some quite interesting comments. First of all Lord Neuberger, this is a 2014 decision of the UK Supreme Court, he reiterated that it's the court's role to form its own view on the proportionality of the decision. So it's for the Court to make its own assessment. It's not

bound by whatever decision-maker, whatever resolution or balancing exercise the decision-maker made.

Now at paragraph 68 he actually explains what is meant by that. His Lordship explained how the Court should go about its task. One matter His Lordship emphasised was whether or not the decision-maker had, in fact, carried out the required balancing exercise. What he was saying then, when the Court comes to its own view as to the proportionality of the measure, it is very material whether or not the decision-maker properly carried out the balancing exercise, and here we say that Mr Macrae did not enter into any balancing exercise. So that has a material bearing on the proportionality of the decision when the Court comes to its own objective ruling on the matter.

Now it's quite interesting actually, looking at Mr Macrae I've actually skipped the Macrae affidavit, but I think my friend Mr Hodder has sufficiently taken us through that. But it's very apparent that Mr Macrae did not carefully weigh the rights, the appellants' rights of freedom of speech. Now he did make broad allusions to free speech rights, and to two free speech policies of two UK universities. Just in passing actually, Nottingham on Trent and Bristol. But he did not actually weigh, in any meaningful way, the rights of the appellants to freedom of expression. He had regard to the rights of protesters to peacefully protest, and also he said he had regard to the health and safety of all involved, but he did not factor in the appellants' rights.

Now this, we say, completes the circle. It takes us back to *Doré*. Now sequentially I was going to deal with *Doré*, but I have jumped forward. In *Doré* at paragraph 5, I beg your pardon, I have taken you there. No, it's paragraph 35 I think it is. But anyway, *Doré* her Honour made it absolutely clear that decision-makers must have regard to fundamental values. If there are protected rights they must be factored into the balancing exercise that must be undertaken. So we say it completes the circle because, and the system is not a proportionate one under section 5 because Mr Macrae, here he capitulated without pause, capitulated without pause to what we call the heckler's veto. In rights of judication the Court must come to its own

independent view and we say that because Mr Macrae did not engage in that balancing exercise, the Court is entitled to find that it is a disproportionate exercise of power.

GLAZEBROOK J:

Can I just check again. I did not understand Lord – I don't understand either of the decisions, I suppose, in saying that they have to come to their own view without some – and I'm talking in a generic sense, so if we can just refrain from bringing it back to the facts of this case, because what I'm trying to get is what you say the test is, and I don't know that these are authorities for the Court coming to its own view, especially Lord Neuberger takes into account whether in fact the decision-maker has weighed those factors. Without an indication that if that has been the case, that the Court will necessarily overturn that on a correctness standard. Now a correctness standard is a perfectly reasonable, and has been a view that the Human Rights Commission has indicated in respect of this analysis, so I'm just trying to get what the submission is. And it does your submission is process rather than correctness.

MR JOSEPH:

Well it could be both your Honour. I mean if there's –

GLAZEBROOK J:

Well hopefully I just want to know what it is you say is the role of the Courts. That's what I'm trying to understand. It's difficult to write a decision if we don't know what the submission is and what the test that is being put forward is.

MR JOSEPH:

Yes, well, I mean the Court's view can be informed by the decision-maker's view, that's clear, that of course a decision-maker didn't through the exercise, so that actually is not particularly helpful. So in a sense I suppose it is a correctness standard we're actually arriving at because the Court must make its own assessment as proportionality, as to the proper balancing in these

administrative law cases, the proper balancing of the contesting interests and the need to protect rights. That is the starting point always.

WINKELMANN CJ:

Mr Joseph, in this case you don't need to go the correctness standard in a way because you say the process was so flawed because –

MR JOSEPH:

Well it's hard to get – sorry to interrupt?

WINKELMANN CJ:

I mean I think that is your fundamental submission which is that they didn't, Mr Macrae, you say, didn't allow the process that the Council itself had set in motion to be completed so he didn't have all the information he might have in making the assessment, so his assessment was flawed, but would you say that if he'd gathered all of the information, and he made an assessment that this was a, with all the relevant information, that he made an assessment that this was too risky an operation for the Council, would it be open for, in a challenge such as this, for the to say, well are you saying, is your submission that the Court would have to look at his assessment and second-guess it, even though he's an experienced venue operator, et cetera? Because that's the correctness standard.

MR JOSEPH:

Yes indeed, in fact we've arrived at that, thank you your Honour. The Court must make its own determination and it may be, having looked at all the evidence, had they gone through the process which they should have gone through, that may be that the Court might say, well there really was no option at the end of the day but to cancel, and so the challenge would fail. But we don't get there. We don't know what the position is. We don't know just how real the security threat was indeed, or what, how big the demonstration or the protest would be, we don't know any of these things because the assessments were never carried out. So it's very hard to get, we've now

adopted the correctness standard, it's very hard to get to what the Court's views should be, because the Court is no more informed than any of us.

ELLEN FRANCE J:

Well how does that operate in the context of what's preceded primarily by way of judicial review where there's been no testing of the affidavit evidence, so we have Mr Macrae's statement as to what he took into account, we've got no real basis for questioning that in one sense, have we, because there's been no challenge to his assessment.

MR JOSEPH:

Well, yes, we come back to *Miss Behavin'*. I mean it's the duty of the Court to come to its own determination. Now, I mean Mr Macrae's affidavit after the event in fact, you know, he made the decision between 10 past 10 and 11 o'clock that morning, and in his affidavit he said he had regard to all these matters. He must be a very quick thinker, with respect.

ELLEN FRANCE J:

Well that's the sort of thing one might have asked him about in cross-examination, I'm not sure what we're meant to do with it.

MR JOSEPH:

Well, what we can say is that the decision-making was defective, and it's not proportionate –

ELLEN FRANCE J:

That to me is a different thing from the correctness standard which you're now advocating for.

MR JOSEPH:

Very well. We can say that in fact it was a disproportionate decision because there were no facts before the Court to say that in fact the event couldn't go ahead because there'd been no security assessment anyway, and I would just like to come back to the role of the police in this. That was one of the most

obvious recourses for RFAL, having done the security assessment, which they didn't because Mr Macrae precipitously intervened, but if they had and there was a very real security threat then the obvious recourse is go to the police.

If I can just refer your Honours to section 9 of the Policing Act 2008, it very helpfully sets out the statutory functions of the police. Section 9 declares these functions of the police: preserving the peace – that's sequentially paragraph (a) is preserving the peace, paragraph (b) is maintaining public order, and paragraph (c) is enforcing the law. Now all of those statutory functions would be apposite and applicable here had RFAL gone to the police. Now I believe that – I know her Honour, Justice Glazebrook, mentioned that this was a private event and therefore the police would expect payment. I'm not sure about that at all. Once it spills over into the public arena I don't see why the police should seek recompense. But anyway they are the statutory functions and they –

WILLIAM YOUNG J:

Just pause there. I think in some jurisdictions the police do claim reimbursement of expenditure providing – or the cost providing protection for private events and some of the material in relation to this case suggests that the Victorian Police do so. There's litigation I think in the UK at the moment as to whether Prince Harry can require or pay for police protection himself. I'm not sure that in New Zealand the police do take money for protection. I googled it, I couldn't find it.

GLAZEBROOK J:

They do in certain circumstances, as I understand it. Whether they would in this circumstance I don't know. But, of course, the expenditure of police time does take them away from other aspects and if you're looking in a general public sense in terms of community cost, I would've thought you need to factor in the cost of….

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES
(11:12:48)

MR JOSEPH:
Perhaps, your Honours, we might move on, but just coming back to your Honour, Justice William Young's, question, I suppose there must be some provision under the Policing Act which allows the police to charge for private events. I'm not aware of that provision but obviously one must exist, I suppose.

If I might just make a reference to the decision of this Court in *Fitzgerald*, Mr Macrae said he weighed the rights of protestors to protest and the need to protect health and safety of all involved. We say he did not even weigh, did not have regard to the appellant's rights of freedom of expression. But it seems here that the Court is sort of – well, there's a suggestion from the questions from the Court yesterday that the Health and Safety at Work Act somehow takes predominance over the Bill of Rights Act and we say that that has put the cart before the horse, because of section 6 of the Bill of Rights Act, the Health and Safety at Work Act must be interpreted and applied subject to the Bill of Rights Act and the section 6 interpretive direction, and Mr Hodder took you through the section to which Mr Macrae alluded in his affidavit, imposing a duty upon such people as Mr Macrae to avoid or minimise safety risks so far as is reasonably practicable. So even the section imposing the duty contains its own qualifying language, and so therefore it invites a section 6 interpretation under the New Zealand Bill of Rights Act. In other words, that –

GLAZEBROOK J:
Surely bodily integrity is protected under our Bill of Rights. That must, at the least, come under the right to life.

MR JOSEPH:
Well, no one has suggested here, your Honour, with respect, that life was threatened or in any way –

GLAZEBROOK J:

So it's only if there's a danger to life that you can take into account health and safety concerns under the Bill of Rights, is that the submission?

MR JOSEPH:

Well, one can if one were faced with those facts but we're not, your Honour. There was an unsubstantiated security threat of blockade of –

GLAZEBROOK J:

I understand. We keep coming back to the facts. What I'm trying to get are the points of principle because that's what we're interested in. Well, at least, that's what I'm interested in.

MR JOSEPH:

Well, I can concede that if we had those facts before the Court where there was a clear threat to life and limb and there were no other sensible ways of actually neutralising that threat, that safety threat, then it would be a proportionate decision to say, well, the event should not go ahead were those the facts before this Court and they are clearly not the facts before this Court. So that question can really await for another day, I'm suggesting.

GLAZEBROOK J:

But that would mean that you're accepting not necessarily that the Health and Safety Act would trump freedom of expression but that it certainly might be a proportionate response if bodily integrity was at risk.

MR JOSEPH:

If we got to that stage, I think we'd have to concede, yes, if all other options had been exhausted, but we're not dealing with that situation before this Court. We just don't know the facts, in fact. That's the problem, and if I could just –

GLAZEBROOK J:
Well, it's just you were making the submission that he'd made a mistake by saying health and safety trumps freedom of expression but now you're conceding that might well be the case.

MR JOSEPH:
Well, no, I'm not, with respect, conceding that because Mr Macrae himself didn't have the necessary information before him to come to that determination.

GLAZEBROOK J:
No, you keep, I'm sorry, but you keep coming back to the facts of the case. What I'm wanting to do is to get the points of principle and the point of principle you were saying was that the Health and Safety Act doesn't trump freedom of expression.

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICUILITIES (11:18:11)

COURT ADJOURNS: 11.19 AM

COURT RESUMES: 11.41 AM

WINKELMANN CJ:
Mr Joseph.

MR JOSEPH:
Thank you your Honour. If I might just reply to her Honour Justice Glazebrook finally on this point. I prefer not to engage in hypothetical situations but that said I can summarise what our position is. one, proposition one, there is no right to bodily integrity in the New Zealand Bill of Rights Act per se, there's only a right to light that section 8, although of course we would accept that that bodily integrity is a relevant consideration under the balancing exercise. This is under section 5 bearing on the proportionality. Our second proposition

is this, it is not as simple as one concept trumping the other, because it involves a balance, a balance between the –

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES (11:42:25)

WINKELMANN CJ:
Mr Joseph, can you hear us?

MR JOSEPH:
I can your Honours thank you.

WINKELMANN CJ:
I think we're complete, continue. So you said, you accept that there is a right, integrity is a right, value to be weighed, but it's a balance?

MR JOSEPH:
Yes, and I finish on the second proposition that it's not a simple matter of one concept trumping another, because the matter is always contextual. This is because it involves the balancing exercise. There must be a balance between the protected right and the competing interest, and this must always be determined in an actual factual context. But I can take a hypothetical in response to Justice Glazebrook's question. The hypothetical would be this. In many large demonstrations on controversial matters, it's highly likely there is a degree of scuffling, shoving, pushing and the like, and there is authority by the European Court of Human Rights that even for a person to throw a punch in a very large protest would not actually render the protest itself unlawful. It is tolerated within the context of that type of demonstration. And if even minor impacts, such as those on bodily integrity are taken to trump freedom of expression, the right would become, well not meaningless, but it wouldn't have much value. But we'd also accept, on the other hand, that very serious threats might trump free speech, depending upon the context before the Court.

Now finally, three, and I can finish my submissions on this, well in just a moment, this balance has been recognised by the European Court of Human Rights in the two cases which are in our additional authorities. These cases are *Fáber v Hungary* ECHR 40721/08, 24 July 2012 and *Primov*. They both concerned counter-protests and they dealt with sort of analogous situations as that before this court, and I refer you in particular from *Primov* to paragraphs 131 and 150. I'm going to give three propositions to be drawn from these two decisions in just a moment, but see paragraphs 131 and 150, and *Fáber v Hungary* see paragraphs 37 to 40 and paragraphs 56 to 57. Now –

WINKELMANN CJ:
Just pause a moment. 37 to 40 and?

MR JOSEPH:
Sorry your Honour, 37 to 40 and 56 to 57, that's in *Fáber*.

WINKELMANN CJ:
Thank you.

GLAZEBROOK J:
Can you give the other references again please?

MR JOSEPH:
Certainly your Honour. *Primov* is paragraphs 131 and 150, and *Fáber* see paragraphs 37 to 40 and 56 to 57. Now I'm going to identify three principles which I have discerned from these two cases. All three principles are relevant here. They provide the backdrop or context for this appeal. Now these principles, I call them principles of liberal democracy. They establish that there is no right not to be offended. In a liberal democracy there is no right not to be offended. Come to proposition 1. This is taken from *Primov* at paragraph 150 your Honours. *Primov* at paragraph 150, and I divine this principle, the existence of a mere risk of clashes. The existence of a mere risk of clashes with counter-demonstrators cannot justify banning an assembly or a speaking event, and I cite in particular *Primov* at 150, and what *Primov*

says is that the authorities must produce concrete estimates, the authorities must produce concrete estimates of the potential scale of the risk before they can sensibly engage in the balancing exercise which bears upon the proportionality issue.

WINKELMANN CJ:
Can I just ask, what point does it, when they've done that concrete estimation, what point does it justify cancelling an event or banning a speaker?

MR JOSEPH:
I suppose where the risk to life and limb is too great. Where the protest perhaps cannot be managed. I mean it's a contextual assessment by the Court, bearing in mind the actual facts before it. If it's a demonstration of only 10 people, that can be confined, but if it's 1000 people, it might be otherwise. It's always a contextual balancing exercise, and we accept that at some point the authorities would have the right to shut down a speaking event, or to prevent a protest continuing.

Let's move to the second proposition, and it's an interesting one here because the European Court of Human Rights expressly refers to the heckler's veto. The proposition is this, and this is from *Fáber*, I'll give the references now perhaps, *Fáber* at paragraphs 37 to 40, and at paragraphs 56 to 57.

GLAZEBROOK J:
Sorry, I may be a bit slow here. You had three principles. We've had two of them, is that right, and they come from –

MR JOSEPH:
No we've only had one form *Primov*.

GLAZEBROOK J:
So no right not to be offended.

MR JOSEPH:

Sorry that's the generic proposition, sorry your Honour, that's the generic proposition I make from these three principles I'm now going through.

GLAZEBROOK J:

Okay, so the first is the mere risk and now we're coming onto – so the no right not to be offended was the generic overarching and then we're coming to the three principles now, sorry, thank you.

MR JOSEPH:

Thank you your Honour, I apologise if I didn't make that clear. So that's the first principle. The second principle is this your Honours. Counter-demonstrators cannot be permitted to prevent and assembly or to silence speech. Here I'm referring to *Fáber*, and here at paragraph 57, it's interesting, the European Court of Human Rights expressly denounced the heckler's veto, denounced it expressly as a tool for silencing speech. That's very interesting and it's very relevant to these proceedings.

So that's *Fáber*, but not only at paragraph 57 where the heckler's veto is referred to but see also paragraphs 37 to 40, 56 to 57, where those maters are discussed. I'm just actually distilling the essence of those paragraphs.

My final third proposition is this, and this is from *Primov* from paragraph 131 where the European Court of Human Rights has said effectively there must be a fair balance. There must be a fair balance before the authorities may ban an assembly or a speaking event on account of a security risk or threat. I didn't say that very well, I'll repeat it. There must be a fair balance before the authorities may ban an assembly or a speaking event on account of a security risk or threat. In *Primov* the Court continued, they, the authorities, must consider measures that might allow it to proceed peacefully, and what the Court here said, and it's very interesting because of our submissions, the Court said the authorities must not take, and I quote, "the most radical measure" to deal with the risk or threat. The authorities must not take "the

most radical measure" to deal with the risk or threat. Well, we call Mr Macrae's decision the nuclear option, the most radical measure.

O'REGAN J:
But Mr Macrae wasn't the authorities banning a speech; he was just saying: "You can't have it in my theatre."

MR JOSEPH:
Well, that had the effect of banning speech, with respect, your Honour, because there was no other venue they could actually hold their event to actually utter.

O'REGAN J:
Well, there was, wasn't there? Didn't they find another venue?

MR JOSEPH:
Yes, there was the PowerStation which cancelled the venue hire agreement three hours before the event. So they – in effect, the Macrae decision effectively shut down their rights to free speech.

O'REGAN J:
Well, if the PowerStation hadn't cancelled you wouldn't be here arguing though, would you?

MR JOSEPH:
Beg your pardon, sorry, your Honour?

O'REGAN J:
If the PowerStation hadn't cancelled you wouldn't be here arguing, would you?

MR JOSEPH:
I suppose that's a fair summation. But could I just take your Honours to the decision I mentioned from the British Columbia Court where they had almost exactly the same facts as before this Court? Just very quickly, this is

The Redeemed Christian Church of God v New Westminster (City) 2021 BCSC 1401 in our additional authorities. It's a decision of the BC Supreme Court of last year, highly analogous. It concerned a Christian group. The Christian group hired a ballroom from the city, the city of Westminster. It was to hold a Christian youth conference and having entered into the venue hire agreement the city received a complaint that the conference would be anti-LGBTQ. That was the complaint made, as a result of it the city immediately cancelled the venue hire agreement and that was successfully challenged in the BC Supreme Court, held that the city had violated the Christian group's right to freedom of expression. The city had not taken sufficient steps, the Court held, had not taken sufficient steps to inform itself before cancelling the VHA. It had failed to consider how the infringement of free speech might be minimised, and that was the point I was getting at earlier. That is what decision-makers must pump for, a minimal interference or the least interference with protected rights. So there were options available.

WINKELMANN CJ:
Can I just clarify? There was no risk in that case. It was simply an upset about the content or was there a risk of a protest?

MR JOSEPH:
Basically, it was actually on the content of the conference because it was a policy of the city of Westminster that they would not be antagonistic towards the rights of that particular group, the LGBTQ group. I don't know whether there was any risk of confrontation but certainly there was a complaint made and on the strength of that the venue hire agreement was pulled. The Court said that the city had failed to consider how the infringement of free speech might be minimised. So there were options available.

