IN THE SUPREME COURT OF NEW ZEALAND **SC 80/2015**
[2015] NZSC 196

Wellington

BETWEEN	**ALAN GREER** Applicant
AND	**RAY SMITH** First Respondent
AND	**JACK HARRISON** Second Respondent

APPLICATION FOR RECALL OF JUDGMENT

22 December 2015

Filed by: Vince Siemer
27 Clansman Terrace
Gulf Harbour
Email: vsiemer@hotmail.com

To the Registrar of the SUPREME COURT

I, **Vince Siemer,** apply for Recall of this Court's judgment SC80/2015 [2015] NZSC 196 (**"the Judgment"**)

UPON THE GROUNDS:

1. The Judgment unlawfully created law in negating a statutory jurisdiction to review private chambers rulings of single judges of the Supreme Court, doing so:
    a. Without notice, hearing, legal submissions or legal support for its edict,
    b. On a legal question not legitimately before the Court.

    Resulting in a finding which failed to consider relevant legislation which supported the jurisdiction the Judgment negated.

2. The power exercised by the Supreme Court judges – i.e. convening a fully constituted court to determine, privately in chambers, for what must be an ex parte action as there is no mention of the first and second respondents, a point of law which was not before the court but introduced by the judges themselves without notice or public hearing – raises significant Constitutional and Rule of Law considerations which were clearly not addressed but need to be fully addressed.

3. In countries with like legal systems, an approach – as occurred here – of all judges on the highest court in the land convening un-minuted private conferences without notice or hearing to make law changes on issues not before the Courts is unlawful.

4. The result was Supreme Court judges creating new rights-limiting law outside the lawful constraints of due process and natural justice.

PARTICULARS IN SUPPORT

5. The affidavit of Vincent Ross Siemer filed in support confirms jurisdiction of judges to review chambers orders of single judges of the Supreme Court was not a question before the Court, that Mr Siemer was not heard on the issue despite the Judgment recording on the intituling that he was, that no notice was given by the Court, that the Court's action was ex parte and that no legal submissions to the Court were allowed on the legal question determined by the Judgment.

6. The Judgment premised its finding that no statutory jurisdiction exists to review orders made by single judges privately in chambers on an alleged *absence* of statutory jurisdiction in *only two* statutes:[1]

> "The (Supreme Court) Act and (Supreme Court) Rules do not explicitly address access to Court records, who makes decisions as to such access and the review of such decisions."

7. The failure of one Act to "explicitly address access to Court records" does not act as a lawful negation of the Court's jurisdiction concerning rights of public access. This cursory approach was woefully inadequate in addition to procedurally bereft.

8. The judgment fatally failed to consider legislation of clear relevance, thereby compelling its recall under the guiding precedent for recall *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (NZSC) which advocated recall where:

> "[F]irst, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritive decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled."

9. The significant lapses by this Court included its failure to independently consider relevant law in circumstances where it precluded legal submissions from anyone in support or opposition. Some clearly relevant law not considered includes:

   9.1 A hearing by five judges which is essentially unappealable ought not to be embarked upon without a contradictor, let alone without an applicant.

   9.2 The **Public Records Act 2005** whose "Purpose" mandated "judicial branches"[2] comply under Section 3:

> **"(c) to enable the Government to be held accountable by—**
> (i) ensuring that full and accurate records of the affairs of central and local government are created and maintained; and
> (ii) **providing for** the preservation of, and **public access to, records of long-term value**; and
> (d) to enhance public confidence in the integrity of public records and local authority records"
> [**emphasis** added]

   9.3 The **New Zealand Bill of Rights Act 1990, Section 14**, whose guarantee to seek and impart public court information was simply not considered, and is

[1] Paragraph [5](b) of Judgment
[2] Section 4 of the Public Records Act 2005

therefore curtailed by the Judgment's creation of a new jurisdictional impediment, and **Section 6** which requires this particular statute be preferred in the Courts' determination of rights:

> 14. *Freedom of expression*—
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.
> 16. *Interpretation consistent with Bill of Rights to be preferred*—
> "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

9.4 **The Supreme Court Act 2003, section 28(3)** which provides an unequivocal statutory right of review against single judge rulings made in chambers.

> "28(3) The Judges of the Supreme Court who together have jurisdiction to hear and determine a proceeding may—
> (a) discharge or vary an order or direction made or given under subsection (1);
>
> Subsection (1) reads – "In a proceeding before the Supreme Court, any permanent Judge of the Court may make any interlocutory orders and give any interlocutory directions the Judge thinks fit (other than an order or direction that determines the proceeding or disposes of a question or issue that is before the Court in the proceeding)."

10. None of these relevant laws were considered or applied as they must be. This failure is particularly troubling in respect to the legislative right of review contained in Section 28(3)(a) of the Supreme Court Act 2003 because the full Supreme Court bench had to label O'Regan J's chambers ruling as something different from what O'Regan claimed it to be (i.e. an interlocutory ruling) in order to evade this legislation provision which specifically binds member of the Court.

