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NZ Law Report

[redacted]

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 89/90

BF 20257

2129

UNDER — The Judicature Amendment Act 1972

IN THE MATTER OF — The Broadcasting Act 1989

BETWEEN — DAVID CHRISTOPHER ALTON of 78 Chesterton Street, Johnsonville, Secretary suing on behalf of the New Labour Party
Plaintiff

AND — THE BROADCASTING STANDARDS AUTHORITY a body corporate established under the Broadcasting Act 1989 having its offices at 2nd Floor, 54-56 Cambridge Terrace, Wellington
Defendant

Hearing: 15 October 1990

Counsel: Helen Aikman for the Plaintiff
C.F. Finlayson for the Defendant

Date of Judgment: 16 October 1990

ORAL JUDGMENT OF HERON J.

This ex parte application for interim injunction was brought by the General Secretary of the New Labour Party, and was filed and heard yesterday. It was first dealt with in Chambers, but I am giving judgment in open Court having regard to the public interest involved.

It seeks to delay the allocation of certain monies to political parties for the purposes of broadcasting expenditure to be incurred prior to the General Election to be held on 27 October 1990. Copies of the application were served on solicitors for the Broadcasting Standards Authority, the defendant, and it duly appeared. In the time available it was able to file an affidavit from its executive officer.

By late September 1990 the New Zealand Party had not fielded the minimum number of candidates which the Broadcasting Act 1989 required to entitle that party to funds. Out of the total funds allocated, $52,500 became available for distribution to the remaining eligible parties. The Broadcasting Standards Authority is required to allocate broadcasting time donated by broadcasters and money voted by Parliament. As first enacted the legislation directed broadcasters to provide free time up to certain maxima, that time was to be allocated in accordance with the criteria then set out in s.75 of the Act.

> "75. Criteria in relation to allocation of time to political parties - (1) The Authority shall not allocate any time to a political party under section 74 of this Act unless -
> (a) That political party conducts its affairs throughout New Zealand and has a national organisation; and
> (b) That political party has consistently expressed philosophies or policies on a range of issues over the period of 12 months immediately preceding the issue of the writ for the election; and
> (c) In the case of a general election, persons belonging to that party are candidates at that general election for at least 10 seats in the House of Reprseentatives; and
> (d) In the case of a by-election, -
> (i) A person belonging to that political party is a candidate at that by-election; and
> (ii) Persons belonging to that party were candidates at the immediately preceding general election for at least 10 seats in the House of Representatives.
> (2) The Authority shall, in allocating time to a political party under section 74 of this Act, have regard to -
> (a) The number of persons who voted at the immediately preceding general election for candidates belonging to that political party; and
> (b) The number of persons who voted at any by-election held since the immediately preceding general election for any candidate belonging to that political party; and
> (c) The number of members of Parliament who, -
> (i) In the case of a general election, were members of that political party immediately before the expiration or dissolution of Parliament; and
> (ii) In the case of a by-election, were members of that political party immediately before the date on which the vacancy occurred; and
> (d) Any other indications of public support for that political party such as the results of public opinion polls and the number of persons who are members of that political party.

In March 1990 the Broadcasting Amendment Act became law and provided again for free time and for free production facilities for opening and closing addresses of any political party. It placed different maxima on broadcasting time. In particular it provided that in allocating time which it had determined would be provided free of charge the Broadcasting Standards Authority should "classify as major political parties for the purposes of this part of this Act, the political parties that, in the opnion of the Authority, are entitled to a maximum allocation of broadcasting time".

In September 1990 Part VI of the 1989 Act as amended in March 1990 was repealed and a new regime applied. In brief it required broadcasters in response to invitations, to indicate the free time or the time at discounted rates, they would make available to political parties. Thereafter, depending on the response to that invitation, the Broadcasting Standards Authority would allocate the time. In doing so it would, as required in the earlier 1990 Amendment, "classify as major political parties for the purposes of this part of this Act, the political parties that, in the opinion of the Authority, are entitled to a maximum allocation of broadcasting time". In addition and for the first time in this legislation money to be appropriated by Parliament was to be allocated by the Broadcasting Standards Authority for broadcasting purposes. Section 74 reads:

> "74. Amount of public money to be allocated to political parties - (1) The Minister shall notify the Authority, in respect of each election period, of the amount of money appropriated by Parliament for the purpose of enabling political parties to meet all or part of the costs of broadcasting election programmes.
> (2) Where a general election takes place after the year 1990, an amount of money equal to the amount of public money allocated under section 74A of this Act in respect of the broadcasting of election programmes at the immediately preceding general election shall, unless an Act of Parliament expressly provides otherwise, be deemed to have been appropriated by Parliament for the purpose of enabling political parties to meet all or part of the costs of

broadcasting election programmes at the first-mentioned general election.
(3) Where an amount of money is deemed by subsection (2) of this section to have been appropriated by Parliament for the purpose specified in that subsection, that amount shall be payable out of public money for that purpose without further appropriation than this subsection."

Section 74A reads:

"Allocation of money to political parties - (1) The Authority shall in respect of each election period, decide the allocation to political parties of the amount of any money appropriated by Parliament for the purpose of enabling political parties to meet all or part of the costs of broadcasting election programmes during that election period.
(2) The decision made under subsection (1) of this section-
(a) Shall set out the allocations; and
(b) May include conditions concerning the manner in which any political party is to expend its allocation.
(3) Where the Authority decides under subsection (1) of this section to allocate a sum of money to a political party, the Authority shall supply a copy of its decision to-
(a) That political party; and
(b) The Secretary of Comerce."

