PARADISE LOST: BUT THE STATION IS ALWAYS THERE[1]

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I INTRODUCTION

K-Generation Pty Ltd v Liquor Licensing Court[2] (*K-Generation*) involved a constitutional challenge to provisions of the *Liquor Licensing Act 1997* (SA). The relevant provisions are set out in the joint judgment of Gummow, Hayne, Heydon, Crennan and Kiefel JJ,[3] where the definition of "criminal intelligence" in s4 of the Liquor Act is set out:

> ***[C]riminal intelligence*** means information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement.

Sub-s28A(1) of the Act is recited further in the joint judgment:[4]

> No information provided by the Commissioner of Police to the [Liquor] Commissioner may be disclosed to any person (except the Minister, a court or a person to whom the Commissioner of Police authorises its disclosure) if the information is classified by the Commissioner of Police as criminal intelligence.

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1 As to the station, see [73] below.

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2 (2009) 237 CLR 501.

3 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 539-540 [135].

4 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 540 [137].

And sub-s28A(5) of the Act also appears in the joint judgment:[5]

> In any proceedings under this Act, the [Liquor] Commissioner, the Court or the Supreme Court –
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> (a) must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and;
>
> (b) may take evidence consisting of or relating to information classified by the Commissioner of Police as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.

K-Generation Pty Ltd and its principal, Genargi Krasnov were confronted with criminal intelligence in the course of the South Australian Liquor Licensing Court refusing K-Generation's application for a licence to run a karaoke bar. The police presented the criminal intelligence, then counsel for K-Generation accepted that the legislation stood in the way of him and his client seeing the material (in the light of the High Court's later reasoning, perhaps a fatal concession) but Rice DCJ affirmed this view of what the legislation meant, saying (set out in the judgment of Kirby J in the High Court):[6]

> [I]t seems to be draconian legislation ... but that is what Parliament has said and I am stuck with it. ...

K-Generation and Krasnov went to the South Australian Supreme Court seeking a declaration of invalidity of s28A. They complained

5 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 541 [139].

6 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 550 [179].

that s28A ordered a Court capable of carrying Chapter III federal jurisdiction (the High Court accepted that the Liquor Court was a Chapter III court) to behave in an unacceptable manner: see *Kable v Director of Public Prosecutions (NSW)*.[7] It was argued that the Liquor Court was required to hear an application to determine livelihood in the absence of natural justice: the applicants were not, on a plain reading of the legislation, allowed to know what was alleged against them in the criminal intelligence given to the Court by the police, and consequently the applicants could make no meaningful response to the allegations.

The Full Court of the South Australian Supreme Court dismissed the application for a declaration of invalidity (Duggan and Vanstone JJ, Gray J dissenting),[8] and K-Generation and Krasnov appealed to the High Court, where they lost 7-0.

The question that emerges from *K-Generation* is whether Australian Chapter III courts (those courts, State and federal, capable of exercising federal jurisdiction) must adhere to traditionally required curial standards. At the forefront of such standards was always due process. But the decision in *K-Generation* indicates that in the absence of a Bill of Rights requirement, Australian courts can be legislatively ordered to delete natural justice hearing requirements from their repertoire, to be replaced by curial administration of fairness, lacking transparency. In that, Australia is now completely out of step with recent decisions of the highest courts of the United Kingdom, the United States and Canada, as will be explored below.

The exploration is complicated by the decision of the High Court in *International Finance Trust Co Ltd v New South Wales Crime Commission*,[9] in which French CJ, Gummow and Bell JJ, and Heydon J (Hayne, Crennan and Kiefel JJ dissenting) determined that s10 of the *Criminal Assets Recovery Act 1990* (NSW) was invalid for repugnancy to the judicial process; it conscripted the New South Wales Supreme Court in the mandatory *ex parte* sequestration of

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7 (1996) 189 CLR 51.

8 *K-Generation Pty Ltd v Liquor Licensing Court* (2007) 99 SASR 58.

9 (2009) 240 CLR 319.

property.[10] The majority in *International Finance* seem to rest on the *ex parte* nature of the Crime Commission's application to the Supreme Court. It follows that their reasoning in *K-Generation* presupposes that there is no repugnancy to the judicial process if an affected party is allowed to remain in the court, while not allowed in on the secret of what is alleged against them. As we will see, the High Court in *K-Generation* adopted an expansive interpretation of what s28A meant, allowing for some modicum of natural justice in the shape of an affected party's lawyers possibly seeing the criminal intelligence, thus avoiding constitutional invalidity.

All common law jurisdictions of any size, other than Australia, have Bills or Charters of Rights that deal specifically with the requirement of natural justice in the determination of disputes that require curial attention. The future in a less than fully armed Bill of Rights Australia may be seen in the following judgment.

10 See Gummow and Bell JJ, *International Finance* (2009) 240 CLR 319, 366-367 [97] and [98].

II THE CASE

> "… [T]he objection for want of notice can never be got over. The laws of God and men both give the party an opportunity to make his defence, if he has any. … [E]ven God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."[11]

Adam & anor v Heavenly Residential Tenancy Court & anor [2010] HCH 1.[12]

For the Appellants: Lucifer (instructed by The Satanic Mechanics).

For the Respondents: Gabriel AA SG, and with him Angels and Archangels and all the company of Heaven (instructed by The Heavenly Host).

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[11] Fortescue J in *Dr Bentley's case* (1723) 1 Str 557, 567; 93 ER 698, 704.

[12] *Ex tempore*, God J presiding. God is the legislature, executive and ultimate judiciary for Heaven. God is, of course, the elderly, white bearded gent of my Anglican childhood, now 50 years gone. How quickly time passes. I was recently invited to attend St Peter's Cathedral, Adelaide, to find a woman priest (?) addressing the congregation prior to the service, asking those with a gluten allergy to make themselves known. How cast adrift I felt from 1959. But I digress. As for God, despite His omnipotence, He was a relatively unspeaking character, given only to *fatwas* on the Israelites when they misbehaved: golden calves and sex with things they weren't married to. "Linguistic register" is a standard in statutory interpretation, but judicial voices are so hard to capture. The reader may assume that God J speaks in the tones of Valentine Dyall (Deep Thought in the television version of *Hitch-hikers' Guide to the Galaxy* ["You're really not going to like it"]), or when miffed, Queenie in Blackadder's lurch through the late sixteenth century. In retrospect, I hear other voices: take your pick. Why not: a retired Australian Federal Court judge sees dead people driving cars (see n 95 below). There's something here to offend everybody. Enjoy! (And if Mel Brooks thought it was good to be the king, wait till you get to be God!)

God J:

[1] This matter arises from a "show cause" letter served on Adam, who is himself appellant in these proceedings, as well as on behalf of the female appellant, Eve, as her legal guardian. The "show cause" letter was sent by the Chief of the God Squad ("CGS": second respondent), and gave notice of application by the CGS for a "control order" against Adam and Eve from the Heavenly Residential Tenancy Court ("HRTC": first respondent). The "show cause" letter indicated that the HRTC had received information from the CGS that Adam and Eve had allegedly broken conditions of their tenancy in the Garden of Eden.

[2] When Adam presented himself to the HRTC in response to the "show cause" letter, he was confronted with the *Heavenly Residential Tenancy Decree 1* (Heaven) ("the Decree"), which provides that God Squad information is to remain confidential to the HRTC, and is not to be shown to parties such as Adam on whom the God Squad is reporting. The context and purpose of the "God Squad information" provisions clearly indicate a need to protect informants and sources that provide information to the God Squad. These provisions take the form of amendments made to the Decree specifically for dealing with the recent threat of a War on God, planned (according to God Squad information) by dissident, but as yet unidentified angels. The relevant provisions are as follows:

(A) **Interpretation**

> **"threat to Heaven intelligence"** means information relating to actual or suspected subversive activity (whether in Heaven or elsewhere) the disclosure of which could reasonably be expected to prejudice investigations of subversiveness, or to enable the discovery of the existence or identity of a confidential source of information relevant to the enforcement of Heavenly cohesion.