Okay, well, since we're here, let me take you to paragraphs 115 and 116, if you would, of the decision. The Redeemed Christian Church of God is known as Grace Chapel, incidentally. Now his Honour concluded, this is at paragraph 115, that: "…the city did not make sufficient efforts to inform itself in

order to fairly consider and balance competing rights," and that's the point I've been making from the European Court of Human Rights decisions. This, his Honour said, buttressed – it was buttressed by the fact that the City was asked by Grace Chapel to reconsider and it declined to do so.

We might move on to paragraph 116. His Honour said: "I would also note that the City took no steps to consider how any infringement of Grace Chapel's freedom of expression might be minimized…" and this is pertinent: "Its decision was quick and precipitous." "Quick and precipitous," and we say that explains Mr Macrae's decision. "Had the City, for example, at least explored or considered some possible accommodation, its decision," the Judge said, "might have been reasonably justified." So I think that's –

WINKELMANN CJ:
Mr Joseph, I'm just conscious of the time.

MR JOSEPH:
Yes, we all are, your Honour. Now this takes us to my third submission and I'm going to –

WINKELMANN CJ:
Can you just – how much longer do you think you'll be?

MR JOSEPH:
Well, I'm going to put a question to your Honours whether it would be sufficient if we rest on my written submissions or whether you wish me to address any points there. The submission is the limit the decision imposed on the protected rights was not prescribed by law. The limit imposed on those rights was not prescribed by law. That was because the cancellation decision was entered under the venue hire agreement, an agreement between two private parties, RFAL and Axiomatic. Now the appellants were not party to that agreement. They had no knowledge of it. They had no knowledge of the cancellation clause and the respondents are adamant they acted under that cancellation clause and not under the Health and Safety at Work Act.

Now just to end this submission, actually, I can just draw your attention to *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (Full HC) because that laid down a requirement of "prescribed by law" which is accepted everywhere, in the Canadian decisions as well as ours, and there, in *Solicitor-General v Radio New Zealand*, this is at page 63, line 49, of the judgment, the Court said to be prescribed by law, the law must be, and I quote: "identifiable, adequately accessible and sufficiently precise."

Now we say the cancellation clause in that private contract between two parties to which the appellants were not party does not satisfy that requirement. So the limit imposed by the cancellation decision was not prescribed by law.

GLAZEBROOK J:
I actually have a – I'm slightly puzzled by this submission. I mean I can understand it in the sense that you're saying. One of the issues though is that in many of these situations the limit itself won't be prescribed by law in terms of even – and especially where you are looking at a venue hire agreement of some sort.

MR JOSEPH:
That may well be the case.

GLAZEBROOK J:
Well, does that mean they can never cancel an agreement therefore because there isn't something that says at law you can cancel an agreement? It is prescribed by law in the sense that the law would allow you to cancel if that clause is properly invoked.

MR JOSEPH:
It's a nice point to raise, your Honour, but section 5 is quite specific. It lays down the requirement that a limit must be prescribed by law and the requirements of that prescribed by law requirement means it must be

accessible. Well, the venue hire agreement is a private agreement. I take your point. I suppose the alternative would have been for RFAL to actually impose the cancellation decision under the Health and Safety at Work Act, but the respondents were adamant they were not doing that. They said they would prefer to cancel under the terms of the venue hire agreement. So we accept the respondents at their word.

GLAZEBROOK J:
Given that was the contract they had with the particular people, one can understand why they want to do that.

MR JOSEPH:
Yes, one can understand, but they did not satisfy the requirements of section 5 in doing so, given how the Courts have construed the requirement prescribed by law, and I also refer to the Canadian decision in *Greater Vancouver Transportation Authority v Canadian Federation of Students* 2009 SCC 311, [2011] 1 LRC 293 also in our electronic bundle of authorities. The Supreme Court of Canada said the same thing.

In fact, I'll just read to you if I might very quickly at paragraph 53 of that decision, the *Canadian Federation of Students*. At paragraph 53 the Supreme Court of Canada observed that the phrase "prescribed by law" applies to norms that are "authorised by statute, are binding rules of general application, and are sufficiently accessible and precise to those to whom they apply."

Now we can hardly say that the cancellation clause in this VHA was a binding rule of general application. It only had force between two privates parties to the contract, and it can't then bind third parties. It can't apply to third parties.

WINKELMANN CJ:
I was going to say you're going to have some difficulties with this argument Mr Joseph, because it seems to have rather profound yet strange implications, because it would apply in every kind of a situation so if, on your

analysis, even if they'd done the whole task correctly, they would still have fallen foul.

MR JOSEPH:
I'm afraid so your Honour. It's a requirement of section 5.

ELLEN FRANCE J:
Well might that not suggest they're not subject to the Bill of Rights, if there's no ability to have any limit?

MR JOSEPH:
Well I'm not saying that there is not an ability for a hire company or organisation like RAFL to be able to cancel a contract. They could have done so, perhaps under the Health and Safety at Work Act, because Mr Macrae, as he deposed in his affidavit, was subject to certain obligations under that Act, but they were adamant –

ELLEN FRANCE J:
Well how does that make it any more public?

MR JOSEPH:
The Health and Safety at Work Act? Well that's an accessible statute that satisfies the requirement prescribed by law. Everyone has knowledge of a public statute your Honour.

ELLEN FRANCE J:
Well so they just – well.

O'REGAN J:
You can't cancel a contract except under the terms of the contract.

MR JOSEPH:
No the – well, with respect the – well that could be so, we don't have to deny that, but anyway it still doesn't satisfy the requirement prescribed by law. But in fact legislation does trump private contracts, and if the statutory

obligation is properly on Mr Macrae under that statute to take that action, then that would override any contractual undertaking –

O'REGAN J:
But it's not a question of overriding it. It just justifies his using the power given to him by the contract.

MR JOSEPH:
Yes, sorry, I was distracted by my friend. I beg your pardon your Honour?

O'REGAN J:
It's, the Health and Safety legislation just provides a reason to use the power in the contract to cancel. You're not using exercising a power under the statute, you're exercising a power under the contract because the statute causes you to be required to do it.

MR JOSEPH:
Well that's rather splitting hairs perhaps, your Honour, with respect, because if the statute requires Mr Macrae to –

O'REGAN J:
Well either there's a contract or there isn't Mr Joseph. Are you saying that we just ignore the contract?

MR JOSEPH:
Well what I'm saying is that the statutory obligation imposed perhaps on Mr Macrae overrides whatever contractual undertaking they had entered into.

O'REGAN J:
What would Axiomatic say to that? You've cancelled the contract but without invoking a power in the contract to do it. How does that work when Axiomatics only relationship is the one under the contract?

MR JOSEPH:

Well the law speaks, with respect, and the statute of it requires that action, then that's what must happen and the contract must give way.

O'REGAN J:

That's just nonsensical.

MR JOSEPH:

Well these are the facts of the case. It's a private contractual arrangement and they've invoked the cancellation –

O'REGAN J:

But you've just told us it's not a private contractual relationship and that the Bill of Rights applies. I mean you can't have it both ways. Which way do you opt for?

MR JOSEPH:

Well we can only say that the cancellation clause satisfied the prescribed by law requirement if we doubled back on what the Courts have established what is meant by prescribed by law. What you'd have to say is that the law need not be prescribed.

GLAZEBROOK J:

Can I also just check with you. you talked about your clients, who are not Axiomatic, but I thought that, well I thought that only one of them had a ticket to the event, but in any event that they were effectively, and I'm not sure whether somebody's disappeared because on my screen unfortunately you are unbelievably tiny.

O'REGAN J:

Just keep on going.

GLAZEBROOK J:

Just keep on going? It's just that one of your clients didn't even have a ticket, the other one did have a ticket, but I thought they were acting on a public benefit platform and as they are entitled to do, given I don't think anybody is challenging their standing now.

WINKELMANN CJ:

I think he has gone.

GLAZEBROOK J:

Yes, I thought he had because I can't see him.

O'REGAN J:

It's just the person who speaks last. You speak Mr Joseph and I think you'll come up.

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES (12:05:45)

WINKELMANN CJ:

Mr Joseph, are you there?

MR JOSEPH:

Yes, sorry your Honour. Just to conclude the point, because I don't think we're actually moving forward, but one resolution would be to pass promulgate an Order in Council just providing for this very situation. Now that would be a law and it would be public accessible and it would actually satisfy the requirement of section 5.

WILLIAM YOUNG J:

Order in Council under what?

MR JOSEPH:

The establishment order, I'm not quite sure under what statute that was promulgated, but under the same statute as the establishment order.

WILLIAM YOUNG J:

I see, thank you.

WINKELMANN CJ:

Okay, well I think we better hand over now to the respondents Mr Joseph. So does that conclude your submissions?

MR JOSEPH:

Yes, thank you your Honour.

GLAZEBROOK J:

I think there wasn't an answer to my question. I'm not sure whether Mr Joseph heard it, but given it might be on the transcript it's probably better just to repeat it or can we maybe do that later?

WINKELMANN CJ:

You can just repeat it now.

GLAZEBROOK J:

It was really just a question as to who were acting for because I'd assumed that the people you were acting for, one had a ticket to the event as I understand it, and one didn't, but I thought that they were acting, effectively, as public – in a public sense rather than actually in relation to – as a matter of principle. Because the argument seems to be that it was the speakers' rights of freedom of expression that had been breached.

MR JOSEPH:

Well certainly both appellants were very concerned about protecting the right to freedom of expression. Moncrief-Spittle in his affidavit he deposed that he was very upset that he could not engage in a good rational debate with the views of these two speakers, as controversial as they might be, and Dr Cumin was very concerned on behalf of the Jewish community given the protest action that is directed at that community, very concerned to establish that the right to freedom of expression was preserved.

GLAZEBROOK J:

I can understand that, but the prescribed by law in this context, does that mean that every member of the community – well I think that's your submission, is that every member of the community has to know what the prescribed by law is, so they would have to be some publicly accessible right to cancel. Is that the submission?

MR JOSEPH:

That's right, your Honour, yes.

GLAZEBROOK J:

Thank you.

WINKELMANN CJ:

Can I just ask Mr Joseph. So you wouldn't accept the common law or international law as sources as prescribed by law?

MR JOSEPH:

Well there's no authority to uphold that your Honour. It's always been a matter of domestic law, statute or common law –

WINKELMANN CJ:

So you do accept common law?

MR JOSEPH:

I beg your pardon your Honour?

MR JOSEPH:

You accept the common law is a source –

MR JOSEPH:

Oh yes, yes. Yes, the common law is law. Well that concludes my submissions, if you have any further questions your Honour?

WINKELMANN CJ:

Thank you Mr Joseph. So for the respondents, what –

MR BUTLER:

Yes, your Honour, so I'm to kick off on behalf of the respondents. I will make the point that I'm sure your Honour apprehends I am about to make about my concern around time because we've lost an hour. I'm not quite sure how we're going to deal with that. It certainly seems to me on this basis now we are – even if we had the rest of the day we will come nowhere near having equal time to that of the appellants, never mind their time for reply and suchlike. So I just think I need to register that and perhaps –

WINKELMANN CJ:

We will make some arrangements. I think we'll take a shortened lunchtime and we'll see about sitting later. I'll discuss it with my colleagues in the next break. We'll certainly..

MR BUTLER:

All right, thank you, your Honour, and I'll need to check with my colleagues in regards to that as well, so we'll take the luncheon break to do that.

So, your Honour, in terms of the way in which we thought we might go about presenting the respondents' case on this matter, so what we thought we might do, your Honour, is you've heard a narrative from our friends as to how they see this particular case and we take the point made by her Honour, Justice Glazebrook, about wanting to elevate the case above what's happened here and look at some general principles which we are happy to do. But we do think it's important that you understand our view of the narrative and also that you've a clear view as to what we believe to be the core propositions and how we respond to those.

So what we'd like to do is make some opening remarks which will be shared between myself and Ms Anderson. Ms Anderson after those opening remarks will then continue to address in more detail the facts and also the common law

position and then I will come back to you to deal with the Bill of Rights issues, being those issues under section 3, section 14 and section 5. That's how we propose to proceed, your Honours.

WINKELMANN CJ:
Yes, go ahead.

MR BUTLER:
And we have sent through to our friends and also to the Court earlier this morning a hand-up which we will make reference to from time to time, your Honour. So if I could proceed then, your Honours.

WINKELMANN CJ:
Go ahead.

MR BUTLER:
So in mid-2018 an events promotion company, Axiomatic, entered into contracts with two speakers obliging them to undertake an Australian tour between 20 July and 3 August 2018. Axiomatic knew that the speakers were controversial. It was so concerned about security risks surrounding the tour that special security arrangements for the five Australian events were put in place. Ticket-holders in Australia were only to be told the relevant venue location 24 hours in advance. In Melbourne, for example, they were told by SMS or email to gather at a train station in order to be bused to a secret location.

In contrast, when Axiomatic asked RFAL about hiring the Bruce Mason Centre in Takapuna, it told RFAL the two speakers were a philosopher and a film maker/author. Axiomatic did not say there were any security considerations relevant to venue suitability, nor did it disclose the extreme measures being adopted for the Australian leg of the tour. The reason for Axiomatic's different approach to the Auckland booking have never been explained by Axiomatic despite the fact that its principal, Mr Pellowe, filed two affidavits.

The respondents say, and the Court of Appeal accepted, that Axiomatic decisions about what it would tell RFAL led directly to the eventual termination of the contract that is at the heart of this case. That is, as your Honours know, we say that the 18 June 2018 contract for hire of the BMC was ultimately cancelled for security and safety reasons.

Now your Honours will see from the record that when tickets went on sale on 29 June 2018 the venue was fully disclosed and there was swift and negative public reaction, but I want to emphasise the public controversy did not see RFAL change its mind about hosting the event. As the evidence for RFAL makes clear, RFAL is no stranger to controversial events. In addition, the whole point of RFAL's business as Mr Macrae put it is to run events, not cancel them. However, threats to blockade the BMC were made on behalf of the Auckland Peace Action group on the evening of 5 July and on the morning of 6 July 2018. RFAL re-assessed the emerging situation as it then presented itself.

First, based on RFAL's experience with Auckland Peace Action, the threat to blockade was regarded as credible, and you will see material in the record, your Honours, which illustrates how Auckland Peace Action has acted in respect of previous events such as the defence industry forum some time before.

Second, if a blockade occurred it would create significant health and safety concerns, including the possibilities of violence, the triggering of things such as fire alarms which would see people having to move quickly, and disruption within the venue, and, of course, as your Honours know and as was touched by her Honour, Justice Ellen France, in questioning, that's what occurred in Melbourne.

People associated with Auckland Peace Action would be able to gain easy access to the venue by purchasing tickets. Your Honours will recall it was $79 to get a general admission ticket. There would be difficulties of managing

egress if a blockade were to occur and significant impacts on surrounding businesses due to unique factors relating to the location of the BMC, some of which were touched on by your Honours yesterday. The cost of security measures would be very significant.

Against that backdrop in the circumstances as they presented, RFAL had a limited number of choices. It could box on, it could cancel or it could prevaricate. It chose the second option. Prompt cancellation had the advantage of giving Axiomatic sufficient time to organise an alternative venue. Now talking about alternatives, many other operators hire out venues in Auckland. RFAL has no monopoly on large-scale commercial theatre venues, and as it happens Axiomatic did secure an alternative venue, the PowerStation, for the same tour date.

Importantly, the VHA was not terminated because of RFAL's disapproval or otherwise of the views of the intended speakers. So it is not, for example, a *Redeemed Christian*, Grace Chapel, in other words, case, which my learned friend, Mr Joseph, made reference to at the conclusion of his submissions. Rather the VHA was terminated in accordance with agreed contractual provisions because holding the event at the BMC in the relevant timeframe and in light of the circumstances that had unfolded posed significant safety and security risks that RFAL did not think it could manage in the time available.

We say that the gateway to public law remedies is closed in the circumstances described by me. The starting point has to be the nature and the source of the power that is in issue here. The nature and the source of the power here is contractual, exactly as emerged during the discussion over the "prescribed by law" standard just a few moments ago. We say there was no exercise of a public function, there being no governmental element in hiring out a venue to a promoter for its commercial activity.

Even if the Court does not accept that proposition, RFAL submits that cancellation was well within the reasonable range of options available to it.

It should not be criticised nor found to have acted unlawfully, because that's the proposition from our friends, in respect of a situation that it did not create and which might have been able to be managed differently if Axiomatic had, as a rational promoter would have done, indicated the controversial nature of the speakers and shared its security strategy for the Australian events with RFAL. Such information was highly relevant to whether an RFAL venue such as the BMC was suitable for the event.

When proper regard is had to the actual facts, the decision taken by RFAL can be seen to be an appropriate one. It enabled relocation of the event to another venue on the day it wanted to hold the event and in the timeframe that speakers were contractually bound to make themselves available for the tour. In this context cancellation did not cause a breach of rights. Separately, the speakers ultimately did make it to New Zealand and the dinner, for example, which Mr Moncrief-Spittle had bought access to, could have proceeded regardless of whether the BMC was available or not. RFAL did not stop that aspect of the event proceeding.

Effectively, what the two appellants are trying to do here, and remember neither of them had dealings with RFAL, what they ask this Court to rule is that when a promoter withholds relevant security information at the time of booking and locks in an unsuitable venue the onus is on the venue hirer to put on the event at all costs because some people want to attend regardless of the health and safety concerns and financial risks that emerge post booking. We say that proposition is extraordinary in its implications and should be rejected by this Court. Now I hand over to Ms Anderson.

MS ANDERSON:

Your Honours, in relation to some of the core propositions that are before the Court, RFAL's propositions that it's wishing to engage in dialogue with the Court is that, first, a clear focus on the fact that RFAL is a charitable trust, a trustee of a charitable trust. In that capacity, the significance of that is it can only act in accordance with the trust deed and the purposes of the trust, and we say, and we'll develop this argument further, that in doing so it was not

undertaking any type of governmental function when it was hiring out venues for commercial gain and in this context we say it should not be treated any differently to any other venue hirer. In this context we say it should not be subject to judicial review at common law, nor scrutiny under the Bill of Rights in relation to venue hire decisions, and that focus on what is the decision in issue here, the role of RFAL as trustee of a charitable trust in this particular activity, not in relation to everything it may be doing in accordance with the terms of the trust deed.

Importantly, we say that does not leave persons in the shoes of the appellants without a legal remedy. Concerns around political opinion discrimination which we say really has driven the motivation for this case is best addressed in relation to both public and private venue hires under part 2 of the Human Rights Act 1993.

Now in the alternative to those propositions, we say that if the Court does accept that the decision is reviewable in the circumstances, we say the standard of review to be applied is not the detailed *Oakes'* style proportionality test. Again, and it will be familiar with your Honours, context is everything. Now this decision in its context is a million miles away from the *Oakes* and the *Hansen* type scenarios. We note that this Court and the Court of Appeal have been very clear that most if not all administrative decision-makers should not be assessed by reference to that detailed *Oakes* and *Hansen* framework.

Now what we say is that a core proposition the appellants advance before this Court is that there is a duty to facilitate political speech and they couple that with a presumption of unlawfulness where threatened protest action results in cancellation of an event. We say this proposition is just not supported in the common law and we say it's inconsistent with sections 14 and 15 of the Bill of Rights Act and that's because it's attempting to create a positive right out of a right that is fundamentally a negative one. We say it would also create an uneven playing field between venue operators and owners, namely between private and public operators and owners.

