BOOBS ON BIKES, BYLAWS AND THE BILL OF RIGHTS

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I INTRODUCTION

Important legal principles are sometimes formulated in odd settings. The power of local communities to regulate nudity in urban areas is one of them. The same can be said about the impact of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) on decisions of civic bodies to restrict protest or other expressive activity on public streets and thoroughfares.

The setting, here, is the main street of Auckland City, Queen Street, running through the heart of the central business and shopping district. The day is an otherwise ordinary Wednesday workday, in the mid-winter of 2008. The audience, numbering in the tens of thousands, is a diverse crowd of locals, along with some who have made a special journey. Men in business-suits, loitering, slightly abashed. Construction workers, hanging from elevated building sites, scrambling for the best view. Groups of young male university students, unable to hide their excitement. International students, young men and women from foreign lands, on their lunch-break from their studies, slightly bemused by the spectacle. Other men and women who, by happenstance (or not), are nearby and are drawn in as witnesses. A few antagonists, a small but vocal group of women with placards, precede the main event.

The participants – the centre of crowds' attention – are about thirty female porn stars, with their breasts exposed. Their conveyances of choice, Harley Davidson motorbikes. Rugged bikers up front, with the erotic performers riding pillion – topless. The "hero" of the moment, the architect of the event, is a well-known Kiwi porn magnate, Mr Steve Crow. The event is "Boobs on Bikes" parade, a now famous – or, depending on your point of view, infamous – event on the Auckland scene. The raison d'être of the parade is, arguably, two-fold. The benevolent view is that the purpose is to make a point about the community's prudish attitude towards nudity and erotica; the particular target is some morally conservative civic leaders – now led by the present

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Mayor – Mr John Banks, who have previously tried to stop the parade. The more cynical view is that its purpose is to promote Mr Crow's "Erotic Expo", taking place the following weekend at a local events centre.

In this paper I examine the legal side to this event, that is, the unsuccessful attempt on the part of the Auckland City Council to stop the parade.[1] The adjudicator of these legal issues is a District Court judge, Judge Mathers – rushed in to consider, at the eleventh hour, an application from the Council injunct Mr Crow and his cohorts from parading without the necessary approval from the Council under its bylaw.

First, I set out the background to the case and legal framework that triggered the purported need for approval under the bylaw. I explore, secondly, the nature of the remedy sought by the Council to enforce its decision not to licence the parade. I then explain the judge's reaction – her unfavourable reaction – to that application. In doing so, I attempt to draw together some of the implicit or formative concerns of the judge. The aim is to explain the significance of the decision in terms of the important legal principles noted earlier: the power of local communities to regulate nudity in urban areas; the relevance of the Bill of Rights Act to bylaws restricting protest or other expressive activity on public streets and thoroughfares. The hurried nature of the decision means it is necessary to stitch together the different strands, as well as connecting the factually specific analysis to the generic legal principles at stake in the case. In the course of doing so, I provide a light critique of the judge's analysis and approach.

II BACKGROUND

The parade took place for a number of years, from modest beginnings. In some years, it operated without formal sanction from the Council, with the view taken that the parade was lawful and did not need local authority approval. The year before, the parade was sanctioned by the Council, with a permit being issued by the Council under the then bylaw that applied to street parades.[2]

In July 2008, the Council adopted a new bylaw governing public places. The controls on street parades were significantly strengthened. Notably, the provisions expressly prohibited the grant of a permit where the Council "reasonably believes" that "there is any other objectively justifiable and reasonable grounds for declining consent for example that the event will be or is likely to be offensive".[3]

1 *Auckland City Council v Erotica Expo Ltd* (19 August 2008, District Court, Auckland, Judge Mathers, CRI-2008-004-1938) [*Erotica Expo*].

2 *Erotica Expo*, above n 1, para 22.

3 Auckland City Council *Consolidated Bylaw,* clause 20.6.9(b)(iii). Other situations where refusal was specifically mandated includes prior booking of the public space, where two events cannot be reasonably accommodated (cl 20.6.9(a)), "significant disruption" to traffic flows or public passage (cl 20.6.9(b)(i)), and where public safety cannot be maintained (cl 20.6.9(b)(ii)).