(B) **Use by Courts of "threat to Heaven intelligence"**

> In any proceedings under this Decree, the Heavenly Residential Tenancy Court or the High Court of Heaven—
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> (i) must, on the application of the Chief of the God Squad, take steps to maintain the confidentiality of information classified

> by the Chief of the God Squad as threat to Heaven intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives; and
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> (ii) may take evidence consisting of or relating to information classified by the Chief of the God Squad as threat to Heaven intelligence by way of affidavit of a member of the God Squad of or above the rank of cherubim.

[3] Adam complained that he had no idea of what was alleged against him, and so could not meaningfully respond to the allegation.

[4] The HRTC found against Adam and Eve, and issued a control order, as a result of which they were to be expelled from the Garden of Eden. They successfully sought a stop on that order pending the resolution of their appeal to this Court. The appellants rested substantially on the *Heavenly Charter of Rights* (the Charter), and also much Australian case law.

[5] Unlike Australia, Heaven is subject to the Charter, pursuant to which a "fair hearing" is guaranteed in any suit at law determining a party's rights and obligations. The relevant provision, on which the *Human Rights Act 2004* (ACT) s21 and the *Charter of Human Rights and Responsibilities 2006 (Vic)* s24 are based, provides that:

> Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

This distinction between a Charterless-Australia (at national level) and Heaven will be found devoid of content for reasons which will become apparent.

[6] Lucifer appeared for Adam, and Archangel Gabriel for the first and second respondents. The Court received the affidavit (as tendered below) from Cherubim Ariel, setting out, on instruction from Archangel Michael (the CGS), the threat to Heaven intelligence against Adam and Eve. This Court operates under the same provision of the Decree as that which required confidentiality from the HRTC. Lucifer has now made the pillar of his case the

claim that neither the HRTC nor this Court can proceed in this matter without allowing Adam to see the allegations against him, and put on evidence and/or make submissions regarding the allegations. Lucifer claimed that a failure to ensure natural justice in the relevant Courts resulted in a breach of the Charter provision guaranteeing a fair hearing.

III THE AUSTRALIAN CASE LAW ON ASSUMED NATURAL JUSTICE IN COURTS

A *The Position in the Late Twentieth Century*

[7] The case for the appellants rested principally on case law from the High Court of Australia. This material was led on the basis that that Court was concerned, pursuant to Chapter III of the Australian Constitution, to ensure that Australian Courts kept their integrity. Such integrity rested historically in impartiality and independence. It was submitted that the requirement for a fair hearing in the Charter was cognate with the many Australian High Court assertions as to the need for natural justice, so that courts did not appear to be partial to, or dependent on the party providing information on a one sided basis.

[8] The Court was first taken to Mason J (as he then was) in *Re JRL; ex p CJL*:[13]

> A central element in the system of justice administered by our courts is that it should be fair and this means that it must be open, impartial and even-handed. It is for this reason that one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented to him in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides. **It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide.** This principle

[13] (1986) 161 CLR 342, 350.

> immediately distinguishes the judicial branch from other branches of government, except in so far as they may be relevantly affected by the rules of natural justice. In conformity with the principle, every private communication to a judge made for the purpose of influencing his decision in a case is treated as a contempt of court because it may affect the course of justice. … Indeed, it is regarded as a serious contempt (emphasis added).

[9] The Court then had McHugh J quoted to it, from *Kable v DPP*,[14] where his Honour said:

> N[o] Parliament, for example, can legislate in a way that permits [a State] Supreme Court while exercising federal judicial power to disregard the rules of natural justice … .

[10] Counsel for the appellants quoted at length from *Nicholas v The Queen*,[15] in particular Gaudron J at 208-9 [74], saying:

> In my view, consistency with **the essential character of a court … necessitates that a court not be** required or **authorised to proceed in a manner that does not ensure** equality before the law, impartiality and the appearance of impartiality, **the right of a party to meet the case made against him or her**, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law" (emphasis added).

[11] Reference was also made to *Bass v Permanent Trustee Co*,[16] where Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ were cited for the appellants as saying of the judicial process, that it "requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them." The two of these Justices remaining a decade later in *K-Generation v Liquor Licensing Court*[17] (Gummow and Hayne JJ) were by then of a very different opinion. Unusually for a *gestalt* shift in either science or the law, no reference was made by the High

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14 (1996) 189 CLR 51, 116.
15 (1998) 193 CLR 173.
16 (1999) 198 CLR 334, 359 [56].
17 (2009) 237 CLR 501.

Court of Australia to the above materials when it made a complete *volte-face* on the subject of natural justice in Australian courts: it is usual at the moment of change for the tools and nomenclature from the previous paradigm to be utilised to support different conclusions. I accept that the High Court's new approach is indeed, however covert and lacking in fanfare, revolutionary.

B *Rethinking in the Twenty First Century:* K-Generation *Provides "Curial Fairness" in Place of Procedural Fairness*

[12] Unfortunately for the appellants, the Australian High Court is now more relaxed about the protection of the integrity of Chapter III courts by curial fairness, which now supersedes procedural fairness. The result in *K-Generation v Liquor Licensing Court*,[18] makes clear that the process of the procedural fairness "meeting" evidence led by State Security apparatus may now be reduced to asking the court concerned to check that the evidence being led is in need of secrecy protection, and that the court weigh the evidence for fairness. Such reliance on the court, and consequent loss of transparency, will not damage the institutional integrity[19] of a court as long as the court is not under actual dictation as to result from the Executive.

[13] True it is that since the decision in *K-Generation*, the High Court has brought down the decision in *International Finance Trust Co Ltd v NSW Crime Commission*.[20] I note that in *International Finance* French CJ reflected warmly on the role of natural justice in the judicial function,[21] while Heydon J rested his judgment favouring the primacy of natural justice in courts on avoiding bad decision making processes and "human dignity" (whatever that is?)

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[18] (2009) 237 CLR 501.

[19] And "institutional integrity" was the phrase repeatedly used in the respective judgments of French CJ and Kirby J in *K-Generation*: see 237 CLR at 512 [10], 529 [88], 530 [89] (quoting Gummow, Hayne and Crennan JJ in *Forge* (2006) 228 CLR 45 at 76 [63]), 530 [90], 532 [99] per French CJ; 544 [157], 545 [159], 568 [239], 571 [253], 575 [256] per Kirby J.

[20] (2009) 240 CLR 319.

[21] *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54].

as expounded in the writings of JR Lucas.[22] French CJ[23] even cited Gaudron J in *Nicholas*.[24] That paragraph was cited in argument in *K Generation*, but was nowhere cited on this point in any of the judgments in that case. I am of the view that the majority in *International Finance* were concerned with physical exclusion of an affected party from court proceedings, which is not the instant case. Only *K-Generation*, concerned with covert evidence, is exactly on point, and the legislation involved is on all fours with the "threat to Heaven intelligence" provisions in the instant case.