Just coming to a close on the opening comments here before we lead on to take you through some of the facts. We say this is not a case about the heckler's veto. We note, of course, there is the emergence of cancel culture and that will create challenging issues for the community and potentially for the Courts over the coming years, but this phenomenon is not new. We say boycotts, online petitions, picketing of businesses, are not modern inventions. But this is not the right case or the right vehicle to address such phenomenon.

We say that RFAL found itself in a position, as we've emphasised, just not of its own making but of Axiomatic's. We say RFAL acted reasonably and responsibly in light of its charitable objectives and the scenario that had emerged. It had and has no wider positive obligation to facilitate free speech if the consequences for it or for others be damned and we say that is effectively what the appellants are suggesting, and we firmly say the Court should reject that proposition.

WILLIAM YOUNG J:
Why do you say it's a negative right that they're relying on? Isn't section 14 in positive terms, everyone has the right to freedom of expression including the right to seek other opinions? Isn't that a positive right?

MS ANDERSON:
Yes, Mr Butler will be addressing you in significant detail on that point but I'll just simply note here it's the difference between right not being infringed and having a duty to actually facility or enhance the ability to exercise that right, and that's the difference here. But Mr Butler will develop that further in his part of the submissions.

Now I am going to spend a little bit of time taking you through some of the facts. So this is the first page of the road map that we've handed up. I think it is important for the Court just to be aware of a number of the features of the evidence. So starting with some of the relevant facts relating to Axiomatic and the tour, and I won't go to all the documents that are referred here but they're referenced so that you can look at them later, is that of course Axiomatic was

founded not that long before this tour was getting out of the starting blocks and up and running. So it was founded as an events promotion and management company, so a commercial activity of that nature.

Now in May and June 2018 it entered into the artist agreements with the speakers. So these are the upstream agreements that are part of a contractual matrix here and the reference for there is in the document that you've got. What's to note about that is that there's a commercial element to these upstream contracts as well and also, your Honours, I won't take you to it now but note that clause 6(b) of that agreement itself gave the promoter certain cancellation rights in the event of specified misconduct. The other point to note from that is that in the contractual arrangements between Axiomatic and the speakers it became a very limited of window of time in which the speakers were obliged to make themselves available to Axiomatic for the tour and, of course, the final date there under those agreements was 3 August which was the date they were looking at for Auckland and which is, of course, what became the focus when the interim relief application was made in 2018 to enable the event to actually proceed on that date.

Axiomatic, of course, played a really pivotal role in the proceeding when it was first issued.

WINKELMANN CJ:
I think we understand all that procedural stuff, Ms Anderson.

MS ANDERSON:
Just move down to the point that I make on that page that Axiomatic had no knowledge itself about the Bruce Mason Centre. So it's offshore. So the security considerations and things that it could attend to, including what its four SAS security guards, bodyguards, could do, is not related to the venue itself and you'll see that through Mr Macrae's affidavit as to how he's weighed the concerns around the venue as well, and noting that, of course, there was the public announcement that if the speakers couldn't come to New Zealand that they would webcast for free. So again, this is an alternative platform and

mode of engagement, and noting – we'll be talking in more detail about the alternative platforms but plainly people came forward to Axiomatic when there was news went out on the 6th of July that the event was not proceeding. The Swan Hotel came forward and offered a venue and there's an exchange of correspondence in that, and the significant point in that is that Axiomatic was looking for a particular type of venue with theatre-style seating and the dialogue that initiated on 7 July sort of petered out, probably because of the nature of the venue Axiomatic was looking for, and, of course, we know this significant intervening act, we don't know when it occurred but we do know that Axiomatic secured the PowerStation venue. A reference there to a significant number of protesters, even though the event was cancelled at the PowerStation, coming together in Aotea Centre.

Now the important part of what I'm just going to take you through now relates to RFAL and there are some core materials that we do need to spend a little bit of time on. I'll try to be as brief as I can be. Starting with the establishment order that you've been taken to, and I don't propose to call that up on the screen, but the key point to make, and we think the Court of Appeal erred in this respect, is that it really treated the charitable trust, RFA, as being established by statute. But if you look at that establishment order what it does is it directs the Auckland Transition Authority to establish a number of CCOs and different modes and mechanisms are applied. So when Auckland Council was established there were seven substantive CCOs and the reason only five of them are referred to in that order is because two of them are dealt with in the Auckland Council legislation itself, so Auckland Transport and Watercare have specific statutory functions and aspects that are set out in primary legislation. So pursuant to this order it was only the RFA that was to be established as a charitable trust. The other substantive CCOs were all established as limited liability companies.

I do want to go to the trust deed. This is, of course, a critical document. It's at 303.0522, sorry, 0524 is the beginning of the document. So we can see that on that front page that it's Auckland Transition Agency and RFAL who are entering this deed. It is, if we turn to the purposes which are at clause 3 on

page 303.0527, and of course, yes, this language reflect that in the establishment order that you've been taken to. So it's undeniable that RFAL as the trustee can only take actions that are for the purposes of achieving these trust purposes.

As every charitable trust by its very nature is for the benefit of the public, RFA as the trust and therefore RFAL as the trustee in carrying out trust activities can – are active in the public benefit but only in accordance with the trust deed, and this will become important, I'll develop it just a little bit more, as to how there is actually no statutory context or hook into which you can say the statutory context indicated that there is a sufficient nexus such that you could say that this is a governmental activity or something that has sufficient nexus to make it a public function even though, you know, as the appellants have not been able to point to any single statutory provision that requires the provision of venues for commercial activities.

So just drawing out that, so the engaging communities of Auckland, so the trust is required to support the vision of Auckland, and those elements there that follow reflect the vision of Auckland and then it's to provide world-class facilities and its obligation is to develop and maintain venues that are attractive, both to residents of and visitors to Auckland. So we can see there no express obligation to make them available for any purpose.

Then just over on the next page you'll see a reference there just in (e), "Prudent Commercial Administration". So the trustee must administer and promote the facilities on a prudent commercial basis. So this is the heart of what's happening and you'll see through the statements of intent and the annual reports that are in the bundle and the evidence before you that there's a consistent emphasis on those documents in maximising its general revenue. So they're clearly a commercial part of what this trust is doing.

Just coming over to clause 4 on paragraph 303.0529, so this is important in understanding the relationship between the trustee of the trust and also of Auckland Council in this context. So the trustee, RFAL, is to have control and

responsibility for the trust fund, and obviously this is all subject to them achieving the purposes of the trust, and just noting there the role of Auckland Council is to oversee the conduct of the trustee. The Phil Wilson affidavit…

GLAZEBROOK J:
Can I just check whether the submission is that there was absolutely no duty to facilitate freedom of speech, and I understand the negative duty aspect to this which I think Mr Butler is going to have to really drill down into for me at least, but if in fact they'd decided it wasn't in the best interests of Auckland to listen to these particular speakers or any other speakers are you saying that there is absolutely no duty on them to – that they're totally free to make that decision based on the trustee's own assessment of the value of speech?

WINKELMANN CJ:
I think that Ms Anderson is only dealing with reviewability and the standard of review. Is that right, Ms Anderson?

MS ANDERSON:
That's right, your Honour, and Mr Butler will be covering those points in more detail but can certainly – you'll see from the way the matter was argued in the lower Courts and dealt with by the Courts of Appeal there, we've strongly maintained throughout the history of the case that there is no obligation to make a facility available for a particular speaking event.

GLAZEBROOK J:
So you are arguing that it's totally free to do anything it likes with its venues on the basis of it deciding –

MS ANDERSON:
Obviously – sorry, your Honour.

GLAZEBROOK J:
So it doesn't have to take into account any of the values of freedom of expression in deciding whether it will or will not hire a venue out?

MS ANDERSON:

Well, that becomes relevant to the consequences because if the appellants' view of the world is right then every time somebody is coming forward to look at a venue RFAL will be required to make an assessment of the value of the speech, particularly, or the expression in the venue and weigh that. Now you've got the evidence –

GLAZEBROOK J:

I think the submissions is rather that it shouldn't be making that assessment, that the proposition against you is that it should not be making that assessment because all speech has value and is protected under the Bill of Rights.

MS ANDERSON:

I think that –

GLAZEBROOK J:

But you're saying that RFAL is not at all subject to the Bill of Rights, is that the submission?

MS ANDERSON:

No, no. That is we don't go so far as that, your Honour, but what I'm saying is that the protection against discrimination on the basis of content is managed under the Human Rights Act and that is the right vehicle and mechanism for the protection of the public interest in freedom of expression for the values in a democratic society for which it is known.

What we do say in this case, and we are resisting the proposition, clearly, and Mr Butler will expand on this in greater detail because we know it's of interest to the Court, that RFA was not performing a public function and is not within the scope of section 3(b) in making the decision that it's made here.

WINKELMANN CJ:

So can I just clarify, do you say that RFA, it's actions are never reviewable or only this class of action is not reviewable?

MS ANDERSON:

No, we certainly don't go that far, your Honour, to put the proposition that widely and we don't need to in this case. It's just it's a question of in the context of this contract that was entered into for these purposes on a certain basis of knowledge for one venue on a particular day we say this is not reviewable. We're not advancing a proposition that RFA are, would never be reviewable.

GLAZEBROOK J:

You seem to be advancing the proposition that its cancellation and hiring decisions are not subject to the Bill of Rights; they're just subject to the Human Rights Act. Is that right?

MS ANDERSON:

Where the reason for a decision is based on the content, yes, that it would be subject to the Human Rights Act. We say that's the right place for those issues to be dealt with.

WINKELMANN CJ:

So you're essentially saying –

MS ANDERSON:

Meaning that people in the –

WINKELMANN CJ:

Can I just say you're essentially saying there's no real policy reason for the Courts to be exercising a supervisory jurisdiction over RFA's cancellation and hiring decisions?

MS ANDERSON:

That's right, your Honour. That derives from the statutory context and I'll take you through this in relation to RFAL and RFA because that's the sort of underpinning of why we say there's no scope for the Court to go there and that becomes relevant to the other aspects that Mr Butler will develop as to why it's not under 3(b). So in both regards we say the High Court got it right, that the gateway is closed, in both fora.

GLAZEBROOK J:

And how would the Human Rights Act relate here, that if somebody says: "I don't like the content of this speech," it would have to be discriminatory not to hire it to them? I'm just trying to understand.

MS ANDERSON:

That's right. So if the reason for refusing to hire a venue was on the basis of the content of political speech, that wouldn't be contrary to the provisions, the anti-discrimination provisions ion the Human Rights Act or the grounds on which –

GLAZEBROOK J:

Well, it may or may not be, might it? Because discrimination is on specific grounds in the Human Rights Act.

MS ANDERSON:

Yes, but – that's right, political opinion is one of those grounds, and the appellants have always advanced that this is, was political discourse of the kind that has always occurred in council town halls and therefore should be allowed to proceed. So if your Honours are later looking at the submissions of the appellants in the Court of Appeal, you'll see that that's very much developed up around that town hall and that historical access which we say, of course, is open access to people for meetings and which is very, very different, we say, from a paid speaking event that's got the sequence of upstream contract to the contract here and which has been a bargain that

Axiomatic has entered into freely with, including the provisions relating to the grounds on which that venue hire agreement might be able to be cancelled.

WINKELMANN CJ:
So just conscious of the time, Ms Anderson. We'll let you get on with this part.

MS ANDERSON:
Thank you, your Honour. I'll move through it as quickly as I can, your Honour. Drawing the Court's attention to the Wilson affidavit. I'll give you the references and won't call it up necessarily due to time limits. So that's 303.0090 in paragraph 13 of his affidavit, and what he says is, you know, he's emphasising that Council has formal and informal tools and governance processes available to it to influence CCOs but it can't direct any specific operational decisions.

Just moving quickly through to the last box in that column about this concept that somehow RFAL is standing in Council's shoes, making the point here that there's nothing in the statutory scheme that the appellants can point to to say that Council itself is obliged to or required to make venues available for commercial activities, and we point to section 10 of the Local Government Act and I am going to call up and have on the screen the merged pleadings which is at 101.0055. Clause 6, thank you. So you see the allegation here is that: "The duties and functions of Council include the provision and management of community facilities such as halls and theatres which may be hired or otherwise made available for people in Auckland to meet and, among other things, express and receive opinions and information, including political views." It's this very proposition that we say has been a pivotal plan of the claim, what we say is an absolute misconception.

Now you look at the defence on the right there that what we've said is that in section 10 of the Local Government Act the purpose of local government at that time – now this purpose has changed over time but this is the relevant time period – is that it's to enable democratic local decision-making and action by, and on behalf of, communities; and it's to meet the current and future

needs of communities for good quality local infrastructure, local public services, and performance of regulatory functions in a way that's most cost-effective.

So in that context, looking at that legislative provision, what the respondents say is there is no obligation that you can be crafted out of that purpose of local government to say that it extends to making venues available for hire for commercial activities. So it just simply is not there and so we say Council itself had no obligation, no statutory function. It was just – if any council did this, it would be a discretionary activity not covered by statute, and further we say that RFAL is undertaking activity of hiring out its venues in its role as trustee and can only do so for the purposes of the objectives of the trust. So those things we don't think are controversial propositions in themselves but we say that's critical to the landscape and the context within which this Court is going to have to answer the, respond to the issues that have been put before it, and plainly I've got a reference just before I move off that column to the yield management –

GLAZEBROOK J:
So if I understand the submission, it's that Council itself has no obligations under the Bill of Rights to make venues, even its public venues, accessible for all types of speech?

MS ANDERSON:
Not to proactively – so I'll say two things in relation to that, your Honour. One is, you know, where could you point to a source of a statutory obligation functional duty to hire out venues? You simply can't –

GLAZEBROOK J:
Well, people would say an obligation to facilitate freedom of expression. So if you were – and you don't – do you need a statute because local governments have all of the powers now of natural persons. You don't have to point now to a statutory power.

MS ANDERSON:

Yes, but when a council is acting in accordance with that normal capacity power, that's exactly the territory we get into here, your Honour, as to whether its action is really in a private capacity or is it in that sort of governmental capacity with that divide being, you know, what are the remedies available to somebody who's engaged with Council pursuant to a natural power exercise, like a contract of employment, for example, of those things.

But just to return to your point, the focus I'm making here is there's no local government obligation to make calls or venues available to the community to use for free or to use for paid events. In relation to the concept of a positive obligation, Mr Butler is going to address you on that as to whether that adds a gloss to the statutory context such that you could craft that into the circumstances that we're dealing with. So I won't take that point any further at the moment, your Honour, if you're content to wait to put that to Mr Butler.

GLAZEBROOK J:

Thank you.

ELLEN FRANCE J:

Could I just check, Ms Anderson, in terms of the statutory context, what do you say about section 59 of the Local Government Act, that's the one that sets out the principle objectives of the council-controlled organisations, and I'm thinking of 59(1)(c), "exhibit a sense of social and environmental responsibility by having regard to the interests of the community" et cetera, and "by endeavouring to accommodate or encourage these when able to do so"?

MS ANDERSON:

Yes, I'm just waiting for that to come up on the screen, your Honour. Yes, so this section again, so referring to – so the reference to "commercial" and "non-commercial" there is not surprising because many of the CCOs of course, the reason for their existence is arm's-length commercial activities. I don't see anything here, your Honour, that would enable the RFAL to act inconsistently in any way with its trust deed, but it doesn't mean that sitting

alongside the trust deed that it wouldn't be acting of course in accordance with this provision here. But again, exhibiting a sense of social and environment responsibility by having regard to the interests of the communities again, I would say, doesn't go so far as requiring any specific activity to being undertaken, so it's not mandatory or directional in that way. Is there an aspect of that section, your Honour, that you had a particular concern or interest in?

ELLEN FRANCE J:

Well, it seemed to me that you could argue that (c) allows the council-controlled organisation, or perhaps requires it, to consider free speech and that the must be part of the interests of the community in which it operates.

MS ANDERSON:

Yes. Well, again, your Honour, what I want to do is I want to leave that question for Mr Butler because it's properly dealt with in the BORA conclusion.

ELLEN FRANCE J:

I'm not, I'm thinking also in terms of the common law. Your submission is there's nothing in the statutory context that sort of gives you any hook-in to some sort of public power, and suppose what I'm suggesting is, well, I'm asking, why does that not provide some sort of link into a more public type of power?

MS ANDERSON:

Well, my response to that, your Honour, is that those are effectively guiding principles relevant to CCOs in the context that we're looking at here, RFAL is a CCO of course, as a trustee of a charitable trust. So that's an overlay on the particular circumstances and I'm certainly not speaking in relating to all CCO activities. But the submission we would make here in response to this is that this section of itself is not a hook for requiring the facilitation of any particular kind of service, be it venues for political speech or venues for arts performance or the art gallery, for example.

WINKELMANN CJ:

So your submission is that that's no more than an general direction to behave in a socially and environmentally responsible way but it doesn't oblige any council-controlled organisation to positively facilitate freedom of speech?

MS ANDERSON:

That's right. We're certainly saying that the obligations in BORA in relation to freedom of speech do not create a positive obligation and we're not saying – and our submission is that that's not a gloss to be added on to that section.

GLAZEBROOK J:

I suppose what might be said against you here is that if you are hiring out venues then you must exhibit a sense of social and environmental responsibility, which includes the facilitation of free speech, and I just say that because I know that Mr Butler's dealing with it, but just so that that can be on the table for when he does deal with it.

MS ANDERSON:

Thank you, your Honour. Just moving to column 3 of that road map, there's one factual matter that I haven't identified on that road map factually that we think is relevant to the events that unfolded, and that is – I'll give you the reference, and again I don't necessarily think we need to call it up – it's 304.0740, and the significance of this is in the Australian context on 8 June, so this is before there's been any approach to RFAL here in Auckland, which is, you know, the first date that I've got in that column on 13 June, is there's email correspondence between Axiomatic and the Australian Police directly, so at that point it looks like Axiomatic has engaged directly with the police in Australia relating to the tour arrangements, and again of course, you know, what we say is none of that has been disclosed, at the point that we begin this narrative is around the approach to RFAL and the cancellation.

I do want to move quickly through this because I'm conscious of time, so I'm gong to move down to where we're talking about the discussion between Mr Macrae and Axiomatic on the 6th of July. So just to recap a couple of

things that are really important here, Mr Macrae says in his affidavit that it was exclusively his decision to cancel the contract. He says at paragraph 51 there was no pressure and he didn't experience any pressure from the Mayor or the Mayor's office.

Before I move on to the actual termination aspects, I just want to make a comment. When you look at the statement of claim and the statement of defence that I've taken you to, and again in the interests of time we won't navigate our way back to that document, but you see that there was the allegation of mayoral involvement or direction in relation to the decision to cancel the event, and that's been completely contradicted on the evidence. What the respondents say in relation to that is that as soon as that, that cause of action was doomed to fail, which we say it was from the moment evidence was given in response to the interim relief application, and of course it was dismissed by the High Court and not pursued in the Court of Appeal, we say that any anchor that the appellants might have had to say that there was some kind of governmental involvement, engagement with the elected members in decision-making, that that, as soon as that failed any prospect of there being public law remedies available to them in the circumstances fell away.

