

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA639/2008
[2010] NZCA 4**

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| BETWEEN | THE ALLIANCE PARTY Appellant |
| AND | THE ELECTORAL COMMISSION First Respondent |
| AND | THE NEW ZEALAND NATIONAL PARTY Second Respondent |
| AND | THE FAMILY PARTY Third Respondent |

Hearing: 22 October 2009

Court: William Young P, Hammond and Chambers JJ

Counsel: A J McKenzie and D Goldwater for Appellant
P J Gunn and D Brookes for First Respondent
P T Kiely and D J Erickson for Second Respondent

Judgment: 10 February 2010 at 10 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We make a declaration that Part 6 of the Broadcasting Act 1989 requires the Electoral Commission to allocate time for an opening address and time for a closing address to every political party that qualifies for allocation of time under the Broadcasting Act.

C We make no order for costs.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction: a political party is dissatisfied

[1] In the run up to the 2008 general election for the New Zealand Parliament, the Electoral Commission (the Commission) was required to make an allocation of broadcasting time for opening and closing addresses on television and radio by qualifying political parties. The Commission was also responsible for allocating government funds for the broadcasting of election programmes by political parties. The Commission had available 72 minutes of time on Television New Zealand Limited (TVNZ) and Radio New Zealand (RNZ) for opening addresses by the parties and 30 minutes of time for closing addresses, as well as \$3,211,875 of public money. The appellant, the Alliance Party, received one minute of time for an opening address, a \$10,000 allocation from the amount appropriated for broadcasting election advertising, and a production package of \$7,000. The Party did not receive any time for a closing address.

[2] The Alliance Party claims that the Commission acted unlawfully in this respect. We should make it plain at the outset that there is no allegation or aspersion

that the Commission acted in bad faith. It is accepted that, faced with limited funding, the Commission did its level best to arrive at a solution which it saw to be “fair”. The claim is therefore a strictly “legal” one, concerning the interpretation of Part 6 of the Broadcasting Act 1989.

[3] We should add that the outcome of this proceeding casts no doubt on the standing and lawfulness of the 2008 general election in this country. The Alliance Party wishes to establish – with future general elections in mind – that by law it should have been allocated funds for a closing address.

[4] In the High Court, MacKenzie J held that the Commission’s nil allocation of time for a closing address to the Alliance Party on either radio or television was lawful.¹ That proceeding was brought by way of judicial review, and the application was dismissed.

[5] In this Court, the Alliance Party originally wished to challenge the following aspects of the Commission’s allocation decision: the decision not to allocate broadcasting time for closing addresses to non-Parliamentary parties (the closing decision); the approach to calculating the allocation of public money for broadcasting costs to non-Parliamentary parties (the advertising decision); and the tying of part of the monetary allocation to a TVNZ production package (the production decision). The appeal in relation to the production decision was abandoned by counsel for the Alliance Party on 7 October 2009.

[6] The agreed issues on appeal are now as follows:

- (a) Does Part 6 of the Broadcasting Act require the Commission to allocate time for an opening address and time for a closing address to every political party that qualifies for allocation of time under the Broadcasting Act?
- (b) Whether, in allocating money to the Alliance Party in 2008, the Commission based its decision on the costs of a basic radio

¹ *Alliance Party v Electoral Commission* HC Wellington CIV-2008-409-1253, 18 September 2008.

advertising campaign for a month? If so, was that decision in breach of s 75(2) of the Broadcasting Act?

[7] The Alliance Party seeks declarations that:

- (a) Every registered political party must be allocated a closing address of such length as the Commission determines; and
- (b) Every registered political party must be allocated a minimum amount of money under s 74A of the Broadcasting Act. That minimum amount must be sufficient to provide the political party a “fair opportunity ... to convey its policies to the public by the broadcasting of election programmes on television”: s 75(2)(f).

[8] We will proceed to consider the issues arising under three principal heads. First, we will set out the relevant electoral broadcasting regime in New Zealand, highlighting the way it works. Secondly, we will set out what the Commission actually did in the case under review. Thirdly, we will turn to the legality of the closing and advertising decisions.