[14] French CJ provided a fair summary of the reasoning in *K-Generation* when he said of the South Australian *Liquor Licensing Act 1997*, under challenge in that case, that it:

> … [I]nfringes upon the open justice principle that is an essential part of the functioning of courts in Australia. It also infringes upon procedural fairness to the extent that it authorises and effectively requires the Licensing Court and the Supreme Court to consider, without disclosure to the party to whom it relates, criminal intelligence information submitted to the Court by the Commissioner of Police. However, it cannot be said that the section confers upon the Licensing Court or the Supreme Court functions which are incompatible with their institutional integrity as courts of the States or with their constitutional roles as repositories of federal jurisdiction. Properly construed the section leaves it to the courts to **(1)** determine whether information classified as criminal intelligence answers that description. It also leaves it to the courts to **(2)** decide what steps may be necessary to preserve the confidentiality of such material. The courts may, consistently with the section, disclose the material to legal representatives of the party affected on conditions of confidentiality enforced by undertaking or order. It leaves it open to the courts to decide whether to accept or reject such material and to decide what if any weight shall be placed upon it[25] (numbering inserted).

22 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 380-381 [143]-[145].

23 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 352 [50].

24 See [10] above.

25 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 512 [10].

C *Statutory Interpretive Approaches to Seeing the Decree is Valid: Courts May Now be Authorised to Exclude Natural Justice*

[15] French CJ made much of the "Principle of Legality",[26] whereby a statute was interpreted to make the least inroad into fundamental matters important in the common law, such as an open court, and procedural fairness. His Honour was able to use this tool to interpret the *Liquor Act* so that it could be seen as not necessarily destroying common law principles, and since not definitively destroying them (destruction might still be worked by curial discretion on an individual basis, but the logic of the thing was all), the statutory provisions were not constitutionally odious.

[16] I quote the learned Chief Justice:[27]

> The better view, which is permitted by the language of the statute, is that the Court is authorised but not required to exclude legal representatives from … the proceedings …

Gaudron J's concern that curial unfairness not even be authorised[28] (and her Honour was particularly concerned that an affected party have the right "to meet the case against him or her") has been abandoned, and see also Kirby J in *K-Generation*.[29]

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26 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520-521 [47]-[49].

27 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 526 [73].

28 See *Nicholas* at [10], above n 15.

29 *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 237 CLR 577-578 [257], fifth bullet point.

D *Beware Being Misled by Extrinsic Materials in Decree Interpretation*

[17] An attempt was made to refer to My *pronunciamento* announcing the Decree, in which I said:

> The Decree provides that where God Squad intelligence is used in any proceedings, that information or intelligence must not be disclosed, including to the affected person or his or her representatives. A court hearing an appeal must hear the information in a court closed to all, including the affected person and that person's representatives.

A political communication (Parliamentary speech or Heavenly *pronunciamento*) must defer to the interpretive process to be applied to the Decree. I paraphrase French CJ in *K-Generation*:[30]

> My assertion in the *pronunciamento* that the Court "must hear the information in a court closed to all, including the affected party... and that person's representatives" was a statement of My intention. It is not a substitute for the actual words of the Decree. Nor does it require those words to be interpreted so as to mandate exclusion of legal representatives of an affected party from a hearing in which evidence is received and argument entertained about threat to Heaven intelligence.

[18] The appellants submitted that the Decree, when interpreted in accord with My political intention, was contrary to the "fair hearing" provisions of the Charter. That is a "draconian" furthest possibility argument,[31] and one which I do not need to decide.

[19] The authority for the Chief Justice proceeding contrary to the clear intent expressed in the Parliamentary record was given[32] as *Re Bolton ex p Beane,*[33] where the High Court found against the

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[30] (2009) 237 CLR 501, 240 [70].

[31] See French CJ in *K-Generation* (2009) 237 CLR 501, 526 [71] and 527 [77].

[32] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 522 [53].

[33] (1987) 162 CLR 514, 518.

Commonwealth, because the Act did not go so far as the Second Reader asserted the Act would go.[34] I find, as did the High Court in *K-Generation*, that there is a possibility that the legal representatives for the appellants may receive permission to view the "threat to Heaven intelligence". I am not ruling that Lucifer as counsel for the appellants has a right to see the covert material, merely the possibility: this is only a working hypothesis.

[20] Counsel for the appellants attempted a response to the Australian material, by introducing the first of a long line of legal academics into the argument. Noting the Australian High Court's overturning of the assumption in the Liquor Court and the Full Court of the Supreme Court, by all practitioners and judges involved, that the plain words of the *Liquor Act* meant what they said about excluding the affected party and their lawyers from seeing police evidence or being allowed in court with it, counsel read from Canadian Professor Wesley Pue's unpublished paper "Protecting Constitutionalism in Treacherous Times: Why 'Rights' don't matter":[35]

> Even the casual observer will note the glaring illogic of the approach taken: the fact that a Superior Court Judge who has enjoyed the luxury of time to reflect and the benefit of learned submissions of counsel is capable of "reading", "construing" and "applying" vague or broad words in a lawful fashion rather begs the more important question of how the law serves to guide citizens and state officials alike. Statutory language that is only rendered lawful after it is interpreted in court violates almost every principle of legality that frustrated the blundering King Rex in Lon Fuller's fable … A modicum of realism suggests that lawful state

34 *Mr Beane's case* involved a runaway American serviceman, long resident in Australia after he "overstayed" while on R&R from Vietnam. The legislation provided for American service personnel who absconded from bases in Australia to be returned to US authorities. The Second Reading Speech referred to the handing back of runaway American service personnel in Australia, without mention of the absconding having happened in Australia. Mr Beane had absconded from a US base in Vietnam, and so did not fit the clear words of the statute: the Commonwealth Government unsuccessfully attempted to utilise the return power by reference to the Parliamentary record.

35 Wesley Pue Protecting Constitutionalism in Treacherous Times: Why 'Rights' Don't Matter (2007), page 19, *Social Science Research Network,* <http://ssrn.com/abstract=1028591>.

> conduct requires clarity in statutory drafting, not the sort of ex post facto rationalization that reading down permits.

I intend to adhere to the authority of the Chief Justice.[36]

E *The Appellants' Cases Are Now Outdated*

[21] The real failure in the appellants' argument at this point may be seen in the dates of the cases relied on by them: they are so 20th century. In the words of that splendid Australian Archangel, David Bennett QC SG, the assertions of the inviolability of natural justice in the workings of a court reflect "September 10 thinking" (see *Thomas v Mowbray* [2007] HCA Trans 76).

[22] Times change and demand a new approach to the law. Just as Australian jurisprudence has had to work itself out in the 21st century context of politically driven fear,[37] so, here in Heaven, we have our own security issues, and secret God Squad intelligence records that there are subversive and dissident elements at work in Heaven, even now. This is a factor that will come into play throughout My reasoning, even if unexpressed.

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[36] Gestation in the nine months between *K-Generation* and *International Finance* (see [13] above) led the Chief Justice to take a rather more Pueian line, saying:
The court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity. There are two reasons for this. The first is that if Parliament has used clear words to encroach upon the liberty or rights of the subject or to impose procedural or other constraints upon the courts its choice should be respected even if the consequence is constitutional invalidity. The second reason is that those who are required to apply or administer the law, those who are to be bound by it and those who advise upon it are generally entitled to rely upon the ordinary sense of the words that Parliament has chosen (*International Finance* (2009) 240 CLR 319, 349 [42]).
The South Australian Liquor Licensing Court and lawyers who advise in that area will be heartened at this news, although perhaps perplexed at marrying these sentiments to the reasoning in *K-Generation*.

[37] The War on Terror, the War on Drugs, the War on Bikie Gangs, the Premier Rann War on terrorist up-stream water takers in the Murray-Darling basin, and the apparently never ending possibilities of wars in general.

F *The Appellants' Attack on "Curial Fairness":*

1 *Review of Jurisdictional Fact*

[23] Argument was mounted in respect of the two pronged court administration of "fairness", set out by French CJ:[38] the capacity to accept or reject "threat to Heaven intelligence"; and the weighing of such material for fairness by the court.