The critical locus in this case was embedded within a web of relatively complex regulatory provisions. The bylaw prohibits "events" in a "public place" without a licence issued by the Council.[4] Similar restrictions apply to "street trading" and “street performances".[5] The definition of an "event" is cast widely to include:[6]

> ... any organised temporary activity including an organised gathering, parade, protest, wedding, private function (which is independent of premises), festival, filmshoot, concert, celebration, multi-venue sports event of significant scale, fun run, marathon, duathlon or triathlon ...

It was not disputed that Boobs on Bikes was an event within the terms of the bylaw;[7] clearly it was an organised temporary activity within in its ordinary generic sense, as well as being a parade, one of the specifically enumerated activities. Boobs on Bikes also could have qualified as "street trading" or a "street performance", which are both similarly broadly defined.[8] The spatial ambit of the provision, "public place" is also defined in its widest sense:[9]

> … any land or structure owned, managed, maintained or controlled by the council that is intended for use by the public (e.g. roads, footpaths and public squares, grass verges, berms, public gardens, reserves and parks, beaches, wharves, breakwaters, ramps and pontoons, foreshores and dunes, access ways, recreational grounds and sports fields) but does not include any area, building or structure used or intended primarily for business or commercial purposes (e.g. council offices, libraries, zoo, car park buildings).

The upshot is that, in terms of the bylaw, Mr Crow needed a licence from the Council for the parade.[10] Or, alternatively, a dispensation under the generic exemption power in the bylaw.[11]

4 Auckland City Council *Consolidated Bylaw,* clause 20.6.1.

5 Ibid.

6 Ibid, cl 20.1.1.

7 *Erotica Expo*, above n 1, para 8.

8 "Street trading" is defined as:

> ... the commercial use of any public place under the control of council. It includes the selling, displaying or promotion of any goods and services whatsoever, whether for commercial or not-for-profit purposes, in, on, or over a public place. Street trading includes the display of any message as part of a trading activity. Street trading does not mean an activity that consists entirely of the display or deployment of signs as defined in the Signs Bylaw. Street trading applies to permanent and mobile traders and includes but is not limited to the following activities in or on a public place under the control of council.

"Street performance" is defined as:

> ... the provision of entertainment in public places and includes playing an instrument, singing, dancing, juggling, mime, puppetry, performance art, conjuring, acrobatics, recitation, undertaking artworks on or in a public place and performing other acts of theatrical or visual forms. Street Performance does not include any activity which is within or part of an Event or Street Trading.

9 Ibid*,* cl 20.1.1.

10 The bylaw set out a specific power governing the grant of licences (ibid, cl 20.6.4):

> The decision to grant or refuse a street trading licence, street performance licence or events permit, together with any conditions on the licence or permit, may be made in accordance

Mr Crow applied for a licence for the parade.[12] His application was lodged before the new bylaw was promulgated. However, once the new bylaw came into force, his application was assessed under the provisions in the new regime. Because of the pressing urgency, the application was considered by the Mayor and Deputy Mayor under delegated authority.[13] The application was declined. The formal documentation noted the decision in the following terms:[14]

> That pursuant to the Public Places Bylaw clause 20.6.9.b.iii. the Boobs on Bikes Parade permit application be declined as there are objectively justifiable and reasonable grounds to do so. Particularly that the nature, timing and location of the parade are contrary to accepted community standards and that it is the strongly held belief of some members of the public that the content of the parade is undesirable, degrading, inappropriate, and offensive to the community. The strength of these feelings held by those in opposition to the parade being stronger, more heart felt and more readily articulated than the feelings of other members of the public who are either ambivalent about the parade or are in support of it as a form of harmless entertainment.

The parade was therefore unlicensed and unlawful. Mr Crow publicly announced his intention to defy the Council's decision.

III THE UNSUCCESSFUL INJUNCTION APPLICATION

The Council moved to enforce its decision. It applied to the District Court to injunct Mr Crow from breaching the bylaw. The injunction application was heard by Judge Mathers in the District Court two days before the parade was scheduled to take place, with a decision being issued on the eve of the parade. The judge refused the application, issuing an oral judgment. The writing was on the wall for the Council when, in the second sentence of her decision, the judge reminded everyone that her court was "a court of law and not a court of morals".[15] Judge Mathers did not believe that injunction was appropriate or reasonably enforceable. She also questioned whether the Council would ultimately be successful in proving that Mr Crow had unlawfully breached the bylaw, particularly when she had doubts about the propriety of the bylaw and its treatment of offensiveness.