The New Zealand electoral broadcasting system

Evolution

[9] For present purposes, “broadcast media” refers to television and radio channels. In New Zealand resort to the broadcast media for election related purposes has always been heavily regulated. For a general description of the New Zealand system, see Andrew Geddis *Electoral Law in New Zealand: Practice and Policy*.²

[10] Because broadcasting in New Zealand began life as a “quasi-nationalised public service”, there was some unease as to the potential for governmental interference with the media for partisan political ends.³ In large part that explains why New Zealand has such heavily regulated electoral broadcasting laws.

² See Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis New Zealand, Wellington, 2007) at ch 9.

³ At 159.

[11] However, broadcasting in New Zealand is now almost wholly commercial and privately owned. If there is a purpose for close control of electoral broadcasting in New Zealand today, it must be grounded on a democratic principle of fairness of access. This is particularly important in an age when the broadcast media are so influential in conveying election messages to the voting public.

[12] Ensuring fairness of access has been and continues to be a hotly debated topic. The actual determinations of the Commission in the regulation of election-related broadcasting have routinely produced debate. At every general election there have been complaints of unfair treatment by at least some of the affected parties.⁴ In short, the case which is before us concerns one aspect of a problem which has much exercised political parties generally.

Political parties

[13] Legal recognition and regulation of New Zealand political parties is a comparatively recent phenomenon.⁵ Under New Zealand's current electoral regime, a political party cannot contest what many commentators consider to be the all important party vote unless and until it is registered. Access to broadcast media electioneering is forbidden, save in the case of registered political parties.

[14] To be eligible to register, a party must demonstrate to the satisfaction of the Commission that it has at least 500 "current financial members" who are eligible to enrol as electors.⁶

The form of broadcasting access by political parties

[15] We are conscious that a judgment of this character may attract the interest of general readers. Thus we express what the Commission has to do in making an

⁴ See Stephanie Corban "Financing Political Party Broadcasting" (1997) 8 Auckland U L Rev 265 at 272 – 282.

⁵ See generally Andrew Geddis "The Unsettled Legal Status of Political Parties in New Zealand" (2006) 3 NZJPIIL 105.

⁶ Electoral Act 1993, ss 63 and 70(2).

allocation in plain English rather than in the technical language of the Broadcasting Act.

[16] Part 6 of the Broadcasting Act requires the Commission to allocate time and money to political parties contesting a general election. The broadcasting of election programmes outside those allocation parameters is prohibited.⁷ Accordingly, Part 6 is the only recourse political parties can have to the broadcast media for elections.

[17] The way the Broadcasting Act scheme works is as follows. First, the two publicly owned broadcasters, TVNZ and RNZ, must provide time free of charge for the broadcasting of the opening addresses and closing addresses of political parties in an election period.⁸ The Commission must require TVNZ and RNZ to supply a statement of the amount of time that each of them will provide for this purpose.⁹ Secondly, a sum of public money is made available in respect of the costs of broadcasting election programmes.¹⁰ For the 2008 election the amount contributed by the government was \$2,855,000 excluding GST, or \$3,211,875 including GST.

[18] Part 6 significantly constrains the ability of political parties to communicate their messages directly to voters. Failure to abide by the regulatory constraints in Part 6 gives rise to offences under the Broadcasting Act: for instance, it is an offence, punishable by a fine of up to \$100,000, for any person to broadcast an election programme for or on behalf of a political party in an election period.¹¹

[19] The important point for the purposes of this judgment is that there is a distinct constraint upon activities that could otherwise be undertaken by political parties in relation to the general election, the most important exercise in a democracy. This is an important factor to consider in the construction of the relevant legislation, to which we will come in due course.

⁷ Broadcasting Act 1989, s 70.

⁸ Section 71(1).

⁹ Section 71A.

¹⁰ Section 74.

¹¹ Section 80(b)(i).

Dividing up the pool

[20] The allocated public money plus the time donated by TVNZ and RNZ forms a common pool. Once that common pool is known, the Commission must allocate the time (s 73) and money (s 74A) between all eligible political parties that have requested a share.