[24] The review alluded to in *K-Generation* seems to be primarily the ascertainment of jurisdictional fact. Counsel for the respondents submitted that it was open to this Court, as much as it was to the court below (where no request was made for such review), to make its own determination as to whether the CGS had correctly classified material as "threat to Heaven intelligence". The classification, by either the CGS or a court, was by reference to the criteria of whether the material "could **reasonably** be expected to" prejudice investigations or reveal confidential sources. Indeed, the plurality in *K-Generation*, Gummow J et al, relied[39] on *George v Rockett*,[40] a case concerning whether the Magistrate authorising a search warrant had to have a state of mind that achieved an acceptable objective status: mere subjective belief or suspicion was not enough in the view of that unanimous High Court judgment, resting on the now orthodox dissent of Lord Atkin in *Liversidge v Anderson*.[41]

[25] The proposition in *K-Generation* was that the statutory requirement for "reasonableness" pointed to the power of a court to review the decision of the Executive as to jurisdictional fact: in the instant case, the decision that the secret material was in fact "threat to Heaven intelligence" for purposes of the Decree.

[26] The appellants submitted that a determination of whether material would prejudice investigations or reveal confidential sources was just the sort of thing that courts left to statutorily

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38 See [14] above.
39 (2009) 237 CLR 501, 540 [136].
40 (1990) 170 CLR 104, 112-3.
41 [1942] AC 206.

nominated decision makers: see *Australian Heritage Commission v Mount Isa Mines Ltd*,[42] resting on the reasoning of Black CJ in *Australian Heritage Commission v Mount Isa Mines Ltd*,[43] and *Woolworths Ltd v Pallas Newco Pty Ltd*,[44] Spigelman CJ saying in the last of these,[45] in a judgment determining the existence of jurisdictional fact open to curial review:

> In the present case, the determination of whether a proposed development is a "drive-in take-away establishment" raises questions of fact and degree but not of such a character as to suggest that Parliament intended that such a characterisation should turn on the opinion of the consent authority. This may be an issue on which reasonable minds may differ, but **there is nothing to suggest that the decision requires any particular expertise or local knowledge, let alone that it turns in any way on contestable value judgments. It is a conclusion about which an independent non-expert impartial observer could make an assessment as to whether it is right or wrong**. It is not the kind of test which, by its very nature, is unlikely to be jurisdictional (emphasis added).[46]

[27] I note that Lucifer followed this up with a reference to the House of Lords decision in *Gillan, R (on the application of) v Commissioner of Police for the Metropolis*,[47] where the Law Lords took an expansive view of the need to leave statutorily authorised operational police decisions to the police: I put *Gillan* to one side, as it concerns police decisions at an operational level in street policing, whereas the classification of covert intelligence is at a much higher level of sophistication, and one at which curial oversight is appropriate.

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[42] (1997) 187 CLR 297.

[43] (1995) 60 FCR 456.

[44] (2004) 61 NSWLR 707.

[45] *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 51 NSWLR 707, 720 [62].

[46] Intriguingly, the legislation in *International Finance* (see [13] above) contained in s10(3) a specific provision allowing for the Court to determine whether a triggering suspicion was "reasonable", but it only got a guernsey with the dissenters: see Hayne, Crennan and Kiefel JJ in *International Finance* 240 CLR 319, [116]. The irrelevance of *International Finance* to the present matter rests on the curial proceedings in *International Finance* possibly being conducted to a final confiscation of property *ex parte*.

[47] [2006] 2 AC 307.

2 *Judicial Weighing*

[28] The appellants then attacked the reasoning in *K-Generation* regarding weighing of threat to Heaven intelligence for the purpose of "curial fairness". It was said that traditionally, judicial weighing in the context of discretionary use of evidentiary material involves weighing probative value (itself tested by procedural fairness) against prejudice to the affected party, with the public interest serving to set the mark against which the balance will be measured.

[29] The illustration used was of illegally obtained information, such as telephone calls intercepted without warrant. The deployment of such material rests in judicial discretion, the process of weighing prejudice against probative value: *Kelly v R*.[48]

[30] Lucifer then asked rhetorically whether a conviction (and by extension, any other judicial order going to livelihood licence or civilian status) resting on unfair and untested actions would be obtained at "too high a price"? (see *R v Swaffield*,[49] and see now ss135-138 of the *Evidence Act 1995* (Cth)). It was said that in the classic criminal law expositions on this subject, the defendant at least had an opportunity to address the evidence put on against him, even if it was illegally obtained. From that confrontation, a judge had a clear view as to the probative value of the evidence: it had been tested, and could then be weighed against the prejudice to the defendant.

[31] Lucifer argued that when dealing with "threat to Heaven intelligence", the judicial officer will not have the benefit of evidence put on (if there be such evidence) to contradict the God Squad evidence, so that the process of assessing probative value will be inherently skewed. Unlike the weighing process in respect of illegally obtained evidence, the weighing of "threat to Heaven intelligence" must involve weighing at least one incommensurable, the probative value of the evidence, and a set of scales can hardly

48 (2004) 218 CLR 216, 263 [140].

49 (1998) 192 CLR 159, 176 [21].

operate when one side of the scales contains material incapable of measurement. However, the High Court is clearly of the view that any unfairness in this approach may be dealt with by weighing the probative value (however and inevitably unfairly assessed) against the prejudice to the affected party.

[32] If one observes the trajectory of Australian law since *R v Lappas*,[50] one can see that there has been a steady rejection of the idea that State evidence be discarded because its secret introduction into the court might be prejudicial. Gray J's sense of fairness (misplaced: even his sentencing had to be pushed up by the appeal court) in *Lappas* has been overtaken by legislative developments at Commonwealth level: see *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).[51]

[33] In any case, in *K-Generation* Kirby J was of the view[52] that the court could perform the cross examination of the police officer bearing the analogue to Heavenly "threat to Heaven intelligence".[53]

[34] Chief Justice Beverley McLachlin, writing for the entire Canadian Supreme Court, thought that at this point natural justice had been "gutted",[54] but the Canberra Seven take a much more robust view of how this will work than did the Ottawa Nine, (or, indeed, the London Nine[55]). In the High Court of Heaven appellants may choose the earthly jurisdiction on which they primarily rest for precedent and in the instant matter I am resting on Australian law, as

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50 [2001] ACTSC 115.

51 Patrick Emerton "Paving The Way For Conviction Without Evidence - A Disturbing Trend In Australia's 'Anti-Terrorism' Laws" (2004) 4 QUT LJJ 129, and see the Commonwealth legislation in action in *Lodhi v The Queen* (2007) 179 A Crim R 470, 484 [41] per Spigelman CJ (NSW CCA) for acceptance of the legislative "thumb on the scales".

52 (2009) 237 CLR 501, 577-578 [257] 5th bullet point.

53 Just how this would work, when the court could have no idea what particular issues would attract the eye of the affected party, what particular inaccuracies (known only to the affected party) were exposed in the criminal intelligence, is a matter of conjecture.

54 *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350, 388-9 [64], cited by Kirby J in *K Generation* (2009) 237 CLR 501, 573-574 [254] 6th bullet point.

55 See [46] ff below.

requested by Adam at preliminary directions, prior to the handing down of *K-Generation*.