> with any relevant guidelines approved by the council or specified under this bylaw from time to time. A licence or permit may be declined where the proposal does not meet the relevant guidelines or where an authorised officer considers that appropriate standards of convenience, safety or visual amenity would not be met by granting the licence.

11 The bylaw allows (ibid, cl 1.10) the Council to specifically mandate a departure from the requirements of the bylaw where "full compliance would needlessly and injuriously affect any person or business, without a corresponding benefit to the public or any section of it".

12 *Erotica Expo*, above n 1, para 4.

13 Ibid, para 16.

14 Ibid, para 17. The documentation constituted an officer's report and recommendation ultimately approved by the Mayor and Deputy Mayor.

15 Ibid, para 2.

The injunction application was founded on the long-standing, but rather unusual power, in section 162 of the Local Government Act 2002 (LG Act 2002):

> s 162 Injunctions restraining commission of offences and breaches of bylaws
> (1) A District Court may, on the application of a local authority, grant an injunction restraining a person from committing a breach of a bylaw or an offence against this Act.
> (2) An injunction may be granted under subsection (1)—
> (a) despite anything in any other enactment:
> (b) whether or not proceedings in relation to the breach or offence have been commenced:
> (c) if a person is convicted of the breach or offence,—
> (i) in substitution for, or in addition to, any other penalty; or
> (ii) in subsequent proceedings.

The current version of this power is broader than its predecessors because previously the power to injunct only arose where there was a continuing breach of a power.[16]

The power to grant an injunction is rather bald. The only jurisdictional requirement is an implicit one: a person must either be breaching, or intending to breach, a bylaw. Otherwise, the principles governing the grant of an injunction are somewhat uncertain, particularly as an injunction may be sought as an adjunct to criminal proceedings or, as in this case, as a separate stand-alone application. In this case, though, Judge Mathers adopted the well-known principles applicable to interlocutory injunctions set out in *American Cyanamid Co v Ethicon Ltd*,[17] when considering whether to grant the injunction namely: (a) whether there is a serious question to be tried in the proceeding; and (b) where the balance of convenience lies.[18] The Court also accepted that, where the grant of the injunction would effectively decide the case, it was "necessary to have as precise consideration as possible of the chances of the plaintiff's ultimate success".[19] It might be queried whether the adoption of those principles was appropriate. The injunction sought

[16] Compare section 683(2)-(4) of the Local Government Act 1974:

> (2) Where a person commits a continuing breach of any bylaw, then, notwithstanding anything in any other Act, a District Court may, on application by the council, grant an injunction restraining the further continuance of the breach by that person.
> (3) An injunction may be granted under subsection (2) of this section,—
> (a) Notwithstanding that proceedings for the offence constituted by the breach have not been taken; or
> (b) Where the person is convicted of such an offence, either,—
> (i) In the proceedings for the offence, in substitution for or in addition to any penalty awarded for the offence; or
> (ii) In subsequent proceedings.
> (4) The continued existence of any work or thing in a state, or the intermittent repetition of any action, contrary to any bylaw shall be deemed to be a continuing breach for the purposes of this section.

[17] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 (HL)

[18] Note, however, the judge erroneously uses the terms "interlocutory" and "interim" injunctions interchangeably. See *Laws of New Zealand: Injunctions* (LexisNexis, Wellington, 1994-) para 9.

[19] *Erotica Expo*, above n 1, para 24.

might be better characterised as a mandatory injunction to enforce a statute. It is an independent power, albeit that a criminal prosecution might arise from the same circumstances.[20] Regardless, injunction applications are undoubtedly discretionary, giving the judge in this case the mandate to assess – in the round – the propriety of the enforcement action the Council was seeking.

