IN THE SUPREME COURT OF NEW ZEALAND **SC MA 6/2021**
NZSC[2021] NZSC 50

I TE KŌTI MANA NUI

In the matter of: An application by non-party Vincent Ross Siemer to rescind or vary suppression order

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Application for recall of Judgment SC MA 6/2021 NZSC [2021] NZSC 50

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The Non-Party Applicant seeks recall of Judgment MA 6/2021 [2021] NZSC 50 ("the Judgment");

On the Grounds

1. The Judgment improperly dismissed application merits warranting recission of a suppression order on "practical difficulties"[1] grounds, where recission or variation was unopposed[2] and the Attorney-General representing the Court respondent took a neutral position. In short, the Judgment found the judges' inability or unwillingness to identify what, if anything, in the suppressed judgment[3] posed a risk to fair trial rights, perversely warranted suppression of that judgment's very existence.[4]

2. In breach of natural justice, the Judgment decreed NZ judges' powers to order suppression against the world have no limitations, without considering any opposing view to this Court's stated preference that this power be inherently unlimited. Importantly, the *unconsidered* views included this Court's recent judgments *Erceg v Erceg [2016] NZSC 135* and *Rogers v TVNZ Ltd [2007] NZSC 91,* both of which mandated open justice be the starting point and primary consideration when ordering suppression against the world. *Erceg* underscored this requirement with this succinct condemnation by the Privy Council of New Zealand's longstanding, sordid approach to suppressing publication well before s199(c) of the Criminal Procedure Act 2011 sought to limit the powers of suppression the Judgment mocked:[5]

> "In 2004, the Privy Council concluded in *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* that there was no power at common law to make orders effective against the general public which sought to postpone the publication of reports of proceedings in open court – such a power could be conferred only by legislation. The Privy Council did accept, however, that a court could properly order, for example, that a particular witness give evidence under a pseudonym rather than under the witness's proper name; if a member of the public then published the witness's proper name, that person might well commit a contempt of court. This would not be because the person was bound by the court's order but because he or she interfered with the proper administration of justice. In their judgment, the Privy Council considered the decision of the New Zealand Court of Appeal in *Taylor v Attorney General*, where the Court held that the courts had the inherent power to make non-publication orders in proceedings heard in open court that were effective against the general public. The Privy Council concluded that the decision was inconsistent with other Commonwealth authorities and was not soundly based."
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> **[footnotes omitted]**

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[1] At [13]
[2] Billington QC for the appellant did oppose on the procedural ground the Supreme Court of New Zealand lacked jurisdiction over its own processes and rulings but, as a preliminary question, this argument was rejected as wrong.
[3] *S & M v Vector & the District Court* SC58/2019 [2020] NZSC 97
[4] To this day, the subject Judgment, issued last year, still does not exist on the Courts of New Zealand official website.
[5] *Erceg* at [4]

3. The Applicant submits with force that this authority does not exist for show and the convenience of judges, only to be relied upon when they choose *not* to suppress judgment publication.

4. The Judgment dismissed the public's right to receive and share public court information on the unlawful ground of "convenience"[6], and also improperly curtailed this basic civil right on the irrelevant ground suppression is temporary (approximately two years in this case).

5. While the Judgment expanded the Courts' powers to order total suppression against the world, it failed in law:

   5.1 To address that its current suppression order against the World at [94] of SC 58/2019 [2020] NZSC 97 was unreasoned as to what within this appeal judgment – issued three appellate levels above the trial court – might pose threatening to fair trial rights in a prosecution almost certain to be held before judge-alone trial three courts below.

   5.2 To weigh the substantial public interest in this private prosecution commenced by New Zealand's largest utility against a contractor, and where the Court itself is a respondent and represented by the Attorney-General.

   5.3 To consider or apply in any fashion its own *Erceg* and *Rogers* mandates that Court's weigh open justice and publication as significant hurdles to suppression orders, particularly non-targeted blanket suppression orders such as this case.

COMMON RELEVANT FACTS

6. There exists no reasoned suppression order ***"prohibiting publication of the judgment and any part of the proceedings in the news media or on the internet or other publicly available database until final disposition of the trial"*** – only one sentence in paragraph [94] of SC58/2019 [2020] NZSC 97 that states total suppression is "for fair trial reasons".

7. The public interest in the appeal judgment is extraordinary, as it concerns a private prosecution commenced by New Zealand's largest utility against one of its contractors, where the District Court is a respondent, the Attorney-General is appearing and the appeal determined legal rights that impact all private prosecutions in New Zealand.

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[6] The Judgment asserts judges found "practical difficulties" to redacting judgment SC58/2019 [2020] NZSC 97 to meet its suppression aim, while the chart herein shows few of that Judgment's 159 paragraphs contain any threat to fair trial rights.

8. No party supported the Judgment's decision to uphold the suppression order in its current form. Continued anonymisation of the appellants' names is not the subject of challenge.

9. No party was heard on the Judgment's novel determination that 2011 statute defining the extent of New Zealand judges' powers to suppress public information on "fair trial" bases does not limit judges' "inherent" powers to suppress anything or everything.