G *Analogy with Public Interest Immunity*

[35] There was more of the same from Lucifer in his criticism of Kirby J in *K-Generation*[56] drawing an analogy with public interest immunity. It was argued that his Honour had failed to notice that the point of such immunity is to leave the court with a discretion to refuse entry onto the field of play for certain sensitive evidence, **not** to allow the evidence from one side into the court on a one-sided basis. This, it was said, was almost as remiss as Crennan J in *Gypsy Jokers*,[57] relying on *Alister v The Queen*,[58] saying that "a court may resolve a claim finally without one of the parties being shown certain material relied on for determination of a proceeding." *Alister* involved a determination that the failure of certain Crown evidence to be available at the trial[59] had not resulted in unfairness to the accused, which is nowhere near what is now claimed for it. The recent line through *Gypsy Jokers* and *K-Generation* is abundantly clear: evidence that formerly would not have been available to the affected party, pursuant to public interest immunity, on which basis it was not utilised by the court, may now still not be available to the affected party, but **can** be used by the court.

H *The Relevance of International Conventions on Fair Hearings?*

[36] Counsel for the appellants mounted a last attempt to utilise Australian case law, submitting that since *K-Generation* there has been a softening in the attitude towards the use of international conventions. The example was given of the approach adopted by

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[56] (2009) 237 CLR 501, 569-570 [248], resting on *Gypsy Jokers* (2008) 234 CLR 532, 556 [23]- [24] and 559 [36] per Gummow, Hayne, Heydon and Kiefel JJ, and 596 [183] per Crennan J (Gleeson CJ concurring).

[57] (2009) 234 CLR 532, 595 [180].

[58] (1984) 154 CLR 404, 469-470.

[59] Neither party nor the Bench could rely on the material, allowing that the Crown and the Bench had seen the material in the course of argument over privilege.

French CJ in *R & R Fazzolari Pty Ltd v Parramatta City Council*,[60] decided just two months after *K-Generation*. Observing the tenderness shown by the common law towards private property rights (a tenderness that counsel claims is equally shared with natural justice), the Chief Justice quoted Blackstone and a raft of international conventions as supportive of the protective and interpretive principles of the common law.[61]

[37] The appellants quoted the *International Convention on Civil and Political Rights* (see *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Schedule 2) as explicating of (because derived from) the common law requirement :

> Article 14
>
> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, **everyone shall be entitled to a fair and public hearing** by a competent, independent and impartial tribunal established by law (emphasis added). …
>
> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality;
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; …
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; …

[38] This attempt fails because the *Heavenly Charter of Rights*, like the two Australian jurisdictions with such Charters,[62] employs the phrase "a fair and public hearing", but not the "confrontation" material in clause 3 of Article 14. The judgments in *K-Generation* indicate that in an Australian context a fair and public hearing is one in which natural justice may be reduced to a nugatory status by

60 (2009) 237 CLR 603.
61 (2009) 237 CLR 603, 619 [41], and 620 [44].
62 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s24, "Fair hearing", and *Human Rights Act 2004* (ACT) s21 "Fair trial".

legislative fiat, so long as the court can test for itself the claim that the relevant evidence should be kept secret, and then weigh the secret evidence against any unfairness to the affected party.

IV OTHER COMMON LAW JURISDICTIONS ON AN ASSUMPTION OF NATURAL JUSTICE IN COURTS

A *British Materials and a European Case*

[39] The appellants then took Me to various British cases, on the basis that they still had some residual relevance to Australian law. This relevance was said to rest on the need for a discrimen in determining Chapter III curial integrity. The bedrock of such integrity was said to be found in common law statements of fundamental criteria in curial behaviour. Sir Christopher Staughton was cited from the Court of Appeal in *Hussain v Elonex Plc*,[63] himself quoting Megaw J in *Chandris' case*:[64]

> … [N]o one with judicial responsibility may receive evidence, documentary or otherwise, from one party without the other party knowing that the evidence is being tendered and being offered an opportunity to consider it, object to it, or make submissions on it. No custom or practice may override that basic principle.

[40] Sir Christopher went on to say that "People in this country are not convicted on the basis of a *lettre de cachet* supported by a witness who wraps a cloak over his face while conducting an identification of the defendant." I observe that this was in accord with much of the submissions of counsel for the appellants, which amounted to a scare campaign against "secret police evidence", with a linguistic emphasis on "secret police". As far as overriding the so called "basic principle" of natural justice, these reasons will show

[63] [1999] IRLR 420.
[64] [1963] 1 Lloyds List LR 214, 225.

that My Heavenly Decree is deflected by neither custom, practice nor the Charter.

[41] Counsel for the appellants then waxed literary, by taking the Court to Lord Steyn's speech in *R (Roberts) v Parole Board*.[65] It was submitted that this paragraph was peculiarly apposite to the plight of the appellants, who do not have knowledge of what is alleged against them, nor, inevitably, the opportunity to reply to the allegation. Lord Steyn said:

> [A] prisoner against whom unfounded allegations have been made is in a Kafkaesque situation. Th[e] reference [is] to *The Trial* (1925), the masterpiece of Franz Kafka. A passage in *The Trial* has a striking resonance for the present case. Joseph K was informed:
>
> ". . . the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea; accordingly it could be only by pure chance that it contained really relevant matter.... In such circumstances the Defence was naturally in a very ticklish and difficult position. Yet that, too, was intentional. For the Defence was not actually countenanced by the Law, but only tolerated, and there were differences of opinion even on that point, whether the Law could be interpreted to admit such tolerance at all. Strictly speaking, therefore, none of the Advocates was recognized by the Court, all who appeared before the Court as Advocates being in reality merely in the position of hole-and-corner Advocates".

[42] It needs to be said immediately that Lord Steyn was in dissent, and the majority of the Lords were for a proportional application of procedural fairness, with an emphasis on the public interest in keeping the identity of witnesses hidden where that was indicated. Counsel for the appellants responded that the case involved the Parole Board, not a final determination by trial process.

[43] The appellants then took the Court to the speech of Lord Mance in *R v Davis*.[66] The case concerned the use of witnesses

65 [2005] 2 AC 738, 787 [95].
66 [2008] 1 AC 1128, 1170-1 [91] to [94].

whose identities were suppressed in trials. The House of Lords addressed the issue in terms of fairness to the accused, but rather than the Australian High Court approach of leaving the weighing of impact of the secret (or not properly cross-examinable) evidence to the trial judge, the Lords opted for allowing the appeal where the impact of the evidence skewed the trial too far from fairness, for example where the evidence was crucial to the result. In that instance, the dictates of "fair trial" required that the witness be identified so that thorough cross examination might take place.

[44] Lord Mance relied on the dissent of Sir Ninian Stephen in the International Tribunal for the former Yugoslavia in *Tadic* (1995). Sir Ninian thought that witnesses should not, as a matter of course, remain anonymised, and his dissent was later upheld. Lord Mance said:[67]

> Judge Stephen's dissent received retrospective support, when during the trial in *Tadic* the identity of one of the anonymous witnesses was eventually discovered by the defence. The witness had asserted that he had seen Mr Tadic execute 30 males including the witness's own father. After managing to identify the witness, the defence were able to produce his father, still alive, and only then did the witness admit that he had been trained by Bosnian Government authorities to give his evidence against Mr Tadic.

[45] The antics in a Balkan underworld, and the jurisprudence that derives therefrom, do not impress Me. The informants for, and the members of the God Squad are, of course, above suspicion, and this line of conjecture has no place in Heavenly analysis.