[21] The Commission has to apportion access amongst the various eligible political parties having regard to six factors:¹²

- (a) The number of people who voted at the immediately preceding general election for that party and for candidates belonging to that political party;
- (b) The number of people who voted at any by-election held since the immediately preceding general election for any candidate belonging to that political party;
- (c) The number of Members of Parliament who were members of that political party immediately before the dissolution or expiration of Parliament;
- (d) Any relationships that exist between a political party and any other political party;
- (e) Any other indications of public support for that political party such as the results of public opinion polls and the number of people who are members of that political party; and
- (f) The need to provide a fair opportunity for each political party to convey its policies to the public by the broadcasting of election programmes on television.

¹² Section 75(2).

[22] The Commission regards these factors as exhaustive.¹³ But there is nothing in the Broadcasting Act to indicate how much weight any one of these factors should carry vis-à-vis the others.¹⁴

The application of the Broadcasting Act scheme

[23] The application of the Broadcasting Act scheme means that a registered political party may broadcast an election programme only in the air time purchased with money allocated to it by the Commission or allocated to it for its opening and closing addresses. There are problems attaching to excess and even inadvertent cost overruns by political parties, but they are not germane to this case. We should note that money provided as part of the broadcasting allocation may be used only for the purpose of making and screening an election programme.¹⁵ But parties remain free to spend their own funds on the cost of producing an election programme.¹⁶ However, that expenditure will contribute towards that party's total election expenses.

The Commission's allocation decision

[24] After undertaking the necessary consultation process with political parties, the Commission made its initial allocation decision on 19 May 2008. It made its allocations of time and money to the relevant parties in four bands, as follows:

¹³ Electoral Commission *Decision of the Electoral Commission: Te Kaitiaki Take Kowhiri, on Allocation of Time and Money to Political Parties for Broadcasting of Election Programmes: 2005 General Election* (Electoral Commission, Wellington, 24 August 2005).

¹⁴ For a discussion of the Commission's function in conducting this allocation, see *Alton v Broadcasting Standards Authority* [1990] NZAR 571 (HC).

¹⁵ Broadcasting Act, s 74B(1).

¹⁶ Section 70(2A).

| Parties | Monetary allocation (incl. GST) | Opening address, minutes | Closing address, minutes |
|--|---|---------------------------------|---------------------------------|
| Total available | \$3,211,875 | 72 | 30 |
| Labour Party, National Party | \$1,000,000 | 12 | 6 |
| Green Party, Māori Party, NZ First | \$240,000 | 8 | 3 |
| The ACT Party, Progressive, United Future | \$100,000 | 4 | 3 |
| Aotearoa Legalise Cannabis Party, Democrats for social credit, <i>Kotahitanga Te Manamotu Hake Tiriti o Waitangi</i> , Libertarianz*, <i>New World Order</i> , <i>New Zealand Liberals</i> , <i>Residents Action Movement</i> , <i>South Island Party</i> , Alliance, Family Party, <i>Workers Party of New Zealand</i> (those in <i>italics</i> were not registered as at 29 th April 2008) * will not receive the monetary allocation | \$10,000, plus a production package for the opening address worth over \$7000 | 1 | 0 |

[25] The first three bands comprised all parties represented in Parliament. The fourth band, which included the Alliance Party, comprised all registered political parties not currently represented in Parliament. Parties in that fourth band were each allocated one minute for an opening address. No time was allocated for a closing address. They were also allocated \$10,000 each, plus a production package for the opening address.

[26] In an Explanation accompanying its allocation decision, the Commission said:

In making the allocation the Electoral Commission must have regard to a series of criteria which cover results of the last election as well as consideration of more recent measures of parties' public support. It also requires that eligible parties be provided a fair opportunity to convey their policies to the public (details in appendix, on www.elections.org.nz, Broadcasting Act s 75(2)).