Combined with the discretionary nature of the remedy was the potential sting of a collateral challenge to the lawfulness of the bylaw. Decisions of public bodies – or instruments promulgated by them – are presumed to be valid, unless and until they are declared to be invalid by an appropriate court.[21] However, in some circumstances, the (in)validity of a bylaw can be raised as a defence in proceedings relying on or enforcing a bylaw, without directly challenging the bylaw in the High Court by way of judicial review or application under the Bylaws Act 1908.[22] Judge Mathers recognised that, in principle, a collateral challenge was open as a defence to enforcement proceedings.[23] She canvassed, but appeared not to resolve, the question of whether a collateral challenge was appropriate in the situation before her.[24] Although she expressed some doubt about whether the bylaw would survive an application for review in the High Court on a number of grounds (to which I turn to shortly), she seemed reluctant to definitively rule on the vires of the bylaw: "In approaching this decision I have been careful to distinguish my role from that of an application for review, which is not my province."[25]

To a certain degree, the judge was correct. She did not need to unequivocally rule on the validity of the bylaw, because questions of invalidity were overshadowed by the discretionary nature of the injunction application. But there is also some unfortunately lack of clarity arising from this partial treatment. On the one hand, serious doubts about the validity of the bylaw have been raised. On the other hand, those doubts have not been subjected to the same standard expected in an application for review. Nor has there been any definitive conclusion been expressed about those concerns. This leaves a local authority in an invidious position of having a lawful (by dint of the presumption of validity) but potentially unenforceable bylaw (by dint of the inchoate judicial doubts about its propriety). Such an outcome should be avoided if at all possible.

The substance of the judge's concerns about the bylaw were numerous but largely germinal. In the context of an urgent application and oral judgment, that is forgivable. Indeed, Judge Mathers herself acknowledged the limitations of her judgment, noting the fact that the importance of the issues raised "would normally demand a very full and elegantly reasoned decision" and speculating – rather tongue-in-check – that "the Supreme Court could spend considerable time on

20 Compare *Land Transport Safety Authority v McNeil* [1998] 1 NZLR 622.

21 See *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 and *A J Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA).

22 See *Boddington v British Transport Police* [1998] 2 All ER 203 and Dean R Knight "Ameliorating the Collateral Damage Caused by Collateral Attack in Administrative Law" (2006) 4 NZJPIL 117.

23 *Erotica Expo*, above n 1, para 26, adopting *Brady v Northland Regional Council* [2008] NZAR 505.

24 Ibid, para 27.

25 Ibid, para 42.

these issues in an appropriate case".[26] Those points accepted, it is tricky though to precisely identify the material ground or grounds for the failure of the bylaw, with the discussion of the different grounds overlapping and ultimately the judge indicating that she reached the decision by stepping back and assessing the overall justice of the case.[27] The interpretation of the decision must similarly be coloured by those caveats.

The judge's concerns can perhaps, though, be marshalled into three main themes. First, concerns about the reliance on the trigger of "offensiveness" in the circumstances of the parade.[28] Secondly, concerns about the undue restriction of expressive or other rights under the Bill of Rights Act – the claim that the bylaw was "an attempt at censorship".[29] Finally, the difficulties associated with enforcement, particularly as it was lawful for individuals to severally undertake the activity sought to be prohibited on an aggregated basis.[30]

A Meaning of Offensiveness

In relation to the trigger of "offensiveness" in the bylaw, the judge summed up her view as follows:[31] "[T]he bylaw is uncertain and/or unreasonable in the way it refers to 'offensive', and a so-called objective, test which in my view is inappropriate to the circumstances of this particular case." Central to this conclusion was the judge's assumption – partly based on the position adopted by the Police – that nakedness per se was not capable treated as being offensive under criminal law.[32] This assumption was augmented by reference to the remarks of Blanchard J in *Brooker v Police* when the Supreme Court was called on to consider the meaning of the similar phrase, “offensive behaviour”, in the Summary Offences Act 1981.[33] A high, implicit threshold was set for this otherwise wispy phrase: “behaviour which is offensive in a public place must be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs”.[34]

26 Ibid, para 3.

27 Ibid, para 53.

28 Ibid, para 43.

29 Ibid, para 47.

30 Ibid, para 43.

31 Ibid, para 43.

32 Ibid, para 31. Following the injunction ruling, the police issued a press statement summarising their position, noting the following:

> The display of naked breasts may - or may not - amount to offensive behaviour under the Summary Offences Act, depending on the circumstances at the time. On the circumstances that have previously prevailed, the same display of bare breasts in the same manner will not amount to offensive behaviour under case law set down by the Courts. Neither does it amount to indecent exposure or an indecent act under the Crimes Act

New Zealand Police "Boobs on Bikes parade: Police Role Spelt Out" (Media Statement, 19 August 2008).