[46] Lucifer was able to brandish the unanimous decision of a nine bench of the House of Lords delivered even as the instant argument was underway: see *Secretary of State for the Home Department (Respondent) v AF*.[68] Like a dog with two tails, Lucifer set out the speeches which required natural justice to be afforded to a person facing a "control order", even if the evidence and allegation were in

[67] [2008] 1 AC, 163 [93].
[68] [2009] 3 WLR 74. Forthcoming in the authorised reports.

the nature of confidential and secret State security information. Thus, Lord Phillips:[69]

> The best way of producing a fair trial is to ensure that a party to it has the fullest information of both the allegations that are made against him and the evidence relied upon in support of those allegations. Where the evidence is documentary, he should have access to the documents. Where the evidence consists of oral testimony, then he should be entitled to cross-examine the witnesses who give that testimony, whose identities should be disclosed. Both our criminal and our civil procedures set out to achieve these aims. In some circumstances, however, they run into conflict with other aspects of the public interest, and this is particularly the case where national security is involved. How that conflict is to be resolved is a matter for Parliament and for government, subject to the law laid down by Parliament. That law now includes the [European] Convention, as applied by the [*Human Rights Act 1998*] HRA.

[47] And Lord Hope:[70]

> As Lord Scott of Foscote observed in *A v Secretary of State for the Home Department*,[71] a denunciation on grounds that are not disclosed is the stuff of nightmares. The rule of law in a democratic society does not tolerate such behaviour. The fundamental principle is that everyone is entitled to the disclosure of sufficient material to enable him to answer effectively the case that is made against him.
>
> The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be most dangerous out of circulation for as long as possible. But the slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him.

69 *Secretary of State for the Home Department (Respondent) v AF* [2009] 3 WLR 74, 100 [64].
70 [2009] 3 WLR 74, 105-106 [83] and [84].
71 [2005] 2 AC 68, [155].

[48] The House of Lords, it must be noted immediately, was resting not only on European Convention standards (incorporating not just a right to a fair trial, but a right to confront allegations and evidence in court against an affected person) but on a decision of the Grand Chamber of the European Court of Human Rights, *A v United Kingdom* [2009] ECHR 301. The principles enunciated by their Lordships simply have no application in Australian, and hence Heavenly jurisprudence in this case.

B *North American Materials*

[49] It was submitted for the appellants that United States case law was replete with material going to the fundamental nature of procedural fairness, or due process, as Americans term it, in curial proceedings. In the face of the proposition that all such case law was dependent on the United States Bill of Rights, counsel for the appellants argued that the Bill of Rights, particularly in this area, merely enunciated common law concepts. The provisions going to a fair trial in the Bill of Rights, the 6th Amendment "confrontation" material, it was said, like the other Bill of Rights provisions referred to above,[72] codified common law requirements for judicial conduct. Pursuant to the 6th Amendment the United States Supreme Court has ruled repeatedly that an affected party must have the right to cross examine the witness giving evidence against him, excepting only if the court in its discretion thinks the witness must be protected as to, for example, identity for reasons of personal safety: see *Smith v. Illinois*.[73]

[50] The appellants further relied on *Hamdi v Rumsfeld*,[74] involving an application for habeas corpus by a US citizen detained under anti-Terror laws. O'Connor J, for the Court, said:[75]

> Any [curial] process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any

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72 At [37] and [46] ff.
73 390 US 129 (1968).
74 542 US 507 (2004).
75 542 US 507, 537 (2004).

> opportunity for the [affected party] to demonstrate otherwise falls constitutionally short.

[51] In further reference to War on Terror cases, the appellants quoted at length from the opinion of Stevens J for the Supreme Court in *Hamdan v Rumsfeld*,[76] where his Honor explained the illegitimacy of the military commission set up to try the appellant, for reasons including a failure to adhere to "all the judicial guarantees which are recognized as indispensable by civilized peoples." Stevens J said (and I set out the material as deployed in the appellants' written submissions):

> The procedures adopted to try Hamdan also violate the Geneva Conventions (at VI, D).
>
> Common Article 3 [of the Geneva Conventions], then, is applicable here and, as indicated above, requires that Hamdan be tried by a "**regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples**" (VI, D(iii)) (emphasis added).

[52] His Honor referred to the principles:

> … [I]ndisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him … (VI, D(iv)) (emphasis added).

[53] The Canadian Supreme Court in *Charkaoui v Canada (Citizenship and Immigration)*,[77] through the judgment of McLachlin CJ for all the judges, dealt with migration legislation providing for secret information to go to a judge dealing with deportation in a terrorist setting. I note that both *Charkaoui* and *Hamdi* were relied on by Lord Hope in *AF*[78] but all three jurisdictions (Canada, the US

[76] 548 US 557 (2006).
[77] [2007] 1 SCR 350.
[78] See [47] above, [2009] 3 WLR 74, 105 [83].

and the UK) are affected by Bill of Rights thinking. Counsel for the appellants quoted the Chief Justice in *Charkaoui* saying:[79]

> [S]ince the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. ...
>
> Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?

[54] Nonetheless, the Supreme Court found that there might be mechanisms for dealing with secret materials (such as appointing special counsel with security clearances) that would be consistent with a minimum standard of natural justice.

C *Australian Jurisprudence Compared With Other Common Law Countries*

[55] One may note that in *K-Generation*, in the course of argument, in respect of *Davis*,[80] Kirby J said:[81]

> Of course it is relevant also to note that within, I think, three weeks of *Davis* the Parliament of the United Kingdom enacted legislation to try to overcome *Davis*, and that is subject to whether that conforms to the European Convention on Human Rights. **They have the European Convention, we have Chapter III of the Constitution of this country** (emphasis added).

[56] Neither Kirby J, nor the other members of the Australian High Court, proceeded to treat the issue of natural justice in Australian

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79 [2007] 1 SCR 350, 388-9 [63], [64].
80 See [43] ff above.
81 *K-Generation Pty Limited & Anor v Liquor Licensing Court & Anor* [2008] HCATrans 365 (4 November 2008).

courts as other than revolving around "an unwritten constitutional principle" which came into play through Chapter III of the Constitution. *K-Generation* is a powerful precedent relating to legislation cognate with the Decree under analysis in the instant matter, that there was in fact no infringement of any common law inherent standard of curial behaviour.

[57] Both Chapter III and the Charter in this jurisdiction, lacking a "confrontation" provision, fall short of the protection afforded by the *European Convention*. The confidentiality provision, parallel with that dealing with the deployment of "threat to Heaven intelligence" in the instant case, left sufficient discretion in the courts concerned to provide their own "fairness", even if it was not the procedural fairness of a former age, and such discretion dispelled any charge of Executive control of process or outcome. I cite from *K-Generation* French CJ, Gummow J et al and Kirby J.[82]

[58] I note in support of My use of the recent Australian jurisprudence, that the Charter in this jurisdiction contains only a right to a fair trial, not the additional explicit right to examine witnesses against an affected party which appears in the *European Convention* as Article 6(3)(d)[83] and in the United States as the 6th Amendment.[84] A "fair trial" may be afforded without natural justice, if the court can still display its integrity by performing its own procedures to provide an appropriate measure of fairness.

V THE HISTORY AND PRINCIPLE OF NATURAL JUSTICE IN COURTS

[59] Counsel for the appellants tried for a broader attack than mere reliance on purported precedent, by turning to what was submitted to be deep lying principle in the law. This might be described as the "equality of arms" theory, that the parties in court should be armed

[82] (2009) 237 CLR 501, 532 [98]-[99], 543 [149], and 580 [258] respectively.
[83] See [46] ff above.
[84] See [49] above.

with equal weaponry, and that the judge should keep equidistant from them: see Lord Bingham in *Brown v Stott*.[85]

[60] This approach is also said to be in keeping with the second leg of natural justice: an unbiased hearing. Counsel argued that that was what lay behind the trenchant comments of Mason J in *Re JRL*.[86]

[61] The appellants then turned to yet another Australian High Court case from a decade lacking relevance, and quoted, in the context of the importance of the separation of powers, Mason CJ, Dawson and McHugh JJ in *Leeth v The Commonwealth*:[87]

> It may well be that **any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice** would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case* [*Attorney-General of the Commonwealth of Australia v. The Queen*,[88] a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers (emphasis added).