This fairness criterion was the basis upon which the Electoral Commission decided to allocate a minimum to all eligible parties and also to subsidise from the allocation to the two largest parties to that to smaller parties. Thus, the allocation is not an exact arithmetic reflection of share of votes, seats, membership or support in opinion polls. As in previous years parties were grouped into groups, within which each party receives the same level of funding and time.

The three key criteria which measure current support for a party (number of votes at the last election, number of MPs at the dissolution of Parliament,

and other indications of support) were used collectively when determining the groups for each allocation band. As opinion poll results are becoming less reliable as an indication of the views of the whole population, they were given a lesser weighting than has been the case in previous allocation decisions.

Labour Party and National Party are clearly ahead of all other parties in terms of votes in 2005, MPs, and polling results. The Commission saw no reason to treat the two parties differently and neither party sought a differential in its submission.

Green Party, Māori Party and NZ First are broadly similar in their number of MPs and votes in 2005. Green Party is polling ahead of the other two in terms of the party vote but not sufficiently to differentiate it from the other two parties.

The ACT Party, Progressive and United Future are broadly similar in their poll ratings, votes in 2005, and numbers of MPs. Differences were seen as insufficient to differentiate between the three parties in terms of allocation.

The non-parliamentary parties are clearly distinct from the parliamentary parties in terms of votes in 2005, number of MPs, and polling success. There was insufficient information to differentiate between the parties in relation to the criteria specified in the Broadcasting Act 1989. The Libertarianz stated in its written submission, and reiterated in its oral submission, that it would not spend any money that was allocated to them. Consequently the Libertarianz will not receive a monetary allocation but it will receive the minute for an opening address and access to the production package.

The minimum amount allocated reflects the cost of a basic radio advertising campaign for a month. Each party that has been allocated one minute for an opening address also has access to a production package that has been organised with TVNZ. The package will provide production that would otherwise cost over \$7000 for each party. This package was first offered in 2005 to ensure both the accessibility of TV to these smaller parties, in consideration of the 'fairness of access' criteria and a basic standard of professional production. All those involved in 2005 found the production package to be useful so it is being repeated. Details of the production package will be sent to the political parties concerned.

The two largest parties share \$2,000,000. The remaining money, minus that allocated to the non-parliamentary parties (including the cost of the production package) was split between the second and third groups in a ratio close to 2:1 to reflect the difference in indications of support, votes and MPs for the two groups.

All eligible parties were allocated some time for opening addresses, reflecting the fairness criteria. However only parliamentary parties were allocated time for closing addresses as the shorter time made available precluded a wider allocation.

The order of opening addresses is Labour Party, National Party, Green Party, NZ First, Māori Party, The ACT Party, United Future, Progressive, Libertarianz, Aotearoa Legalise Cannabis Party, New World Order, The Alliance, South Island Party, Family Party, Residents Action Movement,

New Zealand Liberals, Workers Party of New Zealand, Democrats for social credit, Kotahitanga Te Manamotu Hake Tiriti o Waitangi.

This order was determined by following the groups used for time allocation and using double random selection within each group, except that in line with past practice the main government party has the first opening address and the main opposition party has the first closing address.

The order for closing addresses is the reverse within each group: National Party, Labour Party, Māori Party, NZ First, Green Party, Progressive, United Future, The ACT Party.

(Emphasis added.)

The closing decision

[27] The relevant statutory provision is s 73(1) of the Broadcasting Act. It provides:

In respect of each election period, the Electoral Commission must allocate to political parties, in such proportions as the Electoral Commission considers appropriate, the time that TVNZ and RNZ have made available for opening addresses and closing addresses in accordance with section 71A.

[28] The point at issue before us is a very narrow one. What was advanced for the Alliance Party in the High Court is that the Commission *must* allocate each qualifying party both an opening *and* a closing address of whatever length and that, in failing to do so, the Commission fell into error. In other words, there is a mandatory statutory requirement for the allocation to each registered political party of both an opening and closing address.

[29] The argument for the Commission in the High Court was that s 73(1) did not require a closing address to be allocated. On its behalf it was maintained that the wording of the section, that there be an allocation of time to political parties “in such proportions as the Electoral Commission considers appropriate”, contemplates a nil allocation.