33 *Brooker v Police* [2007] 3 NZLR 91, adopted in *Erotica Expo*, above n 1, para 31.

34 *Brooker,* ibid, para 55.

Judge Mathers' adoption of *Brooker* tacitly suggests her view was that that threshold was not reached by the parade. Judge Mathers' concern was the subjectively of the term "offensive" in this context, particularly as this was the sole basis for refusing the permit.[35] She took issue with the Council's conclusion that the parade was "offensive to the community" and its assessment that the "the strength of feelings held in opposition to the parade [is] stronger, more heart felt and more readily articulated than the feelings of other members of the public who are either ambivalent about the parade or are in support of it as a form of harmless entertainment".[36] From the affidavit evidence, she could not discern the extent of "these so-called heartfelt feelings", apart from "the vehement views of certain Councillors".[37] In contrast, she noted that "between 80,000 and 100,000 people line the route of the parade and apparently enjoy it".[38] The strong thrust of her analysis was that the Council had erroneously adopted a subjective view about the offensiveness of the parade when, objectively, the parade was not offensive. "I accept", she said, "that in the context of the bylaw an objective justification has to some extent, to be subjective, but only to some extent."[39]

Any jurisprudential basis for the judge's rejection of the Council's assessment is absent. Although at one point this concern is framed in terms of uncertainty and unreasonableness of the bylaw,[40] criticising the bylaw – or allowing a collateral challenge – on this basis cannot be legitimate. The bylaw adopted the terminology contained in the empowering statute;[41] reliance on "offensiveness" as a trigger for governmental intervention therefore had a legislative mandate. The judge would have been on much stronger ground in founding her concerns on the issue of whether the parade was actually offensive in terms of the ***application*** of the bylaw. Arguably, the judge allowed a collateral challenge to the decision of the Council to decline the permit, on the basis that the local authority's factual evaluation that the parade was offensive was flawed; it followed that a permit for the bylaw ought to have been granted, allowing the parade to operate with impunity. Although this approach appears to lure the court into the "substance" or "merits" – normally forbidden in the court's supervisory jurisdiction of judicial review – the reality is that the courts have routinely been prepared to closely examine factual matters that operate as jurisdictional pre-conditions to the exercise of power;[42] in other words, in contrast to other factual

35 The parade had operated successfully for 5 years without any public disturbance (save for one isolated incident). Nor did Council officers have any objection to the parade on operational grounds. *Erotica Expo,* above n 1, paras 21, 40, 41 and 43.

36 Ibid, above n 1, paras 11, 17, 29 and 30.

37 Ibid, para 13.

38 Ibid, para 14.

39 Ibid, para 28.

40 Ibid, para 43.

41 LG Act 2002, s 145(a) "minimising the potential for offensive behaviour in public places".

42 This is sometimes described as the "jurisdictional fact" doctrine. See *R v Home Secretary, ex parte Khawaja* [1984] AC 74, 97 (HL), *Hawkins v Minister of Justice* [1991] 2 NZLR 530 (CA), and discussion in Mark Elliott *Beatson, Matthews and Elliott's Administrative Law* (3 ed, Oxford University Press, Oxford, 2005) 59-75.

findings, jurisdictional findings of fact are subject to the "correctness" standard of review.[43] Alternatively, it was open to the judge to frame her objection to the offensiveness conclusion in terms of her own jurisdiction. That is, the power of the District Court to issue an injunction under section 162 only arises where it has been established that a person is committing or will commit a "a breach of a bylaw". The court therefore is required to form its own view about whether a breach has been established – or, in the context of this case, whether the parade is offensive within the terms of the bylaw.

In terms of the judge's view of offensiveness, her conclusion that the public nakedness in the parade could not be offensive was bold. Certainly, the criminal law jurisprudence around public nakedness is much more equivocal than she assumes.[44] Further, the direct application of the criminal law standard to the regime of local civic regulation is dubious. One of the central reasons the courts have read down the meaning of offensiveness in relation to nakedness is because such conduct does not justify the disapprobation of the criminal law.[45] Civic regulation of the behaviour through bylaws does not carry the same sanctions, nor the same sting, of regulation through criminal statutes. Therefore, a more robust approach would have been to consider the meaning of the term in the light of the purpose and context in which it arose, as directed by section 5(1) of the Interpretation Act 1999. The blunt application of the criminal law meaning may cut across and effectively undermine the community's mandate to regulate nudity in other contexts, including their power to manage strip bars, adult entertainment businesses, bill-stickers containing nudity, etc.