Just coming in the minute I think I have before we close for the lunch adjournment –

WINKELMANN CJ:
So can I just test that? That means that you accept that if the Council had been involving themselves in it, so having a – well, what's the implication of that because if they'd been taking a non-neutral approach to the content of the speech and they had intervened do you accept there would be a reviewable decision?

MS ANDERSON:
You'll appreciate, your Honour, that I don't necessarily want to nail, you know, colours to the hypothetical mast, but it's a bit like the *Watch Tower* decision

where it's clearly elected members involved in the decision-making about availability of a venue and, yes, you're almost certainly in the space where you'd be looking at review being available, so…

WINKELMANN CJ:
So you're really moving on to Mr Butler's argument then?

MS ANDERSON:
No, I'm talking in the common law context.

WINKELMANN CJ:
So have we moved off whether or not this is open to review then? What topic are we addressing?

MS ANDERSON:
No, sorry, I'm still just on page 1 of the road map on the contract formation/cancellation, so still just hoping to close on the facts before we break for lunch. So I'm just talking about the 6th of July conversation between Mr Macrae and Axiomatic and I diverted momentarily just to cross to that other point that I think is relevant.

So key points there, no indication given by Axiomatic in the phone call that it objected in any way to termination. Mr Macrae says in paragraph 56 of his affidavit that he would do whatever it took to look after the venue, but if Axiomatic had said that it would do whatever it took to look after the venue and patrons, et cetera, Robin would have said: "Well, send that information to me," but it simply didn't volunteer anything. It appeared to accept the termination and it sought the refund of its deposit. So all the signals at that point were that the termination was accepted which was, of course, perfected by the formal written letter on 10 July required under the contract, and again no indication or notice of dispute raised in accordance with the contract that termination wasn't accepted.

Just on this point of the bodyguards, Mr Pellowe in his second affidavit that –

MS ANDERSON ADDRESSES THE COURT – TECHNICAL DIFFICULTIES
(13:02:22)

WINKELMANN CJ:
How far away are you from finishing this factual narrative because it's past one and we're coming back at two?

MS ANDERSON:
Yes, I'll be 30 seconds just to finish this point. So just the point on the security team, Mr Pellowe says in his second affidavit at paragraph 21, 201.0133, and this is in the context of talking about what happened in Australia where he's saying that the security team handled the close personal protection of the speakers, and, of course, that is right, that is the resource that Axiomatic had but it was directed at keeping the speakers safe, nothing to do with keeping the venue or patrons or anything safe.

So I think, your Honours, that's probably a sensible point to conclude that discussion. Haven't quite finished the topic but I'll leave it on the basis that you've got the references there in the road map and when we come back if you've got any questions, particularly arising out of that page 1, I'll be happy to deal with them before we move just to the discussion on the common law reviewability and standard of review.

WINKELMANN CJ:
All right. We've dealt with most reviewability already, haven't we?

MS ANDERSON:
Yes, except for just some of the cases that I just want to mention to you briefly.

WINKELMANN CJ:
Thank you. We'll take the adjournment, and we're starting at two.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.03 PM

WINKELMANN CJ:
So we were proposing, but we haven't checked this with Justice Glazebrook yet because she's not in her, in the courtroom, we're proposing to sit through to five but break for 15 minutes at 3.30, just to make up your time deficit, Mr Butler. Are you able to sit through to five?

MR BUTLER:
No problem.

WINKELMANN CJ:
So, Mr Butler, does that suit, that cures the deficit? So what time – sorry, and Ms Anderson…

MR BUTLER:
Yes.

WINKELMANN CJ:
So what time will you finish your submissions by?

MS ANDERSON:
At the moment I'm proposing to spend the next 15 minutes just on the reviewability issue and then to hand over to Mr Butler, but I've just noticed his microphone seems to have, not be working there as well at the moment.

WINKELMANN CJ:
He'll have muted himself.,

MR BUTLER:
That's correct, your Honour.

WINKELMANN CJ:

Yes. So what time will you finish then, Mr Butler?

MR BUTLER:

I apprehend from the many questions put to my friends that there might be quite a few coming my way as well, your Honour.

WINKELMANN CJ:

Yes, but the original time…

MR BUTLER:

I would have thought I would need, I should have thought I'd need until 3.30 I would have thought, at least, wouldn't I, your Honour.

WINKELMANN CJ:

Well, how much time was originally allowed for the Intervener in your time estimates?

MR BUTLER:

Thirty minutes for the Intervener.

WINKELMANN CJ:

Thirty minutes and, what 15 minutes in reply?

MR BUTLER:

Yes, 10 by us and 20 for my friend, Mr Hodder.

WINKELMANN CJ:

In reply?

MR BUTLER:

So that was the last hour, yes

WINKELMANN CJ:

So that's half an hour.

MR BUTLER:

Yes, so if we work backwards that would see me going until 4 o'clock which that's fine.

WINKELMANN CJ:

Well, allowing us 15 minutes for an afternoon tea break? Right.

MR BUTLER:

Yes, thank you.

WINKELMANN CJ:

Good. All right, under way, Ms Anderson.

MS ANDERSON:

Thank you, your Honour. The general proposition that the respondents have put forward in the submissions is that the Court of Appeal just did not start it's analysis on reviewability from the right point. It seems to have side-stepped the cases, the *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470 case that as Chief Justice you'll be familiar with, having written the decision there, and, of course, this Court's decision in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056, with the starting proposition in both of those key authorities that where you're dealing with a contract your starting position is a narrow scope of review. So only in limited circumstances would the broader grounds of judicial review be available.

I do want to spend just a little bit of time just going through what are some of the key features of those cases that should be in the forefront of your mind as you're addressing the question of is actually this a matter in which the Court should be exercising its supervisory jurisdiction, and as I said in our introduction we say the High Court got it right that the gateway was closed on reviewability.

So starting point, we know that we've got a contract that's been terminated and it's been terminated on health and safety grounds. In the *Problem Gambling* case that is, in our submission, you know, directly on point. It confirms the established approach in New Zealand law that the supervisory jurisdiction of the Court is available in limited circumstances in relation to a contract. I won't take you to it but those are paragraphs 41 and 43 of the decision. But also in that decision the Court of Appeal was saying that where the High Court got it wrong was that it equated a general public interest in the Ministry discharging its duties to provide services, and remember that's under a direct statutory framework, with the need for broad review. So that was the difference between the High Court and the reversal of the decision in the Court of Appeal.

It also in the *Problem Gambling* case discussed the Supreme Court's decision in *Ririnui*. Again, in that case there was a development of the law where circumstances beyond it being fraud, corruption, the analogous circumstances, bad faith, so *Ririnui* was outside of the framework of those things that would normally be pointers to a narrow scope of review. But the distinguishing feature identified in the *Problem Gambling* case, which is right, of course, is that it was the Treaty dynamic and the sort of embedded and enmeshed relationship between the Landcorp board and the Ministers relating to the Crown discharging its very positive obligations that are owed in the Treaty context, and so those, what we say is when you're coming to write your decision on this point, if you're looking at those decisions and, of course, the decisions discussed within them, including the *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 case, we see a very well-established jurisprudence in the New Zealand context that, with a contract, you simply start with low review and you ask questions that in some circumstances, depending on the answers, will enable you to move to a different approach to whether the Court in fact should be exercising its supervisory jurisdiction.

In our submissions we've also referred, of course, to the *Ziegler v Ports of Auckland* [2014] NZAR 1267 (HC) decision, and again, so that's a trespass

notice issued by Ports of Auckland to individuals which actually has a really significant impact on them because they can't come onto Port land which means they can't come on and associate with the people that they know there but they also can't be in gainful employment on the port because they can't go with an alternative stevedoring company because they just can't enter the land, and we know from that case that the land at Ports of Auckland is owned by Council. So we've got the Court's approach in that case saying, actually, there's no governmental element sufficient to trigger the Court's supervisory jurisdiction.

Mentioned within that case is a decision of Justice Priestley in *Brady*, so this is discussed in the context of the *Ziegler* case, which was about a circumstance where a member of a church had been excluded by a trespass notice and in that case Justice Priestley had held that there was no exercise of a power that was in substance public although it had important public consequences.

So when the appellants are saying to you don't look at these line of cases that we say is a very clear jurisprudence and which was not applied by the Court of Appeal, shift instead to this concept which we have to say is an obiter comment in *Phipps* and not sort of – it's difficult to find cases where the test, the obiter test that's articulated in *Phipps* is expressed as an "either/or". But we do know that in the *Brady* case Justice Priestley had said that there was no exercise of a power that was in substance public or had important public consequences when the church issued a trespass notice which had a really permanent effect of banning a person coming on site to the church. So an interference with rights that we say is in a completely different ballpark, different universe, from the circumstance that we're in here where it's simply they couldn't use this forum on a particular day and we know from the facts that I took you through earlier the availability of a suitable venue on a different date was something that wouldn't easily be accommodated after 3 August because of the terms of the artist agreements between Axiomatic and the speakers.

I also wanted to mention the UK Court of Appeal's case in *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] 4 All ER 289, again, these are in the electronic bundle, which was that where the Secretary of State had refused entry of a religious leader on the basis of a threat to public order, and what's interesting for my purposes from that case, it's a very interesting case for a number of reasons, is that they noted it was a very limited extent to which the right of freedom of expression was restricted in that case although entry to the country had been denied. What the Court of Appeal said there was the reality was that it was a particular forum denied rather than the freedom to express his views, and again this comes onto the alternative platform that Mr Butler will be developing in greater depth with you but –

WINKELMANN CJ:
Ms Anderson, what was the name of that case? I'm sorry, I missed it.

MS ANDERSON:
Sorry, it's *Farrakhan*, F-A-R-R-A-K-H-A-N. So what the Court looked at, they said that there's no limitation on disseminating information or opinions by means other than physical presence. So what we say in relation to that, although the decision challenged prevented a face-to-face meeting, the Court did not treat that as a tipping point in terms of infringement of the rights in that context.

We've included in the bundle a case *R (on the application of Liberal Democrats) v ITV Broadcasting Ltd* [2019] EWHC 3282 (Admin). So this is a UK decision again in relation to a decision not to include certain leaders in televised programmes, and you will have seen in our written submissions that the UK Court is referred to in the New Zealand decision in *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC) and takes a very different approach, doesn't apply that, and we say that the *ITV* approach is to be preferred. But again the key elements from that case is that in answering the question in terms of reviewability the Court's looking at the source of the power but also the nature of the power and the function being exercised, and what we say

here, and the question of, this threshold question of should the Court review the decision, is that the source of the power here is a contract. The nature of the power exercised its exercise of a contractual discretion, and the function being exercised which links back to the factual context that I took you to about RFAL is that it runs a commercial activity of hiring out its venues to maximise financial gain and that financial commercial activity is a core part of what it does, and the conflict here is that the function was hiring out a venue to a commercial operator who was looking to then use that who was looking to then use that to make a pecuniary gain through that promoter's activity in the venue on that day.

Another case that's in the bundle is the *YL v Birmingham City Council* [2007] UKHL 27 case. In this context the reason I'm referring you to that is it stands for the proposition very clearly that when you're asking in a common law reviewability context is this reviewable, you can't find a statutory power of decision so you're looking for something else, it says that functions of a public character are essentially functions that are governmental in nature, and what the respondents say to this Court is that the hiring of commercial venues for commercial activities is not a function that can properly be described in any way as being governmental in nature.

It's for these reasons, and in reliance on these authorities, that what the respondents say the Court should be drawing the conclusion that the supervisory jurisdiction and judicial review at common law is simply not available in the context of what's happened here.

Unless you have questions on that particular topic, I wasn't proposing to develop that further.

WINKELMANN CJ:
Thank you, Ms Anderson.

MS ANDERSON:

Before I hand over to Mr Butler, just some short points on the standard of review. I won't go over what's on the written page in front of you because you've got that. It's the propositions that we're advancing before the Court. But I just add to that that when you're looking at, if the Court did say, well, it is reviewable, and then you're turning your mind to, well, what's the standard we've got to apply, we're very clearly saying in our submissions it's the usual test for reasonableness. Is this a decision that a reasonable decision-maker could come to, and it's very much – and it's not effectively a decision that you can stand back and say: "Well, what's the correct answer?" It's not subject to that kind of analysis in any event. But we say that when you're deciding what is the right standard of review, elements that you should be taking into account include what we say is a very minimal level of impairment of any of the rights of the appellants or of the speakers, of course not part of the claim, and that very minimal degree of interference is because there's just no right to a particular forum. It didn't have a significant impact on the ability of the speakers to disseminate their speech in any way, we know that they've got their own platforms, and we also know that, in this context, that when you come down to it any interference in terms of having a face-to-face availability, if we put to one side the dinner opportunity which is something else which we say RFL wasn't in control of and the speakers could have still done that, but if you're looking at what was going to happen in the venue, that it's just denial of a particular venue on a particular date with no alternative venue being available by RFL. It's significant too when you're assessing what's the standard you should apply here.

Now I anticipate that you might have some questions in relation to the standard and I'm happy to take those if that's a more rapid way to get to the points that you really want to address on the standard of review in this in the context of a common law claim.

WINKELMANN CJ:

There seems to be silence on that, Ms Anderson, so if there's anything particularly you wanted to cover in that regard? I suppose you'd distinguish

this from, say, a university deciding not to make a space available because there is particular significance of that forum, the university forum?

MS ANDERSON:
Yes, the universities have particular obligations in relation to facilitating or sort of enhancing freedom of expression that don't apply to other organisations. That's sort of well established. Sorry, your Honour, but the names of the cases are not flooding into my mind at the moment, but I think it's very well established that those university context is distinct.

Perhaps I'll just leave it on the point, again one of the authorities, the concept that I'm putting to you is that the more substantial the interference, it can be expected that the greater level of the scrutiny the Court might want to apply, but here where you have what we say is a very, very minimal interference, we say that assists and supports our proposed approach, that it's the usual test for rationality, the *Wednesbury* standard. If there are no further questions about that I will hand over to Mr Butler in relation to the BORA issues which he is going to engage with you in relation to those.

WINKELMANN CJ:
Thank you Ms Anderson.

MR BUTLER:
Your Honours, you'll have the benefit, obviously, of the hand up that Ms Anderson has been using just to guide our oral submission, and I propose to also use the hand up. Can I just check that there's no problem hearing me?

WINKELMANN CJ:
No, you're very clear.

MR BUTLER:
Thank you your Honour, just to give a heads up, there has been one or two problems with my laptop so I just please, I'll battle on, unless somebody let's

me know there's a problem. You'll see from the hand up that really I'd identified there being three buckets of argument, so to speak, argument around section 3, the application of BORA; section 14, is freedom of expression even engaged here, and then section 5, if it is, are we in the, how do we approach the question of justified limits, noting that the limits under section 5 need to be simply reasonable. I was proposing just to follow that schema, and I think I have a sense of the issues that are of most interest to your Honours, I'm going to try and craft my oral submissions with that in mind. However, your Honours, I do have to note that quite a lot of issues that I had not identified in my hand up have come up in the exchanges that your Honours have had with my learned friend Mr Hodder and Professor Joseph, so I will be looking to interpolate from time-to-time.

WINKELMANN CJ:
Thank you.

MR BUTLER:
So the first argument, obviously your Honours, is whether or not, or even in BORA land at all, as your Honours know that turns on section 3, and it seems to me there's no dispute between the parties that if BORA is to apply, then the relevant act, the relevant conduct in issue here must come within the scope of section 3(b) BORA. On this Professor Joseph identified the criteria in *Ransfield* as being the criteria that he regarded as relevant, and identified no particular dispute with that. I'd accept that as a general proposition, and I'm going to take you to the criteria in a moment because what I don't accept is his submission to you that only two out of the 10 criteria are not satisfied here. So I just want to flag that that's something that I'll come to in a moment.

But before we come to the consideration of the section (**inaudible** 14:23:24) within which the interpretation exercise is to be conducted, is the implications or otherwise of section 3(b) not apply. The point I want to make there is just because section 3(b) is not triggered and therefore the Bill of Rights cannot be brought to bear on the actions of RAFL, does not mean, of course, that the general law is not available. So if section 3(b) is not triggered, then that

means in terms of the Human Rights Act, part 1A is also not triggered. Part 1A, as your Honours will know, is that part of the Human Rights Act that deals with the acts of those entities that fall within 3(a) and those acts and omissions which fall within the scope of 3(b). In such a case as that part 2 of the Human Rights Act is, of course, available, and one of the areas of activity in which the Human Rights Act apply is the making available of facilities, so it's goods, services and facilities, and section 44, as your Honours will know, puts a general ban on discrimination and the making available of facilities. One of the prohibited grounds of discrimination is political opinion. Now of course it will always be open to a venue to say, well we might have discriminated against you because of your political opinions, but in doing so we were justified within the reach of section – as permitted by section 97 of the Human Rights Act.

In addition, of course, here we're in the somewhat unusual situation, as a number of your Honours have implicitly and one or two explicitly pointed out, because the party with whom RAFL had the most direct relationship, APL, I call Axiomatic sometimes and other times APL, APL is not before the Court, and their relationship, as I think it was his Honour Justice O'Regan pointed out, was regulated by the contract. So of course the law of contract potentially has application as part of the general law.

Turning then if I can to the *Ransfield* criteria. So as my friend Professor Joseph pointed out, they're to be found at paragraph 69 of *Ransfield*. Now I'm old school so I'm working with the hard copies your Honours. So for your clerk, that's found at tab 10 of the appellants' bundle of key authorities.

WINKELMANN CJ:

Can I just ask you what you say is the relationship between the issue under section 3 and that threshold relationship of whether this is the type of public function that is reviewable full stop. The issue that Ms Anderson was addressing?

MR BUTLER:

Yes, well, your Honour, it's kind of a tricky one. When I say "kind of" it is a tricky one, and the reason I say that is of course in New Zealand when you look at the ambit of decisions that potentially fall within the JAAL, or whatever it is, JAPL now, they can extend beyond classically public bodies to include those of, for example, societies and the like. That's why, for example, in *Finnigan,* the NZRU, or NZRFU I think it was then, was able to potentially be reviewable. So there's some overlap. It's a bit like a Venn diagram where the two circles will overlap potentially considerable, but that each perform their own function. Because, of course, the role of the JRPA is to regulate access to the supervisory jurisdiction of the Court in respect of the acts that fall within the reach of the JRPA, not all of which would be classified as being public ones. I don't know whether that's helpful or not your Honour.

WINKELMANN CJ:

Not really, but that's all right.

MR BUTLER:

Well, what I was going to say was, however, when you do look at the judicial review cases, your Honour, on occasions they will say that while technically a body might fall within the reach of the JRPA, the old JAA, nonetheless one has got to ask the question as to whether it's a type of decision, the type of act, omission, function which ought to be the subject of supervisory jurisdiction of a High Court operating in its public law domain. So that's a way of framing the question that's not a million miles away from what one is doing in section 3(b) in my submission.