The High Court decision

[30] The Judge took the view that it would be contrary to the purposes of Part 6 of the Broadcasting Act, read in light of s 14 of the New Zealand Bill of Rights 1990, for no allocation of broadcasting time or of funding from the broadcasting allocation, to be made to a political party.¹⁷ That is, the Judge took an anti-exclusionary view: a registered party could not be excluded altogether. The Judge was prepared to assume, for the purposes of argument, that there must be an allocation to each political party both of time under s 73 and of money under s 74A. In other words, the reference to proportions could not lead to a nil allocation of time.¹⁸ But coming directly to the opening/closing address issue the Judge considered that “[s]ection 73 contemplates a single allocation process in respect of time”.¹⁹ The Judge continued:²⁰

What is to be allocated is “the time that TVNZ and RNZ had made available for opening addresses and closing addresses in accordance with s 71A”. The words “in such proportions as the Electoral Commission consider appropriate” in my view apply to the totality of the phrase which follows, not to the four separate individual components which are included within that phrase. I consider that the Commission, in assessing the proportions of the total time made available in this way, may lawfully make no allocation to a party in respect of one or more components, so long as some allocation is made in respect of some other component.

Discussion

[31] In this Court, Mr McKenzie for the Alliance Party maintained that the Judge was wrong to conclude that the Commission had not erred in law in failing to allocate a closing address on either radio or television to any of the non-Parliamentary parties. He said the words of s 73(1) are mandatory and unequivocal: no provision in the Broadcasting Act anticipates let alone permits the Commission to not allocate either a closing or opening address. He argues that the Commission was required to allocate the 30 minutes provided by TVNZ and RNZ for closing addresses between all qualifying political parties in light of the s 75 criteria.

¹⁷ At [12].

¹⁸ At [13].

¹⁹ At [14].

²⁰ At [14].

[32] The Commission supported the Judge's view. That view was that s 73(1) required only that the Commission allocate each party some time, not necessarily an opening and a closing address; provided a political party receives some time, the Commission has discharged its statutory obligations.

[33] In our view, the construction advanced by the Alliance Party is correct. The Broadcasting Act, on its proper construction, requires the Commission to allocate time to each political party for an opening address and for a closing address.

[34] We appreciate the difficulty the Commission faced in this case, given that TVNZ allocated only 30 minutes for closing addresses when there were 18 qualifying political parties. The Commission's justification for the course it took in its Explanation was that "only parliamentary parties were allocated time for closing addresses as the shorter time made available precluded a wider allocation".²¹ There is a strong argument (not raised before us) that TVNZ's allocation under s 71A was in breach of the Broadcasting Act, in that they failed to provide sufficient time for closing addresses, given the number of qualifying political parties. Since no political party could realistically be given less than a minute for a closing address, the Commission clearly considered that the parliamentary parties would be unnecessarily "squeezed" unless it undertook the course it did. The Commission's response to this predicament, which was to effectively "squeeze" the small parties by excluding them, was erroneous. In other words, the fact that TVNZ had failed to supply sufficient time could not in and of itself justify the course the Commission took.

[35] To return to the point of construction – which is what we have to determine – on their face the words of s 73(1) require both an opening and a closing address for each political party. If there is any doubt about the meaning of the words, that meaning should be preferred which accords with the critical context of this allocation: that of a general election. Statutory language should be read, if reasonably possible, in a way which facilitates the important democratic feature of dissemination of election messages.

²¹ See the italicised passage at [26] above.

The advertising decision

[36] The Commission allocated \$10,000 of public money to each non-Parliamentary party for broadcasting costs. In its Explanation, the Commission noted that “the minimum amount allocated reflects the costs of a basic radio advertising campaign for a month”.

[37] The issue here is two-pronged. First, whether the Commission based its decision on the costs of a basic radio advertising campaign for a month when allocating money to the Alliance Party under s 74A. Secondly, if that was so, whether that decision breached s 75(2) of the Broadcasting Act.