B Expressive (and other Civil) Rights

The central kernel of Mr Crow's objection, and his defence to the injunction, was that the bylaw and injunction amounted to improper censorship. This "rights-dimension" permeated the case but received minimal direct treatment in the reasons for the refusal of the injunction.

The bylaw, along with the related refusal of the permit, were claimed to breach the right to freedom of expression protected by section 14 of the Bill of Rights Act.[46] Although not directly referred to, the rights to freedom of movement and assembly were also potentially breached.[47] Local authorities are obliged to ensure their legislative instruments and actions are consistent with these rights, subject only to the standard "justified limitations" latitude provided by section 5 of

43 See Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law" in Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 180, 221.

44 See *Ceramalus v Police* (1991) 7 CRNZ 678 and Hon J Bruce Robertson *Brookers Summary Proceedings* (Brookers, Wellington, 2004-) para SO4.05.

45 *Ceramalus v Police*, ibid, 683.

46 Section 14 provides: "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."

47 Section 16 and 18(1) provides respectively: "Everyone has the right to freedom of peaceful assembly." and "Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand."

the Bill of Rights Act. In relation to bylaws, section 155(3) the LG Act 2002 explicitly commands compliance ("No bylaw may be made which is inconsistent with the New Zealand Bill of Rights Act 1990, notwithstanding section 4 of that Act"), even though that represented the orthodox expectation for secondary legislation such as bylaws.[48]

The Council's determination of whether the proposed bylaw gave rise to any implications under the Bill of Rights Act – an evaluation required to be completed under section 155(2) of the LG Act 2002 when promulgating a bylaw – was perfunctory and conclusory. The report noted that sections 14 and 16 might be implicated by various provisions, including the provision in issue in the parade case, but summarily dismissed any limitations as being justified. The material elements of its rights-vetting report were as follows:[49]

> The proposed bylaw is not considered inconsistent with the New Zealand Bill of Rights (NZBOR) Act 1990. Any limits being imposed by this bylaw (stated below) are considered by council to be reasonable and therefore justified under section 5 of the NZBOR Act 1990…
> The restrictions in clause 20.6.1 are to ensure that proper provision is made for the organisation of these activities to avoid conflict with other activities that may take place at the same time or to avoid disruption of the free flow traffic and do not constitute a general restriction on these activities.
> The implications of these provisions of the proposed Public Places bylaw are in accordance with the "reasonable limits" justification in section 5 of the NZBOR Act 1990 and are therefore considered acceptable.

The report also contained incidental reference to protection of the public from offensive behaviour, albeit in relation to other bylaw provisions – not the street parade restriction. The reference was, however, the mere repetition of the language of the statutory empowering provision:[50]

> The clauses do not prohibit the activities but rather impose reasonable conditions to ensure that those freedoms can be exercised in an orderly manner, and in a way that protects the public from nuisance, promotes and maintains public health and safety and minimises the potential for offensive behaviour in public places.

When put to the test in the injunction application though, Judge Mathers expressed "doubts" about whether the bylaw complied with the section 155 rights-consistency requirement.[51] Drawing on the Supreme Court's recognition of similar rights in relation to the offence of

48 See *Drew v Attorney General* [2002] 1 NZLR 58, para 68 where the Court of Appeal rejected an argument that secondary legislation were enactments entitled to protection under section 4 of the Bill of Rights Act and ruled that the injunction to interpret legislation consistently with the Bill of Rights Act necessarily meant relevant empowering provisions could only be read to authorise the making of secondary legislation that was consistent with Bill of Rights.