[62] *K-Generation* is decisive authority that the historical role of natural justice as a prerequisite of judicial behaviour has been displaced[89] in favour of court controlled "fairness", which will be a court administered concept, devoid of any transparent content, and tested only by reference to whether a court may still claim to be independent of the Executive will as to procedure and outcome.

[63] The penultimate fling for the appellants under the heading of principle was to refer to the famous line from Wigmore regarding

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85 [2003] 1 AC 681, 695 ff.

86 See [8] above.

87 (1992) 174 CLR 455, 470.

88 (1957) 95 CLR 529, 542; [1957] AC 288, 317].

89 In *International Finance* (see [13] above) French CJ ((2009) 240 CLR 319 , 354 [54]) seems to be re-asserting the fundamental importance of natural justice in court proceedings, but on its facts that case goes only to presence of parties in court, while *K-Generation* goes to the instant problem of legislative ordering of covert evidence into a court.

cross examination: "[I]t is beyond any doubt the greatest legal engine ever invented for the discovery of truth." That is as may be, but the issue at stake in the present proceedings is whether there is a fundamental and unquenchable requirement for natural justice in the work of courts. Cross examination may be less potent under the Decree in issue, and less potent to the point of negligibility, but "fairness" is still guaranteed by the court concerned: without the affected party knowing how, the court will ensure fairness.

A *Untested Allegations*

[64] The appellants' last redoubt of principle was to submit that systemically untested allegations provided

> … a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.

Per Jackson J in *Knauff v Shaughnessy*,[90] cited by Kirby J in *K-Generation*.[91] St Michael of Kirby (and it was his very last decision as a Judge) was no more moved by that reference than he was by the experience of Professor David Cole as to the consistent incorrectness of secret evidence against suspects in the War on Terror once they came to trial and discovery was permitted: "Secret Evidence in the War on Terror",[92] or the shenanigans in *Tadic*.[93] I take the view that if the Australian High Court is sure that Australian judges can resist any errors in this area, or at least any public appearance of error, then I have no concerns in this Court.

VI THE SOCIOLOGICAL ARGUMENTS FOR NATURAL JUSTICE IN COURTS

A *Theology and Transparency*

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[90] 338 US 537, 551 (1950)

[91] (2009) 237 CLR 501, 574 [254], last bullet point.

[92] (2005) 118 HLR 1962, 1980.

[93] See [44] above.

[65] The last of the submissions for the appellants might be termed the "sociological arguments" for retention of natural justice in courts. These were apparently led to persuade this Court that the *K-Generation* approach was not adequate to deal with an express requirement for a "fair trial", as existed under our Charter.

[66] Let Me deal first with the theological references. *Dr Bentley's case*[94] was wheeled out. By way of counter example, I do not remember giving Belshazaar a hearing when he was having a nosh up with mates, and I gave him the finger. He simply went under the chopper. I knew he was no good, so off he went.

[67] Then followed the arguments for transparency in the administration of justice. I agree that the *K-Generation* approach is to a distinct degree opaque, but it is workable. The appeal to Brandeis "Sunlight is the best disinfectant, and electric light the best policeman" falls on deaf ears. Summoning up the occasional failings of Australian judges and police[95] will not advance the appellants' cause in this Court.

[68] That a party confronted with "threat to Heaven intelligence" is inconvenienced is neither here nor there, and counsel for the respondents produced a practical example of how courts may approach secret God Squad intelligence: see the unanimous decision of the NSW Court of Appeal in *Commissioner of Police NSW v Gray*,[96] ironically argued on the day that *K-Generation* came down

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94 See material in text, above n 11, epigraph to this judgment.

95 What are Murray Farquar (NSW Chief Magistrate imprisoned for corruption), Marcus Einfeld (retired Federal Court Judge imprisoned for perjury when he claimed a dead American woman was driving his car at the time of the speed offence), Detective Roger Rogerson (apparently a one man "death squad"), the Wood Royal Commission (run by Justice Wood in 1994-5 into NSW Police corruption) or Manly Police Station (where business went as usual in suburban Sydney right through the Wood Royal Commission), all matters in New South Wales' murky, if recent past, to Me? The same applies to Tasmania's recently retired after exoneration Police Commissioner, Victoria's Underbelly, and the recent revelation that it has been on with the show for the Queensland police in the twenty years since the Fitzgerald Royal Commission. These are no more to Me than the Balkan underworld despatched at [45] above.

96 (2009) 74 NSWLR 1.

in the High Court. McColl JA, for the Court of Appeal, had no hesitation in relying on *K-Generation* to overturn the judge below and the Administrative Decisions Tribunal, which had both found that the police had to provide particulars to an applicant for a Security Industry licence, blocked by secret police information. Giving particulars might impinge on secrecy, so no particulars were to be provided. I agree in this reasoning.

B *Public Respect and Acceptance*

[69] The argument then slid from transparency to a concept that had vogue in the Australian High Court at the end of the 20th century: behaviour and process in courts at a standard that would retain public respect and acceptance. French CJ provided the one reference to that concept in *K-Generation*.[97] It was not raised in the context of whether the disappearance of natural justice would lead to loss of public respect and acceptance, but the much more abstract issue of whether the courts in South Australia could be adjudged to retain their integrity on the review and weighing theory.

[70] Public respect and acceptance may now be regarded as having passed into desuetude, or at least as watered down to whatever judges think is a fair thing. The whole point of *K-Generation* is that what matters is not what the public think about what is happening to them in the courts, but whether Judges are confident of feeling fair about what they are doing, and that in that process they are independent, and so retain institutional integrity.

[71] The "public acceptance" gambit was tied to judicial expressions (of a bygone age) regarding justice being seen to be done. The appellants quoted Lord Goddard CJ (one of My special creations I've always thought) in *R v Justices of Bodmin*:[98]

> Time and again this court has said that justice must not only be done but must manifestly be seen to be done. If justices interview a witness in the absence of the accused, justice is not seen to be

[97] (2009) 237 CLR 501, 529-530 [88].
[98] [1947] 1 KB 321, 325.

> done, because the accused does not and cannot know what was said.

It needs to be said clearly and emphatically that I and other Judges see that justice is done. Goddard LCJ was under a misapprehension in his assumption that an affected party should see the evidence. Judicial sighting is ample to the task.

C *The Draconian Scare Tactic Argument*

[72] The theory espoused in *K-Generation* is that even if the affected party cannot be present in court to deal with evidence against him, his lawyer may be allowed. That possibility is antidote to the bane. It follows that the more trying references by counsel for the appellants fall away, and become so much rhetoric. Not content with insinuating Kafka, the Star Chamber and *lettres de cachets* through the case law set out above, Lucifer then went on to claim that the "threat to Heaven intelligence" provisions in the Decree would foster the likes of Judge Freisler and Prosecutor Vyshinsky. In respect of the former, counsel quoted from *A Social History of the Third Reich*[99] referring to:

> … [T]he last vestiges of judicial independence. It became standard practice for judges and prosecutors to confer together in advance of each trial, with a view to pre-determining its outcome.

This really overstates the case I feel.