[38] Section 74A deals with the allocation of money to political parties. The criteria which the Commission must take into account in the allocation of both time and money to political parties are set out in s 75(2). Section 75(2)(f) relevantly provides:

The need to provide a fair opportunity for each political party ... to convey its policies to the public by the broadcasting of election programmes on television.

The High Court decision

[39] In the High Court, counsel for the Alliance Party submitted that the Commission erred by failing to take into account a relevant consideration (the cost of television broadcasting referred to in s 75(2)(f)) and taking into account an irrelevant consideration (the cost of a basic radio advertising campaign).

[40] The Judge disagreed:²²

I do not consider that the Commission’s reference to the cost of a radio advertising campaign demonstrates that the Commission has failed to have proper regard to s 75(2)(f), or that it has had regard to an irrelevant consideration. The way in which the \$10,000 allocation is spent is not tied to radio advertising. The evidence as to the material available to the Commission on the cost of television advertising indicates that it would be feasible to use part or all of that sum on television, if that is how a party chose to spend its allocation. Section 75(2)(f) cannot properly be interpreted

²² At [23].

as requiring the Commission to make available to every political party sufficient resources to fund a substantial television advertising campaign. Furthermore, I consider that, in having regard to s 75(2)(f), the Commission may properly take into account the totality of the opportunity for each political party to convey its policies on television under both s 73 and s 74A. That is to say, in making the allocation under s 74A of money, the Commission may take into account under s 75(2)(f) the opportunity for access to television time provided under s 73. Accordingly, I do not consider that any error by the Commission in relation to s 75(2)(f) has been made out.

Discussion

[41] In this Court, Mr McKenzie sought a declaration that every registered political party must be allocated a minimum amount of money under s 74A, and that such a minimum must be sufficient to provide the political party a “fair opportunity” to convey its policies via television broadcast.

[42] Mr Gunn for the Commission contended that the evidence showed that the Commission did not base the quantum of the advertising decision solely on radio advertising. In making its decision, the Commission had in mind that each party would make its own decision as to the amount of broadcasting time it would buy and whether it would choose to buy radio or television airtime or both.²³

[43] We are reluctant to make a declaration in the terms sought by Mr McKenzie. The wording of the Commission’s Explanation – that “the minimum amount allocated reflects the cost of a basic radio advertising campaign for a month” – is unfortunate. However, it does not preclude the possibility that the Commission turned its mind to the cost of a television campaign. In so far as the basic radio advertising campaign *was* the basis of the decision, and it was the only basis given in the Explanation, the allocation of money to non-Parliamentary parties was in error. Because the mechanics adopted by the Commission for allocation of monies which the appellant has sought to test has already taken place, the decision is moot in a technical sense. In matters relating to the election of Members of Parliament, this Court should not intrude any further than is absolutely necessary to determine lawfulness. We therefore do not make a formal declaration in the terms sought at [7](b) above.

²³ See the affirmation of Helena Catt, the Chief Executive and a member of the Electoral Commission.

Conclusion

[44] The appeal is allowed.

[45] We make a declaration that Part 6 of the Broadcasting Act requires the Commission to allocate time for an opening address and time for a closing address to every political party that qualifies for an allocation of time under the Broadcasting Act.

[46] MacKenzie J and the parties on appeal considered that costs should lie where they fall, given the significant public interest in the proceedings. We agree. Exposing the Commission to costs would risk operating as a disincentive to the Commission's active assistance on appeals from its decisions. Frequently, there would be no opposition to an appeal if the Commission did not appear. (Although the National Party appeared in this case, it was there to safeguard its own interests rather than act as a counterweight to the Alliance Party's argument.) Our reasoning here is similar to this Court's decision that the Commerce Commission should not be exposed to adverse costs orders where it unsuccessfully opposes an appeal.²⁴ Accordingly, we make no order as to costs.

Solicitors:
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Crown Law Office, Wellington
Kiely Thompson Caisley, Auckland for Second Respondent

²⁴ See *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491 (CA) at [17].