49 Auckland City Council "Report on Public Places Bylaw".

50 Ibid.

51 *Erotica Expo*, above n 1, para 47.

disorderly behaviour in *Brooker v Police,* the judge properly identified that the question of consistency with the Bill of Rights turned on the "reasonableness and justifiability" of the limitations imposed on those rights.[52] In this context, reasonableness and justifiability is measured by a proportionality test – or, rather, calculus.[53] The judge's reasons hints at a conclusion that the regulation was disproportionate to the claimed governmental imperative. "The Council's fears as set out in their adopted recommendation, do not…" she said, "seem to meet the threshold of seriousness or tolerance as per Blanchard J in *Brooker v Police.*"[54] She downplayed the public imperative the Council had anchored its proportionality assessment on; as noted earlier, she characterised the parade as being "tactless" or "distasteful", but not "offensive.[55] At the same time she appraised the rights curtailed by the bylaw as being more valuable. Notably, she implicitly accepted the notion that the type of expression modifies the weight attaching to the expressive right in a proportionality calculus. To the extent that the parade was advertising a commercial venture – Mr Crow's Erotica Expo taking place the following weekend – Judge Mathers accepted that there was "a degree of proportionality" in the Council's actions.[56] However, having heard testimony from Mr Crow on this point, she discounted the conception of his objective in this these singular terms as a generalisation: "I consider and find that he wishes to make a point as to sexual expression and tolerance, rightly or wrongly."[57]

On the latter point, the Council faced an awkward conundrum. The factual finding was inevitable, if not solely because the Council's own actions over the preceding years to attempt to stop the parade formed a credible basis for Mr Crow to claim he was crusading against state suppression of nudity. Of course, there's a degree of cuteness in Mr Crow branding his speech as political (merely?) ***because*** the government was seeking to suppress it: it looked like he was attempting to pull himself up by his bootstraps. However, the broader context and chronology, particularly the political rhetoric deployed by local politicians, suggests his claim was not disingenuous. Further, the claim and the challenge to community standards or morality has some pedigree in the region. Similar claims were used in part to justify the Hero gay pride parade that promenaded for many a year in the inner city suburb abutting the city centre. The night-time event attracted extravagant and risqué performers, along with thousands of spectators. The parade was contentious but no legal steps were taken to suppress it; although the propriety of local authority support was much debated, the parade received some civic support.

52 Ibid, paras 32, 33, 47 and 48.

53 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington 2005) 139 and Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2006) 168. For the (in my view, preferable) expression of the evaluation as a "calculus", rather than a definitive "test", see Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: rights, utility and administration" [2008] 2 NZ Law Rev 377.

54 *Erotica Expo*, above n 1, para 48.

55 Ibid, para 44.

56 Ibid, para 33.

57 Ibid, para 33.

On the former point, in my view, the judge was correct to grade the value of expression in different ways.[58] The reality is that when considering the justifiability of limits on expression, we grade the nature of the expression and place differing degrees of importance on different types of expression.[59] Political expression sits at the top. It is regarded as lying at the core of the right and therefore requiring the most protection. Speech lacking intrinsic value sits at the bottom, and limits on such speech is arguably more easily justified. Commercial-related speech sits somewhere in the middle. The difficulty in this case was that the parade exhibited elements of all three types of expression, ranging from a political element deserving of vigilant protection, to commercial speech deserving of some protection, to gratuitous pornographic titillation less deserving of protection.

C Enforceability of the Injunction (or Lawful Use of Thoroughfare?)

Finally, Judge Mathers was troubled by the enforceability of any injunction. She described the terms of the injunction as "inappropriate and not capable of enforcement."[60] The concerns were predicated on the basis that it was lawful for individuals to severally undertake the activity sought to be prohibited:

> Individuals are without question entitled to drive vehicles down Queen Street. It is not offensive per se for women to be topless. It may be tactless, it may be distasteful to some, but in my view the Council's reference to 'offensive' cannot reasonably apply in these circumstances.
>
> An injunction as to the organisation of a parade cannot, as I have said, prevent individuals carrying out these acts, even if there are a number of them. I refer to the recent example of the mass of trucks which invaded Auckland streets. The Court could be brought into contempt by the issuance of an injunction which could not adequately be enforced.

Although couched in procedural terms, the gist of the judge's concerns appear more substantive than they seem on first blush. The two critical premises of the conclusion are: (a) people have the right to drive on roads; and (b) it is not offensive for women to expose their breasts in public in an urban centre.