Now I note that the 10 criteria that were referred to by my friend Professor Joseph I've set out at 69(g). Of course prior to setting out the non-exclusive indicia his Honour Justice Randerson had scribed quite an important intro to contextualise how those criteria should be, or indicia should be approached. So, for example, at (a): "The fact that the entity in question is performing a function which benefits the public is not determinative." For reasons which he gives. The fact that the function might be carried out in

public is not determinative, and as he points out at (d) the primary focus of inquiry is on the function, the power or the duty rather than on the nature of the entity at issue, although the nature of the entity can, of course, be relevant.

He says at the next one: "It is essential to focus on the particular function, power, or duty at issue." We say that when you adopt that focus, the particular function being exercised here is the function of controlling…

MR BUTLER ADDRESSES THE COURT – TECHNICAL DIFFICULTIES (14:30:59)

MR BUTLER:
The function here centres on the cancellation of the venue hire agreement and agreement that had been made between RFAL and the private promoter. So we say this is an ordinary commercial arrangement in respect of a venue owned by a charitable trust, that function is one comparable to access to, for example, SkyCity, Ellerslie Racecourse, ASB Waterfront, PowerStation and many of the other venues which are in the evidence that could accommodate an event of the sort here, so that we say when you look at that, when you focus in on the particular function, power or duty, you'll see that it's not particularly public. In fact, it's one that is comparable to, and the same as, the function exercised by a private venue provider.

So we then look at the indicia in (g): (i) "whether the entity concerned is publicly owned or is privately owned and exists for private profit." Let's just start there. The trustee of the RFA, of course, is RFAL which, of course, is a limited liability company, shareholder the Council, but the important thing we say to focus on here is that RFA is a charitable trust. In that sense it's comparable to any other private charitable trust which has trustees with responsibilities in respect of the running of it, and, of course, the Court will be familiar with the fact that Public Trustee, for example, or Public Trust as it's now called, for example, is also an entity which, although a public body in that

sense, has trustee obligations and those trustee obligations are dictated to it in each case by its trust deed. It's bound by the deed.

The source of the function, power or duty here, well, the cancellation is sourced in the VHA, and the interests which are sought to be protected through the cancellation are interests related to the protection of the assets in the trust, so making sure that the BMC isn't trashed, if I can put it colloquially and quickly, making sure that future events are not endangered by the unavailability of the venue, ensuring that liabilities, for example, if there was to have been non-compliance with the Health and Safety at Work Act, are not accumulated and detract from the assets available to perform the public functions, and so on.

It's true that there was a requirement to create this charitable trust but that does not make the charitable trust itself a statutory creature. That's our point.

The extent and nature of any governmental control of the entity, well, that's plain from the trust deed. It's plain also from the evidence which has been accepted, as it has to be, by our friends, that Council did not interfere and dictate to RFAL what the outcome was to be here.

Item (iv), whether the entity is publicly funded, well, on this the evidence before you, your Honours, is that about a quarter of RFAL's total funding, so that's for all of its facilities, 25% of the funding is public funding, 75% of it is generated by its own activities, and, of course, as has been pointed out in numerous cases, for example, the *Cheshire Homes Foundation* case in the UK, public funding is not itself an indicium of whether a body should be tagged as public because there are very many private providers of public services, think, for example, GPs, think rest homes, think disability support service providers, IHC and the like, or even their private equivalents, the truly private equivalents like Healthcare New Zealand.

(v), whether the entity is effectively standing in the shoes of the government. Well, I'm not going to go over that ground in detail because that's already

been covered by my friend, Ms Anderson, when she took you through the statutory background.

But it is important to tie indicium number (v) to indicium number (ix), "whether the entity is exercising extensive or monopolistic powers", because often if an entity is exercising extensive or monopolistic powers, that's a good indication that the entity is effectively standing in the shoes of the government when exercising the function, power or duty. Of course, here the evidence is clear RFAL is not acting as a monopoly. It doesn't have extensive powers. There are very many other venues available for those who wish to hire them.

So this is not a case like *Brett S*o *Brett* is the *Low Volume Vehicle Technical Association Inc* case, where through a series of contracts effectively LVVTA was set up as a regulator on behalf of NZTA. That is not this case.

As to (vi), we say the function being exercised here is of benefit to the public in the charitable sense.

(vii), there are no coercive powers analogous to those of the state.

On item (viii) you've heard from Ms Anderson why we say the JAA as then was is not applicable, and you've heard from Professor Joseph as to item (x) that he accepts that it does not fall within that criterion.

So I say that when you go through the *Ransfield* criteria you'll see that on balance, I'd say comfortably, that the act in issue here is not one that needs or does engage section 3 of the Bill of Rights. We're not in *R v Panel on Takeovers and Mergers, ex p Datafin Plc* [1987] QB 815; [1987] 1 All ER 564 (CA), we're not in *Cameron*, we're not in that type of situation.

If I can move from that argument, your Honours, then, to section 14 and its scope, and this part of the argument I've split into a number of subheadings and some of them, your Honours, will merge one into the other and it will be when I'm discussing aspects of section 14 that I will disappear from shot once

or twice as I just check the notes of the interactions that your Honours had with my learned friends yesterday and earlier today. So the first point we wanted to make in relation to section 14 is to whether there's even, let's assume that we're in section 3 territory and BORA applies, is whether in fact there's an infringement of section 14. Just stopping here. One of the most difficult things about this case, and your Honours have touched on it, is how it has come to the Court, because even though Professor Joseph, I wrote it down, at least five times, and your Honours can check it in the transcript, at least five times said reference to the appellants' rights this, and the appellants' rights that. Dr Cumin was never going to the event and Mr Moncrief-Spittle, while he was a ticket-holder, it was not his event. He was not speaking. He was not the promoter. The way the argument –

WILLIAM YOUNG J:
Why does that matter because his right to freedom of expression includes a right to seek out opinions.

MR BUTLER:
Yes it does Sir, but the further away you are from being the event organiser, or the event speaker, we submit, the more tenuous your ability to claim that a particular event should have proceeded. That's our argument. Particularly in a situation – sorry Sir?

WILLIAM YOUNG J:
Well I can understand, is it supported by any authority or – I can understand the argument, that a right to say something might be more important than a right to go out and hear someone say something, although I'm not 100% sure that's right, but is there anything that supports that, apart from a sort of a feel for it?

MR BUTLER:
Yes, it is a feel for it, and one of the reasons it's a "feel for it" is of course there are not that many cases that are like this case that you have before you.

GLAZEBROOK J:

There a number of cases, or at least commentary, that the right to be informed, and to have information is as much a part of the right to freedom of expression as the right to express those opinions, and that's often said in the environmental context in a major way, but there will be other contexts where that is true as well.

MR BUTLER:

And I think, your Honour, this is one of the difficulties with a case like this, and particularly the way it's been run by my friends, because I can't deny that there would be lines, or statements, that can be found in particular freedom of expression cases in contexts that are not like this. So, for example, using the scenario your Honour has put forward, of that of access, for example, to environment information that might be held by a government, relying on section 14, for example, in a situation where government has denied you access to that information which it holds, that might fall squarely within section 14. But here we're not in the territory, here we're in territory where a ticket-holder is saying, I've got a right to insist that a particular event arranged between APL and RAFL proceeds. Pleading rights of consultation which aren't even Mr Moncrief's right of consultation or Dr Cumin's right of consultation. It's never been suggested by Mr Hodder, nor by Professor Joseph, that either of the two appellants should have a right to have been consulted. What they do is they plead somebody else, and rely on somebody else's right to be consulted, which is part of what makes the case, again, difficult and unusual in the way in which it's being advanced.

GLAZEBROOK J:

Particularly in terms of process, so to the extent that their argument is based on process, that's right, but my understanding is, although I did have some difficulty their argument, but the argument seems to be more than process.

MR BUTLER:

Well I'll be very honest. I struggled to understand what the basis of their case is as well your Honour, and your Honour did test my friend Mr Hodder on it

quite closely, and then again this morning Professor Joseph, and so I still don't have a complete feel for what the core proposition that's being advanced. Is it a process case or is it not a process case, and I don't think that's assisted, as I said, by the identity of the appellants who are before us, because it makes it an even more artificial case in which to consider these issues.

So, your Honour, just returning to where I was on my handout, no infringement of section 14, so I say that's an issue that's very much on the table I say, because other options were available. So my learned friend, Ms Anderson, has referred your Honour obviously to the PowerStation and I made reference to that in the opening remarks, but there was also further engagement with another venue called Swan Hotel, and that's in the materials your Honour. Again, because the appellants have no clue about Swan Hotel, or indeed the dealings with PowerStation. The Court doesn't have access to the information in relation to all of the detail of the interactions between the Swan Hotel and APL, and APL and the PowerStation in order to make an assessment as to what actually went on.

But what I do feel comfortable submitting to your Honours is that, and again going back to the difficulty of the way in which the case has come before you, there is authority to say that a breach will not be found where alternatives are available. Now the example I've given you in the hand up is, of course, *Denbigh*, which was a freedom of religion, but equally a freedom of expression case. The one as to whether the particular apparel that the school child wanted to wear was acceptable or not. Your Honours will recall it was in breach of the school uniform policy of the particular school, of the Denbigh High School, and their Honours in the House of Lords that there's no breach, they zeroed in, in particular, on Article 9 of the Convention, I could've said the same in my submission in respect of Article 10, on the fact that –

WINKELMANN CJ:
What is Article 9?

MR BUTLER:

Sorry, freedom of religion. Manifestation of religious belief. I'm sorry your Honour. But there the school uniform policy was well-known when she enrolled at the school. She enrolled there knowing what the rules were, what effectively the bargain was between her and the school. Other options were available. When it turns out that over time she was not happy to abide by those school rules, and relied on Article 9 of the Convention, to seek to depart from those rules and say those rules can't apply to me, the Court said, you can't do that, you have other alternatives available to you if you wish to manifest your religious belief, there's other places you can do it, and secondarily said, you entered into an arrangement, in other words you made an agreement, whereby you agreed for your rights to be able to be limited.

GLAZEBROOK J:

Wasn't there an important part of the reasoning, and I'm sorry it's a while since I've read it, that in fact the school uniform did take into account, and had made consultation et cetera to take into account religious beliefs, just not the way she wanted to particularly wanted to express them, because I'm not sure the decision would've been the same if there hadn't been some accommodation – well, the type of accommodation of religious belief that the school had entered into. But maybe you can correct me because it is a while since I've read that case.

MR BUTLER:

Your Honour, I will. I hate to use the word "correct you" so I won't take up your invitation to correct you your Honour, but to simply describe the facts a little, and the decision a little differently. It is true to say that the school had undertaken consultation with its community about what the school uniform would look like. What is very clear is the school was not prepared to have uniform of the type that the plaintiff had wanted to have, because they felt that it was not appropriate for their school community and the like. So to be very clear, it was a decision made to say: "We will not tolerate at this school that type of school uniform because of what it represents," and that's the agreement. "By enrolling with us, we made plain to you what the rules were

here and you enrolled on that basis," to which the House of Lords says: "Well, you've entered in on a particular arrangement," first point, and second point: "You have alternatives available to you if you wish to express yourself through the particular mode of dress."

So that's why I think here, your Honour, that's quite a pertinent frame to look at the questions here, and that's relevant also, I think, to how the case has been cast. If you go back, your Honours, and look at Mr Moncrief-Spittle's affidavit you'll see that it's interesting how he talks about John Stuart Mill and those sorts of things, describes his own political development and so on, which is all to the good, but if you go and look at the affidavit a very significant part of his evidence was as to the value for him to meet the speakers and associate with them. In fact, he uses the word "meet" in about five paragraphs and "associate" he uses, from memory, twice.

The point I'm trying to make to your Honours there simply is that from the point of view, for example, Mr Moncrief-Spittle, which is the right that's really in play? Is it the associative right or the expressive right, because what his affidavit also makes clear is he was able to access relatively straightforwardly, through YouTube, social media and other online resources, the messages, the arguments, the views of both Mr Molyneux and Ms Southern.

In any event, the point I just wanted to make in terms of section 14 at the outset was even if we're in section 3(b) territory, thank you, that's a good example, 17, it comes up in many, many places, that word "meet" and "associate".

GLAZEBROOK J:
Is that the right of association or is it part of the right of freedom of expression, the right to debate, because that would be quite relevant in terms of a university, because I think you argue in your submissions the association right is not engaged here, because that's a different right with different manifestations.

MR BUTLER:

It is a different right –

GLAZEBROOK J:

If I understood your submissions correctly.

MR BUTLER:

Well, thank you, your Honour. So the point we were trying to make in relation to that was in some ways it looks as if the case is a freedom of association case actually and, if it is, then the way in which freedom of association claims get analysed is quite different. That was the point we were just trying to make, your Honour. So again it comes down to – I'm know I'm going to be saying this several times – it comes down to who it is who's before you who's bringing the claim, because you don't have the promoter in front of you, you don't have the speakers in front of you.

WINKELMANN CJ:

Well, it's brought as a freedom of association claim too, isn't it?

MR BUTLER:

Yes, there was reference in the pleadings, if I remember rightly, to that.

WINKELMANN CJ:

Yes, and I thought your submissions said that it isn't really engaged, that freedom of association is to do with people with like minds coming together and gathering and discussing things, sort of the unions, the political party, the animal rights activists, that kind of scenario.

MR BUTLER:

By way of association of that sort, precisely. So that's what I'm trying to say is in terms of trying to consider what the metes and bounds of the right of freedom of association are it seems to be that what was being suggested in Mr Moncrief-Spittle's affidavit was he viewed it as being an associative

exercise and all I was trying to say was if that's how he conceived of it then that freedom of association deals with other aspects, with other things.

So I don't think I can take it much further than that, your Honours, simply to say the last point being that we don't know what happened with PowerStation. Obviously, there's a newspaper article or two in the record, but we've got no background as to when PowerStation was hired or what considerations went into the decision for that venue to be no longer available.

So we go to B, so a negative not a positive right. So in the respondents' submission that is indeed the correct starting point when you're looking at freedom of expression and freedom of association and those rights. Now I have the misfortunate to be working from home, but your Honours, if you at the look at the Rishworth text, which I don't have a copy of here at home, you'll see that fairly and squarely addressed, in memory, either in the first chapter or the second chapter where there's quite a long discussion on that.

Your Honours should also, in my submission, profit from reading the decision of the Court of Appeal in the *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) case which is, from memory, from 1999 written by his Honour, Justice Keith, where he, as your Honours know, was instrumentally involved in the drafting of the Bill of Rights and his Honour very much and strongly makes the point that the rights in the Bill of Rights, particularly those that we are now discussing, are not about positive rights; they're negative.

WINKELMANN CJ:
In a sense it's right not to have that right interfered with as opposed to being facilitated?

MR BUTLER:
Yes, correct, your Honour.

GLAZEBROOK J:

That is fairly strongly challenged in all of the commentary that the committees that are administering these bodies and also in some of the more recent jurisprudence, I think, and that distinction is seen to be one that isn't upheld except – well, what do you say to that?

MR BUTLER:

I don't accept it, with respect, your Honour, and I note my friends haven't put material of that sort before you, so maybe it's something that –

GLAZEBROOK J:

Well, if you look at the articles of state responsibility, they quite clearly do have some positive obligations that they put on states, don't they?

MR BUTLER:

They do, your Honour, but not positive obligations of the sort we're talking about here. The positive obligations they've got –

GLAZEBROOK J:

Well, that may be the case but I don't know that you can say there are no positive duties because there are certainly positive duties on the state to make sure that even private entities comply with the obligations that the state has entered into in respect of those human rights treaties.

MR BUTLER:

So that's the point I was just going to come to, your Honour. So the point of the obligations that you've made reference to is an obligation to have a legal system which reflects whatever the rights obligations happen to be. So you can't, in my submission, rely on the fact that there are positive obligations to adopt laws to then say that means that the rights themselves are positive rights.

The breach of the state obligation would be the failure to have laws in place which provide protection to the rights in issue. So we'd be in breach of our

international obligations if we did not have the Human Rights Act in place because we've got obligations to stamp out discrimination, both by public and private entities. But one can't take that to say and therefore every right guaranteed at the international level has positive aspects to it which the domestic courts are required to hold place positive obligations on the state to facilitate.

GLAZEBROOK J:
So what does the obligation on the Courts require them to do?

MR BUTLER:
The obligation on the Courts is simply to police the requirements of section, in this case section 14 of the Bill of Rights. If, as I submit, section 14 of the Bill of Rights is a negative right then that is the metes and bounds of the Court's obligation.

GLAZEBROOK J:
So it can't, in fact, wouldn't be able to force the state to provide information on environmental issues?

MR BUTLER:
Correct. What it would be able to do –

GLAZEBROOK J:
Under Article 14.

MR BUTLER:
What it would be able to do, your Honour, is if the state denied access to information that it has in its possession and says: "We're not giving it to you," then that is an act by the state which denies access to the information, and that's policing that obligation. There's an obligation –

GLAZEBROOK J:
There's a few pins we're dancing on there but I think I've got the submission.

MR BUTLER:

Thank you, your Honour. So I've given some examples just in the hand-up. I don't think I need to talk to them particularly. It's just to try and show where we say this should be situated, and recall that many of the cases, in fact, almost all of the cases that were referred to you by my learned friends, are ones where there is an interference on freedom of expression in that in almost all of them the state has criminalised the particular expressive conduct.

Fáber, from memory that's a criminalisation case. *Primov*, the Gay Pride case, that's a criminalisation case. The *Forsyth County*, from memory that's also a criminalisation case. So all of those are cases where people are criminalised for expressing themselves.

So the next point I'd wanted to develop at C comes to the nature of the place and how you might think about freedom of expression as being affected by the nature of the place that's in issue, because many of the cases that are relied upon by my friends are on-the-streets cases. We say the streets are not the same as an enclosed hall. You might be allowed to shout: "Fire," on the streets, even if there isn't a fire, but you certainly, even in America, cannot shout: "Fire," in the theatre.

So what we're just trying to say here, your Honours, the simple point is that, for example, when you look at *Primov*, *Primov* is about a demonstration in the streets. *Fáber* is a case about demonstration on the streets. *Ziegler* was a demonstration on the streets in front of a building. The settings are very, very different. Here what we're talking about is an enclosed place, large-style theatre venue, hired out just like private providers do to make a profit. In other words, thinking about it, it's not a place for disorder.

Whatever might be happening on Molesworth Street at the moment, your Honours, that's in a public, open space. Whatever difficulties arise out of it, if that was happening within a building and people said they were expressing themselves, I submit to you you would take, the law would take and should take, a very different take on whether freedom of expression is

truly engaged, and if it is truly engaged how you would register that in terms of the level of protection that you would wish to provide it.

ELLEN FRANCE J:
Is that the same if you're talking about the sort of "town hall" venue?

MR BUTLER:
I'm glad your Honour has brought me to that. So, of course, a town hall venue, the point we were making in respect of the town hall is that we can see a distinction possibly between a venue that can be truly classified as a town hall-style venue which is open to all comers, so we're envisaging the classic idea of a town-hall facility that's traditionally made available to community members of all comers, so as to speak, for relatively low rates, and the point we're trying to make is even if the Court was minded to say that town hall-type buildings, venues, should be treated in a particular way, a bit like the *Mount Roskill Borough Council* case which I can come to if your Honours wish, that's not what the BMC is. It's a large-style theatre venue designed for commercial hiring out.