11. Moreover, the Court's attempt to apply its ruling ***Marfart v Television New Zealand Limited [2006] NZSC 33*** as decisive on the issue of limiting public access to Supreme Court public records – actually quoting ***"In Mafart v Television New Zealand this Court was required to address the role of judges in relation to Court records."***[3] – is manifestly and undoubtedly incorrect in respect to court record access. The proof of this is confirmed in the first sentence of the *Marfart* judgment which states the single question before the Supreme Court was whether jurisdiction existed to appeal to the Court of Appeal:

[3] Judgment, Paragraph [7]

> **"[1] Does the Court of Appeal have jurisdiction to hear an appeal from a High Court determination of an application under the *Criminal Proceedings (Search of Court Records) Rules 1974*? <u>That is the single question addressed on the present appeal</u>."**
>
> ***This Court's answer to this question was "yes".***
>
> **[emphasis given and <u>stressed</u>]**

12. So when the Judgment declared at **[8]** ***"The current position in the Supreme Court in relation to access to court records corresponds to that which obtained in the High Court before search rules were adopted in 1973 and 1974"*** and admitted further their Registrar is not permitted to allow public record access despite this being the customary regime prior to 1973 and 1974 and the statutory regime thereafter, the significance of the Supreme Court choosing to operate in New Zealand's legal framework of 43 years in the past becomes crystal clear – The Court thereby sidesteps relevant statutes passed in 1973, 1974, 1990, 2003 and 2005 which conflict with their finding no jurisdiction exists to challenge their private chambers rulings preventing access to public records.

13. Perhaps more dangerous, the Judgment as it stands falsely represents that the Supreme Court operates similar to the High Court and Court of Appeal when considering access requests to the public court record:

> "[10] (c) There being no rules of court directly applicable, decisions on access will be guided by the rules which apply to access to High Court and Court of Appeal court records."

14. Nothing could be further from the true factual and legal position, as the table below shows the procedures for seeking access to the public record at the High Court versus the Supreme Court of New Zealand *if the judgment is allowed to stand*:

HIGH COURT	**SUPREME COURT**
Registrar decides request for public access to the court record in the first instance	A single judge sitting alone in chambers privately decides off the record any application to access the public record
A Judge reviews any appeal against the Registrar's refusal to allow access to the record	*NO REVIEW OR APPEAL AGAINST A DENIAL*
Further appeal to the Court of Appeal (confirmed to exist by *Marfart v Television New Zealand Limited [2006] NZSC 33)*	
Further right to appeal for leave to the Supreme Court	

DOES THE SUPREME COURT OF NEW ZEALAND HAVE JURISDICTION TO CONVENE A FULL BENCH FOR THE PURPOSE OF PRIVATELY CREATING NEW LAW ON ITS OWN MOTION AND WHAT IS THE LAWFUL SOURCE OF THIS POWER IF IT DOES EXIST?

15. While New Zealand does not have a written Constitution, it is generally accepted the separation of powers doctrine provides the legislature with sole authority to pass new law, and then only after public debate, and the judiciary's role is limited to applying the law, which often involves interpretation, again in a publicly accessible and open process.

16. The *Ministry of Justice* promotes on its official website that *"New Zealand's Constitution" "is the foundation of our legal system".*[4]

17. The rule of law is said to underpin our Constitution. Again from the official Justice website:

> "The rule of law also forms a significant part of the New Zealand constitution. The principles of the rule of law are not easily defined, but encompass ideas such as:
> * The powers exercised by parliamentarians and officials are based on legal authority;
> * The law should have safeguards against the abuse of wide discretionary powers;

18. The Appellant can find no support in law for the 5 permanent members of the Supreme Court of New Zealand to exercise such wide discretionary powers without lawful authority to convene court in private to create new law on its own motion, without any public knowledge, input, or scrutiny. Noticeably the mainstream media are also excluded. This is clearly not permissible where the separation of powers doctrine is accepted, principles of open justice exist, and the Rule of Law has some bearing on judicial conduct.

19. If the Appellant is wrong in asserting the five judges on New Zealand's highest court have no jurisdiction to create law on their own motion in a secret court where the public and media are excluded, and legal submissions are not permitted from anyone, it is vitally important to democratic and legal principles for the Judgment to be recalled simply for this Court to address:

---

[4] www.justice.govt.nz, **New Zealand's Constitution page**

a. Under what power or authority is the full Supreme Court able to raise and determine new points of law or change the law on their own motion, in private, without notice to, or hearing from, the parties, the government or anyone?
b. Under what power or authority is the full Supreme Court able to keep such sittings resulting in issuance of new legal edicts secret?
c. Once determined to convene to create new law on their own motion, what are the relevant legal principles which allow for preventing notice to the public until after the private motion is declared new law?
d. What, if any, consideration was given to such a course of action when it must have been apparent that such a course negated any appeal rights, was unilateral and a breach of the principles of open justice?

20. Every Judge of this Court has repeatedly represented to Parliament that they conduct Court business in public and by way of a "high visibility process":[5]

> *"Moreover the judicial process is a high visibility process: hearings are conducted in public and judges must give reasons for their decisions, which will be subject to appeal. These features of the judicial process impose an important discipline on judges and provide an effective protection against arbitrary or biased decisions."*

21. The common law imperative of publicly available court decisions providing an important discipline and protection against judicial misconduct is also a recurrent retort promoted with force by every judge of this Court whenever legislation is proposed to make the judiciary accountable:[6]

> *"The openness of the judicial process reduces the prospect of misconduct and of it going unremarked and unchecked. "Sunshine is the best disinfectant."*

22. It is not possible to reconcile a full bench of the Supreme Court convening secretly to consider and create new law on its own motion with Constitutional limitations on their authority. Nor is it possible to reconcile Judges of this Courts representations to Parliament with their actual conduct here.

.....
Vince Siemer

[5] REGISTER OF PECUNIARY INTERESTS OF JUDGES BILL - SUBMISSION ON BEHALF OF THE JUDICIARY, 30 August 2012
[6] SUBMISSION OF THE JUDGES OF THE HIGH COURT AND COURT OF APPEAL ON THE JUDICIAL MATTERS BILL, 8 December 2003 Note: These Court of Appeal Judges were then appointed to the newly formed Supreme Court of New Zealand