[73] As for Vyshinsky, I offer a note of congratulations to Myself for being so clever in the drafting of the Decree. The whole point is that the affected party never gets to see the God Squad material, and only perhaps will his lawyer. Even if the stuff is riddled with error, with any luck it will never be challenged, by even the most intent of judges. This avoids the appalling example of the evidentiary bungles

99 Richard Grundberger, *A Social History of the Third Reich,* (Reprint 1991), Penguin, 16.

that emerged in Stalin's show trials. In the trial of Zinoviev (accused of plotting with Trotsky),

> … the court heard how Trotsky's son, Sedov, ordered the assassinations in a meeting at the Hotel Bristol in Denmark – yet it emerged that the hotel had been demolished in 1917.
>
> "What the devil did you need the hotel for?" Stalin is said to have shouted. "You ought to have said 'railway station'. The station is always there."[100]

D *Argument by Psychobabble*

[74] Things got really sociological when Lucifer returned to the judgment of Sir Robert Megarry in *John v Rees*,[101] having earlier quoted the well known piece about open and shut cases.[102] The quote continued:

> …[T]hose with any knowledge of human nature … [will not] underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.[103]

The then Solicitor General, Sir Harry Hylton-Foster, has since intimated to Me[104] just that gut buckling sensation when his prosecution of Megarry for tax fraud in 1954 went west upon the trial judge taking the matter away from the jury on the basis of reasonable mistake by Megarry, and dismissing the charge. I note also that Lord Phillips in *AF*[105] referred to Megarry J on resentment,[106] but it is arguable that feelings of thwarted entitlement

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[100] See Simon Montefiore, *Stalin: The Court of the Red Tsar*, (2003), Weidenfeld and Nicolson, 170.
[101] [1970] Ch 345, 402.
[102] See below, n 103.
[103] Quoted by Heydon J in *International Finance* (2009) 240 CLR 319, 381 [145], as was the portion on "open and shut cases" at 380 [143].
[104] Oh come on! Obviously he's a Gold-pass holder with full entry rights.
[105] See [46] above.
[106] [2009] 3 WLR 74, 100 [63].

that underlie resentment are based in expectations raised by a detailed Bill of Rights or similar.

[75] The Court was then taken to the extra judicial writings of an Australian Federal Court judge, Susan Kenny: "Maintaining Public Confidence in the Judiciary: a Precarious Equilibrium",[107] her Honour adverting to a requirement on courts:

> … [T]hat each party be accorded a fair opportunity to advance its case before the judge and that the judge must listen attentively to it. One contemporary philosopher has described this aspect of the judicial process in the following terms:
>
> > We are entitled not to 'like results' but 'like process' (or 'due process'), and this means attention to the full merits of the case, including to what can fairly be said on both sides: to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language.[108]

[76] Kenny J returned to her theme, saying:

> Procedural fairness, whether described as due process or natural justice, has, however, an abiding importance which is illustrated every day in the work of the courts in free societies.

[77] Lucifer then went for broke by quoting from two monographs by a legal scholar, Professor TRS Allan, who in the first quote was himself lifting from a legal philosopher, Rawls:

> The principles of natural justice find a place even within a formal doctrine of the rule of law: the requirements of a fair and open hearing and the absence of bias are recognized as essential for the correct application of the law. "These are guidelines intended to preserve the integrity of the judicial process … The precepts of natural justice are to insure that the legal order will be impartially and regularly maintained."[109]

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107 (1999) 25 Monash LR 207, 216-217.

108 James Boyd-White, *Heracles Bow: Essays on the Rhetoric and Poetics of the Law*, (1985), University of Wisconsin, 134.

109 TRS Allan, *Law, Liberty and Justice*, (1993), Clarendon Press, 28.

[78] And further:

> There is therefore an analogy with democratic participation in political affairs: the fairness of legal procedures, providing full opportunity for each party to present his case, provides moral grounds for accepting the outcome, just as the possibility of political action, protected by basic civil and political rights, affords grounds for obedience to duly enacted law.[110]

[79] The respondents submitted first that the jurisprudes were not addressing fairness in courts in particular,[111] and secondly that this approach was now outdated and outmoded. In times of peril the State was better secured by reliance on judges as the Guardians of Plato's *Republic*. They were above the fray, and completely trustworthy, and their utility was to be preferred to that of a procedure attached to a former and simpler time. Just as child birth might have seemed natural to a past that knew no better, with progress and improved technology it had to be abandoned in favour of the C section. Lucifer responded by saying that 500 years after Plato, Juvenal asked: "Who will protect us from the guardians?" That may be dismissed as so much Roman cynicism.

E *Times Have Changed*

[80] Lucifer asked how the Australian High Court could have thought in *Webster v Lampard*[112] that in the absence of a cross examination at a pre-trial stage, the party adversely affected by that lack had to be believed, but by 2009, a party could be done down in a full on trial without cross examination? The answer is: Parliamentary sovereignty. The Great and the Good, in other words Me have determined that a new paradigm is required to deal with the legislative changes wrought in the *War on God*. The populace will get used to not being heard in response to God Squad (or in Earthly terms, State security) evidence against them, and learn to rely on the impeccable judgment of judges in ensuring "a fair hearing".

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110 TRS Allan, *Constitutional Justice* (2001), Oxford, 79.

111 This vice also applies to the work of Lucas referred to by Heydon J in *International Finance* (2009) 240 CLR 319, 380-381 [143] to [145].

112 (1993) 177 CLR 598.

F *Triangulation by Squaring the Circle*

[81] Lucifer argued that a judge should always sit at the point of a triangle equidistant from the disputing parties, thereby displaying impartiality and equality of treatment.[113] He claimed that the use of secret materials wrecked the triangulation of a court. The answer to this claim lies in the recognition of fairness in a different form. The bench may seem nearer to one party than the other, and nearer to the Executive party at that, but judges are equipped with innate qualities of fairness which arm them for the reviewing and weighing exercise. The triangle has altered from isosceles to scalene, and the public aspect of the testing of evidence has largely died (but for good reason): fairness lives on in new form! Just as there are two species of elephant (and many more extinct species), so *K-Generation*, and in turn the instant case, illustrate 21st century fairness as distinct from that of the 20th and earlier centuries.

[82] Mangling his metaphors, Lucifer submitted that this Court should make the effort taken by British, European, American and Canadian courts to attempt to square the circle of "fair hearing" with its seeming contradictor of secret evidence. The obvious answer is that in at least the first three of those jurisdictions, supervening rights at a constitutional level are asserted to confront evidence against an affected party. No such right exists in Heaven, and I am satisfied that the Decree is Charter compliant.

113 See [59] above.

G *Fairness in Art?*

[83] Lucifer essayed a last artistic reference, to Lorenzetti's *Allegory of Good Government* painted in the Palazzo Pubblico in Siena in about 1340. The claim was made that the figure of Justice on the left, depicted dispensing mercy and execution, was joined to the figure dressed in black and white representing the Executive (the Senese formed a republic, devoid of a king) by a cord that ran through the hands of the populace depicted walking past the whole structure of government. This, it was claimed, represented the share that all in that community had in justice fairly dispensed. I can only concur with French CJ in *K-Generation* when he demanded in the course of argument that counsel for the appellants "keep … social commentary out of it …".

H *Decision*

[84] I am in accord with the reasoning of the court in *K-Generation* and I have received belated application from Lucifer (who is on thin ice) to perform what he called the "two step review and weighing process", to be preceded by a determination as to whether the appellants or their lawyers might see any or all of the threat to Heaven intelligence. I have decided against that course of action after having inspected the "threat to Heaven intelligence" material, and I then reviewed it for its correctly being classified, (it was) and weighed it for its fairness, (it is) and make the usual orders in cases such as this:

1. Appeal dismissed.
2. Control order confirmed in respect of both appellants.
3. Expulsion from the Garden of Eden to be effected forthwith.
4. Gate to the Garden to be guarded by an angel with a flaming sword.
5. Fig leaves to be applied.
6. Tears and recriminations (but the identity of any animal involved is suppressed pursuant to the "threat to Heaven intelligence" provisions).