GLAZEBROOK J:
I just do have a bit of difficulty in how one would draw that distinction between the different buildings because I think the Bruce Mason Theatre was always conceived of as a community theatre and a theatre that would not be hired out at exorbitant rates because it did have that community function. So for children's music concerts and pantomimes and things of that kind.

MR BUTLER:
And that's why, your Honour, we've been keen to emphasise in our factual narrative that whatever may have been the situation in relation to the BMC, your Honour, the Court needs to approach the decisions here with, if I may put it this way, a current understanding of what the objectives of RFAL are and the facilities it provides. In the context of Auckland, it should be pointed out we've touched on it in our written material but it's important your Honours understand that not every facility in Auckland to which the public would have

access for running what your Honour indicates, pantomimes, community events and suchlike, is held by RFAL. In fact, RFAL holds relatively speaking very few. The evidence shows us something like 200 other venues in Auckland, including parts of the town hall, which are held directly or indirectly by Council and which have their own policies and their own objectives not run to generate a profit. So I don't know whether that's helpful to you, your Honour, in terms of –

GLAZEBROOK J:
Not particularly, I must say, because I think your friend was saying that even if this was held by the Council directly there would be no obligations either.

WINKELMANN CJ:
Mr Butler, you need to get this fine-grained. Is your submission really no more than it's all very context specific and you have to look at the extent to which the denial of the forum really does deny the platform, the meaningful platform?

MR BUTLER:
Yes, your Honour, and I was just trying to make that submission by tying it to the facts using these facts as illustrative of the point, but that is the nub of the point, your Honour.

GLAZEBROOK J:
All right, so it's not a fine-grained distinction between particular venues. It is an indication that one looks at the facts to see whether in fact the venue or the platform had been denied. Is that the submission?

MR BUTLER:
Yes, but – yes, whether it had been denied but also what it is, what is the platform that is being denied because of course what you hear from my friends is their take on the platform. What we're trying to submit is you don't need to go with their take on the platform. There are other venues that are available in the Auckland region which –

WINKELMANN CJ:

So your point is this is a fungible commercial venue. It is not, it is not a university. It is not a hello-community space which is known for the mark – known for the exchange of ideas. It is simply a fungible commercial space?

MR BUTLER:

That's correct, your Honour. That's the point.

WILLIAM YOUNG J:

Before the local government reforms of I guess the last 20 years, presumably the owning and operation of a town hall was regarded as a public function by local authorities. It was probably mentioned in the Counties Act or the Municipal Corporations Act, I imagine.

MR BUTLER:

I think in the old legislation your Honour might be correct. I can double check that after the hearing, your Honour, if that's of importance. But you certainly – I'm sorry – you don't find reference to that aspect of local government functions any more in the LGA.

WILLIAM YOUNG J:

But that's because it's sort of a power of universal competence, isn't it, and very general purposes? It's a different style of drafting.

MR BUTLER:

Yes, there is a different style of drafting, your Honour, but, of course, what the LGA does is it focuses on the objectives, the objectives of local government as opposed to doing the list. It's a bit like the shift in trust law from the list to the general principles of prudence, so, but the point that we're trying to make which was made through my friend, Ms Anderson, and therefore I don't want to repeat it is that if you look you don't see purposes which correspond to saying there's an obligation on local governments, local authorities, to make available facilities to facilitate freedom of expression by those who in their community wish to do so, never mind an obligation if there are facilities to

facilitate whoever wishes to come and express whatever views they do regardless of impacts, of health and safety impacts.

So the next point I'd wanted to come to is at D, your Honours. So this is where I interact with the statement of claim, paragraph 37, effectively –

MR BUTLER ADDRESSES THE COURT – TECHNICAL DIFFICULTIES (15:12:00)

MR BUTLER:
– that there is a duty on RFAL not to cancel on health and safety grounds unless proper investigation and consultation has occurred, and the simple point there means that that converts section 14 into a process, right? Here are things, steps you should have taken, considerations you should have taken into account. But *Denbigh* and *Miss Behavin'* make clear that the rights we're talking about are not process rights, they're outcome rights, and then the point which I've touched on earlier. Well, if section 14 BORA does confer a process right, it doesn't, then neither of the appellants would have been part of that process, and why should they be allowed in this hearing before your Honours to plead somebody else's consultation right. It'd be like somebody in Queenstown objecting to the Auckland Unitary Plan when it has no impact on them. Now maybe they're allowed to do that, I don't know, but I'm just trying to come up with an analogy just to make the point. That's quite important –

GLAZEBROOK J:
I think the argument, wasn't the argument rather that there just wasn't enough information for a decision to have been made that was reasonable and rational? Now I know you say there was and you could take into account the Axiomatic failure to indicate the security risks and processes that had followed in Australia, but I –

MR BUTLER:
Well, you see that's the job I might have –

GLAZEBROOK J:

– I understood that the unreasonableness came about because they didn't have enough information. That's how I'd understood the argument to be.

MR BUTLER:

Well, your Honour did better than me, I have to say, because that's not how I understood the argument. I'd understood the argument as being, if we go to that pleading and hopefully I've made the right cross-reference…

GLAZEBROOK J:

Paragraph 27 – or was it 27? 37.

MR BUTLER:

Your Honours, I can't quite put my – can I just come back to that point and just check it at the break and just get you the correct reference? But it was the part of the pleading where my friends say that there was a duty to investigate and consult, and you'll recall that Mr Hodder spent some time saying that there should have been consultation with police, there should have been consultation with Axiomatic, and it seemed to me that the criticism that was being made by him which was shared by Professor Joseph was there was a process problem here.

Well, generally speaking, we don't allow other people to plead somebody else's process rights in a judicial review to challenge a decision, yet that seems to be what's been done here.

WINKELMANN CJ:

So that's at paragraph 29: "Prior to the decision and cancellation, RFAL did not undertake any investigation into, nor consult the New Zealand Police or other organisations with expertise and experience," is that what you're talking about?

MR BUTLER:

Yes, that was what I'd had in mind.

WINKELMANN CJ:

And then there's other ones as well, I think.

MR BUTLER:

And then there's ones along a similar line.

WINKELMANN CJ:

Yes. 37.

MR BUTLER:

Thank you.

ELLEN FRANCE J:

What was that first reference?

WINKELMANN CJ:

29 and 37, I found. That's just a quick scan.

MR BUTLER:

And, of course, part of why that's relevant, your Honours, is that rights confer entitlements on people, very trite law, but, of course, as his Honour, Justice Tipping, pointed out in the *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 537 (Full HC) case, people who have rights are entitled to give them away. They can waive them or they can agree consensually not to exercise them or to have them abrogated in some way, pro tanto, I think he says, and we say, well that's something that can be done by way of the agreement here, the contract permitted it and we should be enabled, or allowed rather, we say able, to rely on our contractual rights which Axiomatic voluntarily entered into with this, with that termination provision there. Just like any other venue provider. It's not before you so your Honours are not able to interrogate that. All you're able to do is to look at the situation from the point of view of a ticket-holder and a member of the community, or a concerned member of the community.

Then moving to the last point under E, my friend suggests that there's a presumption –

WINKELMANN CJ:
Sorry I'm under E, what is E?

MR BUTLER:
If you're in my column on page 3, the second to the right.

WINKELMANN CJ:
Okay, got it.

MR BUTLER:
Thank you your Honour. We say there's no overseas support, no New Zealand/no overseas support for the presumption that's been advanced by the appellants, and that's just another reason why, in our submission, your Honours should reject the –

GLAZEBROOK J:
Sorry, I'm obviously not caught up. The presumption being?

MR BUTLER:
The presumption that where an event is cancelled because of the heckler's veto, that that cancellation is invalid. From memory it's at 1.2 of their submissions. Your Honours, if I can now go to section 5, I did want to talk a little bit about section 5. The first point I want (**inaudible** 15:20:22) trite, but it's important, because if you disagree with me it'd be useful to know if it's something that's arguable, but when one looks at the language of section 5, of course, the word "proportionality" none of those words appear. The requirement under section 5, what section 5 says is it says that the rights conferred may be subject only to such reasonable limits that are demonstrably justified in a free and democratic society, and if they are prescribed by law.

So the important word, I just wanted to split those two concepts of “reasonable limits” and “demonstrably justified” into two parts, just briefly, just for the purposes of exposition, because my submission you’ll see in the hand up is that what’s reasonable and how reasonableness is determined flows from the context, and I really just want to separate those two things out. What’s reasonable and how reasonableness is determined. When you look at cases like, say, that follow *Oakes*, so *Doré*, as an example looking in Canada, and you look at our own cases, *D v New Zealand Police* [2021] NZSC 2, for example, one of the things you see when you look at those cases is the Court is struggling with the idea that the approach to reasonable limits that they deploy when what is being challenged is legislation, is and should be different from the approach to be deployed when looking at an individual decision of a judge, or the individual decision of an adjudicator, and I would say indeed of a mere official, and I want to come back to that distinction in a moment, just focusing in on a mere official in a moment.

Part of the, it seems to me part of what the Courts are grappling with is the idea that the context within which the question of reasonable limits is being asked, or addressed, are different, and why are they different. It just seemed to me it was probably worth just teasing out aspects of that which lie just below the surface I think in quite a number of the cases. Sometimes the cases are approached of the point of view of the difficulty of the reviewing court, sometimes deference and those sorts of things, but it seems to me that when you look at this type of issue, really what the Courts are saying is, well look, when it comes to reasonable limits imposed by legislation, for example, the legislative process generally speaking, not always as we know for the use of urgency and the like, but generally speaking the legislative process is quite a deliberative process, so it moves slowly. It allows for many inputs to be provided. There is a phalanx of public servants available to provide inputs to Ministers and senior officials in terms of thinking through how a particular legislative provision might limit, or affect, rights guaranteed by the Bill of Rights, so substantial resources able to do that. There’s expertise of a particular type, public policy type within the government. Detailed reasoning on particular points may be expected.

Here, for example, I'm thinking of the section 7 vetting process, and your Honours will be familiar with that, obviously I don't need to go into that in detail, but your Honours will know that not only do you see the product on the website where there is a section 7 negative effect given but your Honours can also go, or anybody can go to the Crown Law, the Ministry of Justice website to see the assessment that's been made of particular provisions impact on guaranteed rights and freedoms, and, of course, legislation typically, not always but typically, has quite a wide social impact, the net's cast quite broadly, and for that reason there's quite a level of significance typically that attached to a legislative intrusion on guaranteed rights and freedoms.

So it seems to me, for that reason, the Courts, when they come to assess, well, what's a reasonable limit when it's being imposed by legislation, are right to demand a high level of justification in determining that issue. What, in other words, Parliament, through the Attorney-General, needs to do to demonstrably justify the reasonableness of a limit, takes colour and context from the legislative process is what I'm trying to say. Therefore the detailed proportionality analysis that one gets in *Oakes* may be very appropriately applied in that context.

But if you look at a case, for example, like *D v New Zealand Police*, your Honours, what the Court was saying there, for example, if I think of the judgment of your Honour, Justice O'Regan, which, from memory, was joined by your Honour, the Chief Justice. In that particular case, around paragraph 101, what was being said there was, look, we don't need an overly sophisticated *Oakes* on steroids type analysis. "We agree that the *Hansen* methodology is not appropriate in this case. Rather, we see the task to be undertaken," and it's an interpretation thing, and it should not be a more complex analysis.

WINKELMANN CJ:
And that really reflects the fact that Judges quite often do undertake these exercises when they're sentencing.

MR BUTLER:
Correct.

WINKELMANN CJ:
Without saying: "This is a *Hansen* analysis," they just balance…

MR BUTLER:
Just get on with it, just balance, and the important thing as I read *D v New Zealand Police*, your Honours, I'm not saying you're going to pick your way through and analyse every particular sentence of word to see, well, does it match up with the detailed proportionality analysis. That's how I've understood it. If I've misunderstood it then I apologise, but that's how I've understood it.

That seems to me to have parallels with what the Supreme Court of Canada said in *Doré* at paragraphs 37 to 38. Do your Honours see that passage there? "The more flexible administrative approach," which they've outlined, "to balancing *Charter* values is also more consistent with the nature of discretionary decision-making." It notes that some of the aspects of *Oakes* are poorly suited, et cetera. Your Honours are well able to read it and I'll leave that with you, but the point that I want to make as a result of Doré is, you know, you don't have a cookie-cutter approach based on *Oakes* or *Hansen* to assessing section 5.

So in this context Mr Macrae, whatever he is, he is not Parliament, he's an official, not even an adjudicative decision-maker, he's an official – and I'm using that language on the supposition that the appellants are through section 3(b) – within RFAL, who is confronted with the circumstances as they have evolved, has said to your Honours that he has taken into account freedom of expression considerations, is aware that there are such considerations to be taken account of but not withstanding those his expert view is that in the time available these risks are not able to be managed and, for example, in the record you have before you, just, for example, on the issue of road closures, the lead-in time for that is eight weeks' notification if you're

going to close a road. We're four weeks before the event. He knows all about Auckland Peace Action, having dealt with them previously. He knows that the way in which Axiomatic managed safety and security concerns in Australia was by making sure that nobody knew what venues were going to be used. That security measure, which was considered appropriate in Australia, was not available to him because of what RFAL had done.

Your Honours, I'll complete there and we're back at 3.45.

WINKELMANN CJ:
Yes, and that looks good for you from the point of view of timing, doesn't it?

MR BUTLER:
It does. I will come back, your Honours, and ask some questions of Mr Hodder in terms of alternate media and how we cope with that new landscape. I do have some things I'd like to say on that, please.

WINKELMANN CJ:
Thank you. All right, we'll take the adjournment.

COURT ADJOURNS: 3.31 PM

COURT RESUMES: 3.49 PM

MR BUTLER:
(audio starts at 15:49:44) … there's no prescription by law because you haven't passed an Order in Council, not by the way that RAFL has any ability to pass an Order in Council. You haven't passed an Order in Council and therefore you fail the prescribed by law standard. That can't be right –

WINKELMANN CJ:
Isn't prescribed by law just really the limitations on the right that have been recognised at law over time. So it's the common law is a large part of what prescribed by law is?

MR BUTLER:

Yes it is, absolutely it is, in the same way as, for example, the law of defamation which in large part is still common law. It's part statute, part common law, but that limits rights and of course, for example, in the old days, so I'm thinking *Handyside v United Kingdom* (1976) 1 EHRR 737 (E Ct HR.) and those cases and *Sunday Times v United Kingdom* (1979) 58 ILR 491 (ECtHR), *Sunday Times* I'm thinking of in particular, of course in that case contempt of court in the UK was found, the common law doctrine was found to be unacceptable, not because it wasn't at common law, but because the particular common law rules were found to be inappropriate. But the European Court of Human Rights had no difficulty in recognising that common law can be a source of prescription in a particular case, and I would recommend your Honours have a read of the decision of the Court of Appeal in the *Low Volume Vehicle Technical Association Inc v Brett* [2019] 2 NZLR 808 case where there's a very good useful detailed discussion of prescription by law by his Honour Justice Kós, and also of the Allied Notions of waiver and consensual agreement to abrogate rights.

So your Honours I wanted now at this point, if I could, just to come to specific issues that had emerged during the discussion between Bench and Bar yesterday and today, and I'll try and work my way through these points reasonably rapidly. So the first point I wanted to make was do your Honours recall the argument you heard from my friend Mr Hodder this morning focusing on content neutrality. Do your Honours recall that?

WINKELMANN CJ:

Yes.

MR BUTLER:

And do you recall in particular that my read on that was that my friend Mr Hodder realised that, for example, issues like pricing, conditions, security, those sorts of issues, he needed to accept, but so long as they were content neutral, then he couldn't object to those. So that the scope for section 14 was going to be, thereby, limited. So the first comment I wanted to make in terms

of content neutrality is that, of course, the approach adopted her by RAFL is content neutral. If this had been, for want of a term, a left-wing event, and people who do not share those views had made threats against the venue, there is nothing on the record to suggest that a different approach to health and safety would have been adopted. The decision turns on the assessment of health and safety concerns.

WINKELMANN CJ:
Which is where his heckler's veto comes in, because he's saying it's not content neutral so far as the protesters are concerned. Well I thought about that and I thought, let's test Mr Hodder, and you'll have the opportunity to do that shortly more broadly than I do, but come back to the issues of security concerns and security costs, because you'll remember Mr Hodder accepted, as he must, that if there were additional security costs that came out of his preferred consultation and information gathering process, that then those security costs could be passed on by RAFL to Axiomatic. Do your Honours recall that?

WINKELMANN CJ:
Yes.

MR BUTLER:
Well if he's true to principle, then he shouldn't accept that. The only reason why extra security costs are incurred on his thesis, is because of the heckler's veto. In order to deal with the problem of the hecklers, additional security costs that would not otherwise be legitimately incurred, now have to be paid for by Axiomatic. So the point I'm trying to make is that when one tests this heckler's veto concept that he's advancing to you, allied with content neutrality I say that when you test it you see it's not a very stable concept. It breaks down.

My learned friend Professor Joseph in his submissions to you talked about the least infringing limit. That's old law, that's not a proposition which is supported by the case law, even in those cases where we are applying an *Oakes* or a

Hansen approach. Think, for example, *Moonen (No 2)* and even if you go and look at *Hansen* the Supreme Court there was clear in saying that it is the minimal impairment test is not about adopting the least infringing test. Of course, here, where what one is engaged in is a predictive exercise, what might happen, talk of a least infringing limit is, in our submission, inappropriate.

The approach of the Court in a case like this, your Honour, Justice Glazebrook, raised a number of issues in regards to this issue, and there was discussion back and forth between my friend, Professor Joseph, and your Honour about correctness and so on.

The position for RFAL is that it's not for the Court to come to its own assessment here. Rather the Court is asked to assess the decision made by Mr Macrae on a basis of is this decision within the reasonable range of decisions that could have been made. That's the one that reflects the context within which Mr Macrae was operating and that's the one that enables the Court not to adopt a with the benefit of hindsight approach to the circumstances as they evolved in front of him. No one knows, for example, what the correct approach is.

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES (15:56:44)

MR BUTLER:
So just before we lost your Honour, I was just saying the context here is not an adjudicator, not a Judge, somebody running a commercial venue operation, trying to predict how matters might proceed, but with the benefit of his knowledge about what's happened in the past and his knowledge of the venue in issue and the knowledge of the fact that one method, indeed the preferred method in Australia, to manage security issues, is not available to him for reasons outside of his control.

I was just going to make the point there's some live equivalent of that on the streets of Wellington as we speak. Who knows what the right approach of the police is to adopt to control at the moment? There are a range of reasonable alternatives available to respond. The same is true for Mr Macrae, albeit the circumstances are quite different.