The first premise is expressed in rather sketchy terms but has a sound pedigree. The right of citizens to pass and re-pass on roads has been treated as a fundamental common law right.[61] In fact, it is the very essence of roads. As Fogarty J recently remarked:[62]

[58] See Dean Knight "Boobs on Bikes, bylaws, and the Bill of Rights" 15 August 2008 <www.laws179.co.nz/2008/08/boobs-on-bikes-bylaws-and-bill-of.html>. See also, Butler & Butler, above n 53, 307, and Huscroft "Freedom of Expression" in Rishworth and others, above n 53, 308. But see, for example, G Stone "Content Regulation and the First Amendment" (1983) 25 Wm & Mary LR 189.

[59] Butler and Butler, above n 53, 307, and Huscroft "Freedom of Expression" in Rishworth and others, above n 53, 314. But see G Stone, above n 58.

[60] *Erotica Expo*, above n 1, para 43.

[61] For a New Zealand example see *Kerr v Attorney-General* [1996] DCR 951. See also Butler and Butler, above n 53, 471.

> [T]he ancient right of passing and repassing on the highway is the most critical right and always has been. It is the right which is central to our constitutional history. It is no exaggeration to say that the British are freedom loving people and the love of that freedom was brought to New Zealand when it was settled as a British colony. The right of the meanest citizen to travel on the highway has always been regarded by the law as a key protection for every individual to live the life he or she wants, to move to whichever property he or she wants to go, and meet with whomever he or she wants to meet with.

Further, as well as the facilitation of travel, roads and highways are intrinsically linked to expressive activity. Roads have been one of the primary spaces for protests and other expressive activities. Protests, too, are a lawful and importance use of roads, albeit subject to the qualification that protest activity must not unreasonably obstruct the rights of others to pass and repass on the same road. As Lord Irvine said in *Director of Public Prosecutions v Jones*, when allowing an appeal by protestors from convictions for peaceful, non-obstructive assembly on the grass verge of a public highway beside Stonehenge:[63]

> [T]he law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass; within these qualifications there is a public right of peaceful assembly on the highway.

But such rights are, of course, not absolute. Carefully crafted restrictions legitimately may override the common law right. To the extent that this right is fundamental though, the "principle of legality" – or, rather, the "well-established interpretative principle" that the courts should be "slow to impute to Parliament an intention to override established rights and principles where that is not clearly spelt out"[64] – requires a clear legislative mandate for the abridgement of this common law right. Whether this right has been legitimately abridged with the backing of legislative authority, however, blends back into the principal question about the propriety of the limitation of rights; although the right is a common law right framed in a different way, the analysis of whether it the limitation is authorised and justified is almost indistinguishable from the related analysis under the Bill of Rights Act.

The second premise is more fragile. As has been discussed above, the propriety of public nakedness is more equivocal – and contextual – than the judge suggests. And the concerns about a distinction between aggregated activity – an organised parade of a group of people – and several expression by individuals is perhaps overstated. If the injunction was granted and a number of topless women rode down Queen Street on motorcycles, it would be open to a court to conclude that it was either unconnected individuals spontaneously exercising their expressive

62 *Abbott v Police* (27.05.08, Christchurch High Court, CRI 2008-409-3), adopting *Director of Public Prosecutions v Jones* [1999] 2 All ER 257 (HL).

63 *Director of Public Prosecutions v Jones* [1999] 2 All ER 257 (HL).

64 *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SCNZ), para 26.

rights or a rogue parade of colluding people attempting to circumvent the judicial prohibition. While being a fine distinction, it is ultimately a factual one capable of being adjudicated on.

D Conclusion

The unsuccessful attempt to injunct the Boobs on Bikes parade pleased some, and angered others. In the legal world, the case will stand as a significant one in the development of the principles relevant to the local government regulation of public protest and exhibition and the deliberative obligations on local authorities when considering the Bill of Rights implications of their laws. The jurisdiction of local authorities to pass bylaws in order to minimise the potential of offensive behaviour in public places was significantly read down, perhaps unjustifiably. The importance of rights-consistency, and robust deliberation about the balance to be drawn between community objectives and individual rights, was again endorsed. And the democratic significance of public spaces and thoroughfares was championed and preserved, with the judiciary demonstrating a reluctance to condone undue restrictions on this historic and fundamental forum for expressive activity by citizens.