10. Acting in private, the Supreme Court considered no opposing interpretation to its parochial and unilateral view that laws codifying powers of suppression in no way limit judges' powers to suppress any information they choose to suppress.

SUMMARY OF SUPPORT FOR RECALL

11. It is submitted to be elementary that this Court had an obligation to hear opposing views on whether recent codification of law[7] defines judges' powers to suppress public court information in accord with a plain reading of the statute. Acting on its own volition and in private to conclude judges can suppress public court information as they wish evaded all views and laws that conflict with this Court's narrow approach and insular conclusion (including, as shown above, reasoned rulings of the Privy Council and other Commonwealth countries).

12. In this case, Dr Francisc Deliu was denied the right to produce evidence that suppression in this case has harmed him in another extant private prosecution, demonstrating blanket suppression at New Zealand's highest court is not simply an assault on freedom of expression and law as practiced in Commonwealth countries, but to due process itself.

13. And this is not an isolated occurrence. The Applicant has another application before this Court challenging its total suppression of a more recent judgment, [2021] NZSC 11.

14. The Judgment confirms this Court intentionally determined to hear debate only from its members, after clearly understanding others wished to present cogent law that conflicted with the full bench's inward-looking view.

15. The applicant has a copy of the judgment[8] - the very existence of which this Court has prohibited the public from becoming aware. It is submitted that nothing in this September

[7] Section 199c of the Criminal Procedure Act 2011
[8] SC58/2019 [2020] NZSC 97

2020 judgment poses a threat to fair trial rights. To the contrary, its reasoning supports the importance of the public's right to know. For example, paragraph [23].

16. The applicant has conducted an analysis of the judgment, categorising the information contained within it by topic and paragraph. This analysis appears below. It reveals that the appellants' names had already been anonymised by a separate suppression order and there is no mention of them by name anywhere in that judgment. Only paragraphs [139] to [159] contain information contesting prosecution specifics or evidence. It is submitted nothing else in this judgment could unfairly influence a jury empanelled to determine the charges.

JUDGMENT TOPICS	General appeal info	Result findings	Majority's approach to legal questions	Prosecution background	Litigation background	Relevant Law	Legal arguments	Court's opinion	Minority's approach to legal questions
Paragraphs	Intitulin g page [8], [9]	[1],[92],[93],[94] [111],158],[159]	[28], [38]-[55], [57]-[63], [65]-[84], [86]-[91], [95]-[101]	[10]-[15]	[16]-[22], [23] [i], [24] [ii] [25]	[2]-[8], [26],[27]	[29]-[37], [56], [60]	[64],[65],[66 [85],[102]-[110], [113], [114], [139]-[157]	[112], [115]-[138]
Potential risk to fair trial if disclosed	NO, (Appell ants' already anony mised)	NO	NO	NO	NO	NO	NO	[139]-[159] pose very slight potential risk	NO

[i] Public interest is confirmed as a relevant factor in private prosecutions
[ii] Jury trial unlikely due to recognised "complex factual and legal issues".

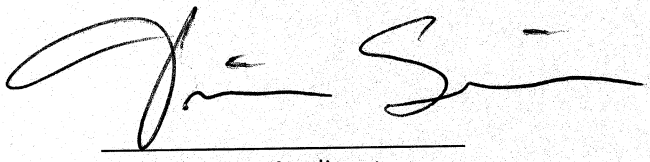
13. The Judgment accepted the seminal relevance of *Erceg*, yet rejected, without reasons, its primary finding that open justice requires publication as the starting point. And this Court did so in circumstances where the suppression order itself failed entirely to consider the requirement for open justice and lacked reasons.

14. The Attorney-General, already acting for the District Court respondent, has a role to play in upholding the rule of law – and this official role now places him in a potential conflict of interest. This is because his obligation is to notify Cabinet of the Supreme Court's actions, in accordance with the Cabinet Manual 2008 and to actively defend law being subverted by sitting judges:

> **" Role of Attorney-General**
> **Law officer role**
> 4.3 The Attorney-General has particular responsibility for maintaining the rule of law. The Attorney-General has a responsibility to notify Cabinet of any proposals or government actions that do not comply with existing law and to propose action to remedy such matters. The New Zealand Bill of Rights Act 1990 requires the Attorney-General to report to the House of Representatives if a bill appears to be inconsistent with this Act."

15. Action by the Attorney-General is legally required, and formally requested.

16. The Applicant intends to publish all judgments and submissions in this matter – including the suppressed judgment SC58/2019 [2020] NZSC 97. This Court has confirmed he has the right to be heard on this topic but has denied him this right as posing "practical difficulties". It has blocked hearing legal arguments challenging its proclaimed limitless powers to suppress information despite such powerful authorities as the Privy Council, current statute and its own prior judgments arguing strongly for limitations. It has refused to allow evidence to be submitted concerning the real harm its suppression orders are causing to other parties currently before the Courts. And not one Supreme Court judge dissented to signing on to the Judgment and this approach.



Vince Siemer, Applicant

14-6-21