Health and safety considerations are relevant considerations to be taken into account. There was a case in the bundle, *R (on the application of Ben-Dor & Ors) v University of Southampton* [2016] EWHC 953 (Admin), the *Southampton University* case, decision of then-Justice Whipple, now Lord Justice Whipple. That was in a different context. It was in the context of Southampton University's obligation, duty, statutory duty under the Education Act 1986, to enable external speakers to come on its premises and speak. The University was gravely concerned about – it was going to be a conference on Israel – there were grave concerns as to what might happen if the conference were to proceed and notwithstanding the duty on the University to facilitate free speech, the Court, on judicial review, accepted there was a good basis on health and safety grounds to not proceed with the event, and a number of the reasons that I have given to your Honours today you will see reflected in the decision of her Honour, Justice Whipple.

My friend, Professor Joseph, when he was talking about relevant considerations and what one could have regard to and was talking about a high threshold, do your Honours recall he was talking about, well, after he had been quite pressed on it, I have to say, by your Honour, Justice Glazebrook, about bodily integrity and he kind of um'd and aw'd and, yes, he accepted bodily integrity as being something that might be taken into account, threat to life and limb, yep, that could be a basis upon which it might be appropriate to cancel an event, but, of course, there are wider interests. What about property in the context of the BMC? So if you look at his affidavit, one aspect, not the sole aspect, but one concern that Mr Macrae had was the potential for damage to the facility, what impact that would have on future bookings, bookings that were lined up to come in the days thereafter and so on, and it seems to me that when you think about it you're running a commercial venue,

if you consider that there's a chance that your place will get trashed or damaged, that's also got to be a legitimate consideration that can be taken into account in that type of environment.

He also made reference, Mr Macrae this is, to neighbouring businesses and suchlike. Your Honour, Justice Ellen France, made reference to section 59(1)(c) and having regard to the social environmental aspects of the community. It seems to me that it's appropriate for a centre like the BMC that is located right at the heart of the Takapuna CBD to have some regard as to the impact that their venue, the disorder that might emanate from their venue, might have on its neighbours as an aspect of that feature of the statute that I've just referred your Honours to.

Redeemed Church, you heard from my friend, Professor Joseph, that that is "almost completely analogous" was the phrase that he used, but, of course, it's not. The reason it's not analogous is the reason why the contract was terminated. We have not terminated this contract because of the content of the speech.

WILLIAM YOUNG J:
You have really. The content of the speech triggered the threats from Peace Action Group which triggered the cancellation. So the chain of causation is clear.

MR BUTLER:
But, of course, Sir, as indicated, we have experience of previous events that were controversial.

WILLIAM YOUNG J:
No, I agree. It's just that it seemed to me to be quite a broad proposition that the cancellation wasn't to do with the content of the speech.

MR BUTLER:

The response of Auckland Peace Action is motivated by the content of the speech and recall, your Honour, that's why I made the point in the opening remarks that there Auckland Peace Action wasn't the only one to call the two speakers by the political epithets that they did, "fascists", "old right", and the like. Lots of people had been in contact with RFAL, with Auckland Live, with the Council, and suchlike, to express their disquiet with the views that were going to be expressed at the event, and RFAL didn't change its mind. They just said: "Right, we will just engage with those people and respond." It was that health and safety concern. So there's a subtlety there, Sir. I see what you're saying in terms of the causation in the sense that, well, if the speakers weren't so provocative maybe they wouldn't have provoked the response that was made by Auckland Peace Action, I see that point, but that's not why we cancelled the event.

Professor Joseph made reference to, as we say, it's the reason that the event, it's clear when you read it, the reason the event was yanked in *Redeemed Church* was because the city council didn't like one of the speakers who's going to be there, and the messaging that that speaker was associated with, that's not what we are doing here, and also the reference that he took you to where there was a need to accommodate, the accommodation that was talked about there was accommodating ways of revisiting, potentially, who was going to be speaking at the event, and so what the Court was saying in that particular case was, well, you ought to have allowed some accommodation in order for a rejig of the line-up. But again that's not this case, the line-up was clear.

There was some reference to reviewability if Auckland cancelled and interfered, your Honours, do you remember that in the interaction you had with my learned friend Ms Anderson. Of course in that case the real target of any judicial review would, in all likelihood, be Auckland Council for exceeding its remit and interfering with improperly with the actions or the activities of RFA, but in any event of course we know from cases like *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) that if a

decision is made in bad faith that might ground an ability to judicially review that would not otherwise be allowed.

My learned friend Mr Hodder in his submissions made reference to *CREEDNZ* and *Tameside.* Your Honours, the context of those cases is just simply nowhere near what we're dealing with here. Those cases simply do no govern and it was an example, with respect, of the pick and mix approach that's a feature, I say, of the submissions that have been filed by the appellants in advance before you yesterday and today.

WINKELMANN CJ:
You're winding up are you Mr Butler?

MR BUTLER:
I am, yes, I'm coming now to the two last points. First of all, it's a point we made in our written submissions, but it's important that it be restated. It's all well and good for those who aren't stuck with the liability, if there were to be liability for something going wrong, to say you should proceed with an event that I want to participate in by way of having a ticket. It's different to be the person who has to make that particular decision, and I think that's part and parcel of the context which hasn't really come out. Really what we've heard from the appellants is an approach to this issue as if it is one that is capable of a right or a wrong answer. Correctness, we are told by Professor Joseph, and you're either right or you're wrong. But no factoring in of that context under the Health and Safety at Work Act at personal liability that cannot be insured for and which cannot be delegated to other persons, and your Honours will be familiar with that, I know, from litigation that's reached this court previously.

The last topic I wanted to talk about briefly was the modern media and what that might mean. It seems to me that that is indeed a highly relevant contextual factor on a going forward basis. If we look at quite a number of the older cases, the older cases were operating in an environment where your means of communicating with people were quite limited. So as an ordinary person, if you did control the newspapers you might be lucky if a letter to the

editor might be accepted. You would have very limited access to radio or television. You certainly couldn't have a film and just distribute it for everybody to see. You couldn't have your own private radio channel. You couldn't approach a company like Facebook and say to Facebook I know you've got two billion users, here's a target audience I want to communicate a message to, could you please do that for me for relatively modest costs, I know this personally having had some experience of it myself with our constitution ideas. The ease of it and the cost of it. So I think when you think about those sorts, that new context, we're operating in quite a new environment of expression and communication, and so therefore it seems to me that whereas in the past you might have said, well look, we need to bear a few broken bones and thwacks on the head for the greater good of freedom of expression so that messages can be conveyed, I just query whether that price in that way is one that needs to be paid in the same way in the modern context. I'm not saying that there isn't still opportunity and reason for meetings in public, but when considering the reasonableness of limits, and such like, it seems to me it is reasonable to have regard to the new communications landscape.

WINKELMANN CJ:
But not in the protest context, for instance, so it's all context specific?

MR BUTLER:
That's exactly right. It's all context specific. Correct your Honour. So a protest in person maybe more powerful than a protest online. It may be. Whereas communication of ideas, the difference between in person and online maybe much of a muchness. And I think when you're looking at some of those older cases, that's part of the context of understanding them that needs to be factored in.

Your Honours, they were the additional items I wanted to address. Was there anything I hadn't addressed that your Honours had wanted to raise with me?

WINKELMANN CJ:
No, thank you Mr Butler.

MR BUTLER:
I'll pass the baton to Mr Hancock. Thank you your Honours.

WINKELMANN CJ:
Mr Hancock?

MR HANCOCK:
Thank you your Honours, may it please the Court. Bill of Rights issues obviously have considerable resonance in this proceeding, and were described by the Court of Appeal as sitting at the heart of the appellants' claim, and the Court of Appeal also observed that the claim gave rise to novel issues regarding the law pertaining to freedom of expression in New Zealand, which of course is a fundamental right in a free and democratic society, albeit a right that's not absolute, and just to follow on from my learned friend Mr Butler's observations, the consideration of those issues, in particular the issues concerning a right to a platform, or perhaps conversely the right not to be deplatformed, as well as within the modern context of communications and media is particularly resonant and novel in this proceeding as well, of course, the issues relating to whether or not, or the extent to which the application in New Zealand of this heckler's veto concept applies.

So the Commission makes three principal submissions, which essentially follow the Court of Appeal findings. The first submission is that the decision by the respondents to cancel the venue hire contract constituted, in the particular circumstances of this case, a public function for the purposes of section 3(b) of the Bill of Rights Act.

The second submission is that the Bill of Rights rights of the appellants engaged are the rights to freedom of expression, but more specifically the right to receive information, a subset of the right to freedom of expression, and peaceful assembly, and for the purposes of this oral submission, and given

time constraints, I'm suggesting that I will just address the platform issue the extent to which the existence of alternative platforms relevant to determining whether the right to freedom of expression has, indeed, been limited.

Then the third submission that the Commission makes is that any limitation upon those rights must be considered by way of section 5 of the Bill of Rights Act including consideration of a heckler's veto. The approach taken in the United States is constitutionally distinct, and while it is informative, it is not applicable in the New Zealand context. So I will now address each of those issues in turn.

In respect of whether section 3(b) is engaged, the Commission relies extensively on the *Ransfield* judgment. Firstly, whether a function is public in a pure judicial review sense should not be determinative whether it's a public function for the purposes of the Bill of Rights Act. The Bill of Rights Act has wider application and that was one of the points that Justice Randerson identified where he stated at paragraph 69(c): "Whether the entity is amendable to judicial review is not necessarily decisive and some care needs to be taken in applying decisions from that context…" Part of the reason for that, of course, is that the human rights context is important, and *Ransfield* recognises the need for section 3(b), being a provision in a human rights enactment, to have a flexible and generous approach to interpretation.

So the impact of any function upon someone's rights under the Bill of Rights Act must be a significant factor when considering whether a decision is a public function for the purpose of section 3(b).

Now in this case the Commission recognises that the issue of section 3(b) is very finely balanced because of the commercial nature of the decision in question. However, the Commission would say that the wider context of the particular case, and that was the wider context recognised by the Court of Appeal in paragraph 11 of its judgment, the human rights implications as regards freedom of expression begin to resonate. So it's arguable that the cancellation itself engaged section 14 of the Bill of Rights Act through limiting

the ability of the appellants to be able to access a venue for the purpose of receiving information.

The venue itself was a publicly owned property that could be hired by the public for expressive activities and procurement is facilitated by way of contract with a public body that was established for that purpose.

So, taking that broader context into account, and applying the generous conceptual approach that Justice Randerson indicated should apply in relation to a section 3(b) calculation, this indicates that in this case, despite the very commercial orientation of the decision, that section 3(b) may be engaged.

Now the Commission acknowledges that the respondents seek to confine this matter to a contractual dispute and note that the Human Rights Act, of course, is available if this was purely a commercial matter by way of part 2 of the Human Rights Act. My friend, Mr Butler, has already addressed that.

The respondents also emphasise that RFAL is a charitable trust and suggest it's inappropriate for public law or BORA obligations to apply accordingly. However, what the Commission would say is that if those arguments succeed that would have implications for ensuring that public entities, such as local government authorities, are duly accountable for ensuring that their subsidiary entities meets their human rights and BORA obligations or it meets the human rights and BORA obligations of the primary entity being the local authority.

In this respect, the case that the appellants have introduced, *The Redeemed Christian Church of God v New Westminster* case, speaks to that. That case, at paragraph 91, the Court stated that in respect of the Canadian Charter, that the Charter, it's "clear that the *Charter* always applies to governmental actors," in that case the City, and referring to other cases, *Eldridge v British Columbia* [1997] 3 S.C.R 624, that "the *Charter* even applies to a government's private or commercial actions such as contractual relations." The Court then went on to note two further cases, *Douglas v Lavigne*, where the argument was made that even if entities in question were generally part of the government, the

Charter should not apply to the private or commercial arrangement they engage in, but noted that that contention was rejected by the Courts in Canada, “holding that when an entity is determined to be part of the fabric of government, the *Charter* will apply to all its activities, including those that might in other circumstances be thought of as ‘private’,” and it’s that term, “fabric of government”, that I think has resonance in this particular case.

RFAL can arguably be seen as part of the legislative and regulatory fabric that governs and enables the activities of local government, including the establishment of CCOs under the Local Government Act and their carrying out of business.

So the Commission’s submission to summarise in relation to section 3(b) is that it’s open to the Court to find that indeed the function that’s in question was delivered as part of an entity that constituted part of the fabric of local government and in doing that it’s the decision that it was, the contract related to a publicly owned facility in essence. So that concludes my submission on that particular point.

MS ANDERSON ADDRESSES THE COURT – TECHNICAL DIFFICUILTIES
(16:21:12)

MR HANCOCK:
So the second submission relates to the rights engaged, the rights of freedom of expression, specifically the right to a platform or a venue. Freedom of expression in and of itself does not imply freedom to express oneself wherever one pleases and confers no right to use private property as a forum for expression. However, that’s not necessarily the case for publicly owned venues or property, and in paragraph 25 of the Commission’s written submissions we refer to the case of *Committee for the Commonwealth of Canada* where Justice L’Heureux-Dubé noted the number of factors that could be taken into consideration as to whether or not a right to use of a public venue is engaged and they include things like traditional openness of such a property for expressive activity, whether the public is ordinarily admitted to the

property as of right, the compatibility of the property's purpose with such activity, the impact of the property's availability on the achievements of rights purposes, its symbolic significance and, finally, the availability of other public arenas in the vicinity, and that particular point flows on to the next part of the submission regarding the availability of alternative avenues.

Of course, like many of the cases that have been raised, that case is distinguishable from the one in front of us. That case, *The Committee for the Commonwealth of Canada*, regarded a public way which is the public had free access as of right. In this case we're talking about the Bruce Mason Centre, a theatre that was in this case only available for ticket-holders to access and not the general public.

Moving to this question of the availability of alternative avenues which I would submit is a very relevant consideration when considering whether the right to freedom of expression or the right to receive information as part of that right has been engaged. The Commission submits that the European and Canadian authorities point to the availability of alternative platforms as being relevant to whether the denial of a venue by a public entity constitutes a breach of freedom of expression and this is also relevant in the context of this particular case, given the venue hire in question was a for-profit commercial operator and its primary rationale for the event was to hire a venue in order to sell tickets and, one would imagine, make a profit from that undertaking.

So in the Canadian and European cases the fact of availability of alternative avenues has been given significant weight irrespective of whether those alternative avenues may diminish the effectiveness of the message, or the expression in question, and there's a couple of cases I've referred to in the written submissions, one is the *Animal Defenders International v United Kingdom* [2013] App no. 48876/08, ECHR (Grand Chamber) case, where the European Court of Human Rights placed significant weight on the fact in that case that the organisation had other modes of media that it could pursue to impart their opinion, such as newspaper, magazines, billboards and so on. Similarly in the case of *Baier v Alberta* [2007] 2 R.C.S; 2007 SCC 31 the

Supreme Court of Canada held that the diminished conveyance – sorry, diminished effectiveness in the conveyance of a message is not grounds for a breach and that the existence of alternative modes of expression is relevant and went on to find that a substantial interference rights is required.

WINKELMANN CJ:
What was that last case Mr Hancock?

MR HANCOCK:
That last case, your Honour, was *Baier v Alberta*, a Supreme Court of Canada case. It's a very fact scenario, it involved the right to a legislative platform in a sense. It regarded the right to stand for support and so the right to seek nomination and election and standing, if you like, in that case was the platform that was under contention. So a very different platform to the one that we're talking about. But in the case that I introduced by way of a memorandum, *Alberta March for Life Association v Edmonton (City)*, 2021 ABQB 802 is a much more recent Canadian case that considers *Baier v Alberta* and that issue of diminished effectiveness. That case, itself, involves the lighting of a bridge. Essentially the facts were the local authority had a system whereby it would light up its local bridge to celebrate different events, different types of significant milestones throughout the year, and a (**inaudible** 16:27:36) describes a pro-life or anti-abortion group applied to use, have a particular combination of lights lit up on the bridge to signify their movement, and a bit like this case initially there was agreement but in the end that the city council withheld, or declined to agree, and what's interesting about the *Alberta* decision is that the Court decided to look at that issue from, or at least this is my interpretation of it, looked at it from both a positive right perspective, so the right to express via the application to have the lights on, for the first part of the judgment, and then looked at it from the converse, from the negative rights in the second half, and both cases found that there was no interference with rights. But significantly the Court placed again considerable weight when looking at applying the *Baier v Alberta* approach on the availability of alternative platforms to the group in question, and the purpose of the platform is also relevant, and one of the concluding statements that the Court made in

that case was that there's no particular right to a soapbox. That in this case it was found that the purpose of the policy behind the hiring out of the lights facility was one of inclusion and they were concerned that the message that the pro-life group was wanting to demonstrate through the hiring of the lights was not consistent with that. However, there are cases where the necessity and proportionality of the limiting measure is relevant when looking at alternative avenues, in particular whether or not that has the effect of depriving an affected party of the only means or mode that's truly accessible to them, and there are two cases we refer to in written submissions.

One is the case of *TV Vest AS Rogaland Rensjonistparti v Norway* [2008] App no. 21132/05, ECHR (First Section) which regarded a policy banning political advertising which in itself had a legitimate aim which was to prevent wealthy parties dominating broadcasting coverage, but the way it was deployed in the circumstances was unnecessary due to its impact on smaller political parties and required the avenue to get their message out to potential voters.

We refer to another case, a Canadian case, *R v Guignard* [2002] 1 R.C.S; SCC 1, which regarded a person erecting signs, protesting about an insurance company, an in that case the Canadian Court found that the means of the individual expressor and the context of the mode of expression is relevant, particularly in circumstances where the limiting measure will deprive that person of the only means of expression that are truly accessible to him or her.

So to conclude, the existence of alternative avenues is something that is relevant. It's not always going to be determinative and particularly where a person does not have any other means or avenues available to them, the calculations is different, but it's certainly something that is relevant when considering whether the right to freedom of expression is indeed engaged.

WINKELMANN CJ:
Was that case called *Vanguard*?

MRHAN

Your Honour, sorry *R v Guignard*, so G-U-I-G-N-A-R-D.

WINKELMANN CJ:

Where is it in your submissions. I'm just finding it hard to keep up with you Mr Hancock. It would be helpful if you could tell us where you are in your submissions and then I'll be able to clap eyes on the cases.

MR HANCOCK:

Apologies your Honour. So that is at paragraph 28 of the written submissions.

WINKELMANN CJ:

Thank you.

MR BUTLER:

So I'll quickly move now to submissions on the heckler's veto concept. The heckler's veto itself concerns situations where a particular speaker is silenced because their speech invites opposition, disorder and violence, and it's concerned with the possibility that particular speech will be wrongfully excluded from the marketplace of ideas merely because it's offensive to some of its hearers. And as articulated by counsel for the appellants the proposition that the appellant is introducing is that the threat of violence in of itself is sufficient – is insufficient, I should say, to justify any limitation to freedom of expression.

Now international human rights law does recognise the concept in a general sense. I'm referring now to paragraphs 34 through 35 of our written submission. The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has found that unless a speaker is advocating incitement to discrimination, hostility or violence they are not to be silenced. The UN Human Rights Committee has also noted the duty on States parties to put in place effective measures to protect against attacks aimed at silencing others from exercising their right to freedom of expression, and as in the European Court of Human Rights jurisprudence,

there has been recognition that protesters should not be subject to this concept of the heckler's veto.

Now in relation to the United States jurisprudence, that is where much of the case law on heckler's veto has arisen, and it's arisen from a series of cases, many from the post-ward civil rights era that involve the use of criminal convictions or other coercive State power to restrain or punish a speaker because of the anticipated or actual hostile activity of opponents of their speech.

Most recent police conduct cases, such as the *Bible Believers v Wayne County* 805 F3d 228 (6th Cir 2015) case emphasise that the State may not silence the speaker as an expedient alternative to addressing the behaviour of others. Nonetheless, important to note that US case law does not – does allow, I should say, does allow for restrictions to be placed on speech, it allows the government to impose reasonable time, place and manner restrictions on speech, including for reasons such as public safety and in the *R.A.V v City of St. Paul, Minnesota* 505 U.S 377, 384 (1992) case the Supreme Court noted that a simplistic or all or nothing approach to first amendment protection is at odds with common sense and with the jurisprudence under the first amendment itself.

The contrasting US approach with the New Zealand context. The heckler's veto approach in the United States reflects the distinctive approach of its constitutional law. Broadly speaking, the approach in the US is to take certain speech or expression outside the category of protected speech where it is seen to be harmful or have no value. It's a more rigid approach than ours. It's more of a binary approach. Is it in or is it out? And as the Court of Appeal recognised that approach is not easily reconciled with the approach developed in New Zealand under section 5 of the Bill of Rights Act, as referred to in paragraph 101 to 105 of the Court of Appeal's judgment, referring to two decisions in particular, the decision of Justice L'Heureux-Dubé in *Committee for the Commonwealth of Canada* and also *UAlberta Pro-Life v Governors of the University of Alberta* 2020 ABCA 1. Those –

WINKELMANN CJ ADDRESSES COUNSEL – TECHNICAL DIFFICULTIES
(16:37:08)

WINKELMANN CJ:
Carry on Mr Hancock.

MR HANCOCK:
Thank you your Honour. Well the main point I think it's set out quite clearly, or it's articulated particularly precisely in the *UAlberta Pro-Life* case where the Court when comparing its approach to, noted that the starting point is once the rights are engaged, once it's recognised the rights are engaged, the analysis then moves into a section 5 analysis. A less rigid analysis, a less in or out sort of analysis, a balancing approach which enables the proportionality approach to be, or reflected proportionality approach, that is indeed prescribed by the International Covenant on Civil and Political Rights, and as noted in our submission at paragraph 45, when it comes to considering limitation of rights under section 5 then the framework of the covenant is relevant and the UN Human Rights Committee has found that the principles of legality, proportionality and necessity underpin any analysis as to whether or not a right has been limited, and it's our submission that that approach is relevant when considering this issue of the test.

In the Court of Appeal decision the Court of Appeal held that a sort of *Hansen* analysis or an *Oakes* approach was not applicable to an administrative decision, referring to the approach in *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648. The *Redeemed Christian Church* case also confirmed the *Doré* proportionality test, and paragraph 110 of the *Redeemed Christian Church* case the Court noted that they are of the view that analytical harmony, that's their term, can be found through applying the criteria of minimal impairment and the proportionate balancing of *Charter* protections viewed through the lens of reasonableness. So this chimes with a more flexible approach that can be deployed in an administrative context, but the Commission's submissions would be that where the BORA is engaged, even in the administrative context,

that those principles, those ICCPR principles of legality, proportionality and necessity should still be identifiable, and indeed could capture the issues such as cost and other factors that have already been identified by the Court as relevant potentially to this case. So that concludes my submissions, your Honours, if you have any questions?

WINKELMANN CJ:
Thank you Mr Hancock. Is Mr Hodder replying first or is it Mr Butler, or Ms Anderson?

MS ANDERSON:
It's Mr Butler who is going to reply.

MR HODDER QC:
Mr Butler, when we can hear him.

MS ANDERSON:
Yes, but we can't hear you yet.

MR BUTLER:
Sorry, I beg your pardon, it's two buttons to get in. So I'll reply very briefly to Mr Hancock. I particularly wanted to focus on the section 3(b) argument your Honours.

WINKELMANN CJ:
Yes.

MR BUTLER:
So just very briefly. One of the features of the argument advanced by Mr Hancock, shared I would say by my learned friends, is what I would refer to as a bootstrap argument. So you should find that section 3(b) is engaged because that means we can apply section 14 BORA to the Act in issue. I say that's the wrong way of analysing the issue. You've got to look at the nature of the Act first before deciding whether BORA is even engaged. When he

made that submission he said, information engages section 14 BORA that's why section 3(b) should apply and he said, we're talking about publicly owned property. Again I think a really important– and then he referred a little bit later to the Grace Chapel decision where the relevant city was the city of New Westminster City in British Columbia. The point we've been trying to make quite strongly in relation to the minutiae of this particular case is that the properties that have been vested in RFAL, it's clause 14 of the relevant vesting order, are vested in RAFL in its capacity as trustee to be held by it under the terms of the RFA trust deed. That means cancellers cannot tell RAFL how particular facilities should be used. Those facilities are not publicly owned in that sense, so it's a complete point of contrast that the Grace Chapel case, where it's apparent that decisions were made as a result of pressure from councillors, and that councillors were the ones who were participating in the response in that particular case. That is not this case and our point is that Parliament, having made the decision that these facilities were to be not vested in council anymore, but were to be vested in a trustee in accordance with the terms of a trust deed, has taken them out of the reach of councillors and that political process and converted them into a charitable trust to serve the public benefit. So we say that they're a very important point that needs to be understood when considering whether or not those foreign cases are applicable here.

In terms of the alternative modes, I won't add anything to what you've heard from my friend. In terms of the heckler's veto I just wish to agree with what he says about the US jurisprudence. The US jurisprudence is not applicable in New Zealand. The whole approach is a definitional approach to freedom of expression. Once you fall within the protection of the first amendment, basically there is a very narrow and limited ability to limit the rights. It's a very different framework to the one that applies under the Canadian Charter, under the European Convention and indeed the New Zealand Bill of Rights Act.

Your Honour, they were just the principal points, I'm just conscious of time, that I wanted to respond on, thank you.

WINKELMANN CJ:

Thank you Mr Butler. Mr Hodder?

MR HODDER QC:

Thank you your Honour. So I'm responding principally to counsel for RAFL, there's not a lot I need or want to say about the submissions from the Intervener. Can I start by saying that underpinning this case is the idea that local government is important, and much of it is conducted through CCOs, and RFAL/RFA are a CCO structure. They exist for public purposes, essentially the purposes of Auckland residents and visitors. So all of that, we say, becomes the central reason why this case is important about governmental versus private considerations. This is a quintessential local government exercise being undertaken by RAFL, and the question is whether or not there is a form of accountability through either the common law judicial review process, or through the Bill of Rights Act, and there are a range of matters which you obviously heard about in relation to that. One of the, I don't know that I need to restate my position this morning, but if I can go by what was said by my learned friend in his introduction, that is to say Mr Butler, that we are insisting that the event be put on at all costs. I hope I made it clear this morning that wasn't the position.

Then there was also one of the last things – sorry, one of the first things that was said by my learned friend Ms Anderson was to say, this is not a case about heckler's vetoes and cancel culture. I have to say that that appears to be a different case to the case we think we're running, or arguing about. What we have here is a spectacularly successful example of a heckler's veto. Two emails and the speakers were gone from that particular process, and the implications of that, we submit, are profound, and that was, in effect, acknowledged in the Court of Appeal, didn't particularly take them anywhere.

What I want to say about reviewability, in our submission because of the local government context the statutory processes of the Local Government Act gives rise to Auckland Council Act, gives rise to establishing order. The fact that there is a trust in there doesn't change anything, in our respectful

submission, if one applies the analysis from *Phipps*, and I was a little surprised to hear that described as being merely obiter. In our submission it's well-established as a standard approach to these issues.

There's also the question about asking why these assets are held the way they are, and why they, indeed, exist. They exist because they provide community facilities. And why are they being held in this way? Well they're held in a way which is convenient for the Council's purposes, and I reiterate the references I gave to the Court in relation to the new material that was attached to Mr Cumin's updating affidavit, which indicates that we say beyond any question. I mention again that in our hand up we referred at paragraph 2.5 we referred to our Court of Appeal submissions, which are in the materials at 101.0229, and at pages 238 and following we set out in some detail what the position is, but in particular as a substantive CCO then this particular body is required to comply with and work to the Auckland Council's long-term plan. It has no relationship to an independent private agency.

Now at various points, we phase in and out of what actually happened. I don't want to take too much time in relation to that, but can I invite the Court when it has an opportunity, if it needs to, to go back to the transcript of a conversation that took place on the 6th of July, that's at 304.0776, and the message is all pretty much on that one page. Mr Macrae is doing the talking. When he's asked a question about, well what else, can this be discussed (**inaudible** 16:49:45) finished conversation. That wouldn't be the impression one got listening to my learned friend.

In relation to that also there is a couple of references to the fact that there was –

WILLIAM YOUNG J:
Sorry Mr Hodder, was there any explanation from Mr Macrae of a comment, so we've had some earlier conversations with the police. Is that addressed in his affidavit?

MR HODDER QC:

Sorry, the first part of what you said was a bit obscure to us your Honour?

WILLIAM YOUNG J:

Sorry, so in the passage we've got on the screen, Mr Macrae says: "So we've talked with our security people here. We've had some early conversations with the police." Now as I understand it, there hadn't been any conversations with the police.

MR HODDER QC:

That's how we understand it too your Honour. That sounded as if it were a gilding of the lily, shall we put it.

WILLIAM YOUNG J:

So is there any explanation for that remark in Mr Macrae's affidavit?

MR HODDER QC:

No your Honour. In terms of transcripts there was, as I mentioned, raised a number of times, that there were any number of available venues for RAFL. Can I draw attention to the transcript of a 12 July conversation between Mr Pellowe and Mr Crighton. That is to be found at 304.0790, well covers actually .0788 to .0790. It also reflects Mr Pellowe's second, I think it is, affidavit at paragraphs 23 and 24. What he was told was that the Council controls most of the venues in Auckland and others are related to the Council, and reference was made to a venue which was controlled by a trust, but because of its proximity or its relationship with the Council, it was unlikely that it would be available in the circumstances that arose. So clearly there were other venues, private venues which some progress was made with by Axiomatic after the plug was pulled in relation to the Bruce Mason Centre, but none of that actually came to pass, and as that conversation between Crighton for RAFL and his comments, Mr Pellowe is asking questions, that it was going to be pretty unrealistic to find something.

With respect, in terms of the positive and negative rights, without wishing to display my lack of familiarity with some of the finer points of rights jurisprudence, I have to say that does sound more semantic than useful. The position that we are contending for is a more general public law one, and at the risk of going back, yet again, to paragraph 37 of our pleading, what we are saying is that RAFL, which is what matters for present purposes, is subject to public law accountabilities, by way of judicial review and by way of the Bill of Rights Act, and having got assets, which are to be used for public discourse in some form or other, whether it's theatre or performance or otherwise, irrespective of whether a ticket is sold or not, then we say that it is subject to public law obligations, and public law obligations do include the matters that are fundamental rights that are reflected in common law and in the Bill of Rights Act, and the proposition we're making is, been described at various stages as a process right, but we have drawn it from an authority on unreasonableness and say that it's really about unreasonableness, classic judicial review grounds, but it's unreasonable to proceed to take an action until such time as there has been a proper informed evidence and proper investigation, and that creates the difficulty, that's the factual difficulty in this case, because we don't get past that first *CREEDNZ* and *Tameside* ground of unreasonableness. My learned friend says those cases are different. Well, again, we must respectfully disagree. That case and the propositions it is laid down for, particular in *CREEDNZ*, appear to us to be a general application as to what is to be done by a decision-maker in terms of making itself fully informed, and if it isn't fully informed, it's not making a rational decision. If it's not making a rational decision, the decision is unlawful. This is elementary public law and we weren't asking for any more than that.

WINKELMANN CJ:

Isn't the problem that you have, though, that we don't know what we don't know so we can't say that there was relevant information that wasn't taken into account, which maybe a question about the process that this has come before the Court, and in that case, therefore, you are left with a process point.

MR HODDER QC:

Well we would respectfully say, your Honour, that the we don't know what we don't know point counts the other way. Had there been an investigation we would know what wasn't known. That was what wasn't done, and we say it's not up to us to speculate what there might have been which wasn't looked for. What was, the onus was on the party that was exercising its powers, we say public powers, was to make that investigation first, so we did know what was to be known or not. So it maybe that the point can be taken both ways, but we respectfully say it follows in the direction that I'm suggesting.

Having got to that point then we have the difficulty about dealing with a more, the consequential issues that would follow had there been a proper investigation about addressing the Court helpfully in relation to a was the substantive decision unreasonable or irrational or perverse, or was it disproportionate in terms of the rights analysis, and because we don't have the information we can't take that very far, and while that's unhelpful, we say that if ones goes from not having got the material to making – and before going any further makes a decision, it is by definition, we would say, irrational and disproportionate. Now we can call that process if we like but in the end we say it turns into either irrationality or a breach of the Bill of Rights Act.

And a couple of points, there's an attempt, in our submission, or we perceived the submission, to distinguish this from a town hall case, if I can use that as a general concept. In our submission that doesn't follow. Town halls can be hired as well as anywhere else, and they probably are all around the place, because there are some costs that have to be met, and they're not being handed out completely free. So if that's the case then the only thing that distinguishes a town hall might be its sizes or the kind of performance that might be most usefully accommodated in it. But the essential core factors are that it is a publicly owned asset, in the real substantive sense, it's publicly controlled and it is used for public discourse of various kinds including artistic as well as "political" performances.

To some extent I suppose, in terms of one aspect that my learned friend Mr Buter's submissions that came close to raising the issue of standing, which we hadn't understood to be an issue here. But if there is a public function being performed, which we contend is the case, and is not able to be policed by those who do have standing, irrespective of the relationship they have, how direct the relationship is they have with the decision-maker, then the foundations of the freedoms that are at issue in this case are extremely hollow and at risk.

In relation to that I perhaps should explain the presumption point that appears towards the front of our submissions, 1.2, the point that I was seeking to make in that phrase was that if somebody goes along with the intent of preventing another group from being able to use a platform, the proposition is that that is presumptively unlawful, and if there I somebody abetting that, which is effectively what happens with RAFL in our circumstances, that also should be regarded as presumptively unlawful and the consequences that may follow from that.

GLAZEBROOK J:
You say unlawful, under what would that be unlawful?

MR HODDER QC:
In terms of what happens with the, those who are seeking by means, including violent means, to disrupt use of a –

GLAZEBROOK J:
No, leave violent, you said to prevent someone from speaking. So its unlawful for somebody to heckle, to shout people down, because that's not what I understand to be the case, but there might be –

WILLIAM YOUNG J:
Sorry – could be unlawful to threaten disruption with a view to adducing someone to cancel a contract. Unlawful interference with –

GLAZEBROOK J:
Possibly except I don't know that that was what Mr Hodder was referring to.

MR HODDER QC:
Your Honour – sorry?

GLAZEBROOK J:
Well maybe but…

MR HODDER QC:
I did have in mind the idea that this was an attempt to use violence, or the threat of violence to shut something down.

GLAZEBROOK J:
Okay, well I definitely understand that, thank you.

MR HODDER QC:
A few brief points beyond that. In case of the case of *D v Police* in section 5 of BORA, as we apprehend that case it's an interpretation of a Sentencing Act exercise undertaken by reference to section 6. It does not directly engage section 5, although a balancing exercise is undertaken within the framework of the Sentencing Act itself. We don't know it takes us very far beyond that.

In terms of the *Doré* decision, our impression of that case is that while it incorporates a degree of flexibility into the analysis, it is quite determined not to weaken the analysis, but that seems to have been an implication, or at least one that we took from my learned friend's submissions.

In terms of the question of hindsight, our suggestion there is that in cases such as *Miss Behavin'* and *Carlile*, the question of whether or not there has been proportional and a proper decision, is one that is for the Court to make, and the Court is entitled to use whatever information it has access to. It doesn't have to put itself exactly in the shoes of the decision-maker at the time the decision was made.

WINKELMANN CJ:

So on that basis we would be entitled to take into account the disruption that did take place?

MR HODDER QC:

Did take place where your Honour?

WINKELMANN CJ:

In relation to Melbourne.

MR HODDER QC:

No your Honour. We'd say the position needs to be focused on what happened here.

WINKELMANN CJ:

So that's all the information, isn't it? If it had gone on longer they would've had that additional information.

MR HODDER QC:

We say in terms of what happened to this particular venue, this particular location, what the police position would have been, what Peace Action could have mustered, we don't know that. We don't really know very much about Melbourne either.

ELLEN FRANCE J:

Well I don't understand, then, your submission if we can use whatever information we have. We could presumably look at what did happen in relation to the PowerStation.

MR HODDER QC:

I guess, your Honour, I'm making a submission that in terms of what, in terms of making an assessment, then the Court is entitled to have regard to information that goes to the venue that's involved in the situation we're talking about, the cancellation of a venue. Extrapolation from a distant situation in

which we don't have full material is apt to mislead and dangerous. But it's really, what I'm just trying to point is that the idea of correctness doesn't avoid, or it doesn't deny the ability of some hindsight to be used. The question then becomes what is relevant to a hindsight analysis, and that requires good evidence and, in our submission, there simply isn't any.

In terms of that correctness analysis, there was a discussion about what all that means. In our submission what really is required is what might be described as *Carlile* correctness, the passage from Lord Neuberger's speech in particular that you were taken to this morning. The general proposition is that the Court does look for a sound answer, but if it thinks that there has been a sound answer given by the decision-maker of first instance as it were, and it's entitled to inclined, will be inclined to give that considerable weight.

I guess I can't resist responding to my learned friend Mr Butler's position about modern media. I understood him to say that it felt possible to query whether it's necessary that a broken bone or two can't be sacrificed in the interest of free speech. I think that's kind of a not entirely inaccurate paraphrase, if I can put it that way, what he said, and with respect there's no basis for that proposition because the implication was, we can give up on demonstrations, we don't have to be so protective about those, they just cause too much trouble, and in our submission, as a general proposition that is unsound.

The last matter I think I mentioned is my learned friend Mr Hancock for the Commission talked about whether these were available to the public or they were only available to ticket-holders, with the ticket-holders – sorry, the tickets were available to the public, and it goes to the question mark about whether paying for tickets, and this was for a full profit exercise, is a relevant matter, and we respectfully submit it isn't, and perhaps a possible useful example, always a risk with examples, is the case of *Ward v Quebec* where there was a professional comedian who used mockery of a disabled person as part of something. The possibility that that person was performing at a place where there were, or was likely to perform at a place where there were tickets being

sold, wouldn't change the fact that it's expressive content which is protected and that freedom of expression is engaged.

So your Honours, the appellants are grateful for the hearing you have given us. They do submit that this is an important case. They do submit that the implications of the Court of Appeal's judgment are fraught for what really is meant by freedom of expression and freedom of assembly in this country, and we leave our submissions at that point. Thank you.

WINKELMANN CJ:
Thank you Mr Hodder. I thank all counsel and we will take some time to consider our decision and let you have it in due course.

COURT ADJOURNS: 5.05 PM