The Authority on 4 September 1990 in a written decision referred to its classification which it was required to make under s.73(2), and said:

"The Act requires the Authority to classify, for the purposes of Part VI of the Act, major political parties that, in the opinion of the Authority, are entitled to a maximum allocation of Broadcasting time. The Authority has resolved to classify the Labour and National Parties as "major political parties" for the purpose.

Public monies made available under the Act, for allocation to parties by the Authority, are $1,200,000 for purchasing television time and production of television programmes; and $300,000 for purchasing radio time and production of radio programmes. A further $350,000 is being made available for the costs to broadcasters of opening and closing addresses.

The Authority is to have regard to the provisions of section 75(2) of the Act when allocating time or money to political parties. It is to have regard to -

"(a) The number of persons who voted at the immediately preceding general election for candidates belonging to that party; and

(b) The number of persons who voted at any by-election held since the immediately preceding general election for any candidate belonging to that political party; and

(c) The number of members of Parliament who -

(i) In the case of a general election, were members of that political party immediately before the expiration or dissolution of Parliament; and

(ii) In the case of a by-election, were members of that political party immediately before the date on which the vacancy occurred; and

(d) Any other indications of public support for that political party such as the results of public opinion polls and the number of persons who are members of the political party."

Having regard to these matters and to its classification of the Labour and National Parties as "major political parties", the Authority has decided on the following allocations of money to the 8 political parties.

Party	Television	Radio	Opening and Closing Costs
	$	$	$
Labour	420,000	105,000	122,500
National	420,000	105,000	122,500
Democratic	84,000	21,000	24,500
New Labour	84,000	21,000	24,500
Greens	54,000	13,500	15,750
Social Credit	54,000	13,500	15,750
Christian Heritage	42,000	10,500	12,250
New Zealand	42,000	10,500	12,250"

It is to be noted that the classification required to be done pursuant to Section 73 in regard to broadcasting time is not to be undertaken in regard to the allocation of moneys. However much the same criteria is imported into Section 75(2) and the emphasis seems to be on a quantitative basis having regard at all times to existing support. I think the classification requirement in s.73 is but another process by which an allocation of time can be achieved to meet the criteria in s.75 which relates both to time and money. Allocations will clearly follow and be proportionate to the degree of support. There

seems to be an intention that major parties once classified should be entitled to the preponderance of time once the classification is made. Importing that method into the allocation of money does not in my view amount to an illegality or can it be said in the context of this Act an irrelevant consideration.

Section 76A entitles a reallocation of time and money where "the number of persons who are candidates belonging to a political party changes". The wording meets the situation in this case but is perhaps restrictive in its form overall. There is no requirement to consult before reallocating these available resources, other than to have regard to earlier submissions made by political parties to the allocation overall.

No failure to consult is suggested here, and indeed the plaintiffs real attack is on the allocation originally made of the available money. Indeed I was told that these proceedings would continue on and be dealt with after the election, at which time the basis on which the original allocation was made would come under review. It may be that some declaratory judgment procedure is contemplated to test the approach the Authority took to the allocation of the funds overall. The argument which is based on the classification procedure could have been raised when the total funds were allocated on 4 September 1990. Such arguments are now being directed to the allocation made on 12 October where no specific reference is made to the classification requirement but arguably is influenced by it.

Miss Aikman submitted that the reference to the need to classify in the decision allocating money was an error of law. I do not agree. The Authority clearly confined its requirement to classify as to time, but arguably had regard to that as a relevant consideration in the allocation of money. In my view the Authority was entitled to use a common approach if it thought it appropriate. It is only a pointer in arriving at

the criteria under s.75 which relates both to time and money. I do not think there is a serious issue to be tried on the question of the classification under s.73(2)(a) being an irrelevant consideration or amounting to an illegality in any form which might give jurisdiction to review.

Miss Aikman's second point is that some of the criteria in s.75(1) were not achieved by parties who have received an allocation of time and money. This submission fails on the facts. I have no evidence that any of the parties to whom allocations have been made by decision of 5 September 1990 are ineligible.

Finally Miss Aikman submits that the reallocation which follows the allegedly flawed original allocation is irrational and unreasonable in the Wednesbury sense because it did not reallocate the available money amongst the minor parties but included the two major parties all on a proportionate basis. It is suggested that it was again overly influenced by the classification process. There would appear to be some general equity in dividing the 30% allocated to minor parties amongst those parties. Miss Aikman relies on general recommendations of the Royal Commission on the Electoral System in support of that view. This is all a matter of degree and extent and may require modification in the future as the outcome of this electoral experiment is better known. But nice questions of emphasis in this novel area are the function of the authority and not the Court.

In Secretary of State v Tameside [1976] 3 All E.R. 665. Lord Diplock at 695 said:

> "My Lords, in public law 'unreasonable' as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.

> The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred."

Indeed, it could be argued that to ignore the major parties on a reallocation requires the Authority to suspend for the purposes of the reallocation the criteria in s.75(2). I do not think any serious issue arises here either.

Miss Aikman reminded me of the fact that two of the members of the Authority were directly appointed by the two major parties. Care should be taken, she said, in protecting the minor parties against the influence which that minority of members might have. The decision of 12 October 1990 was, it would seem, a unanimous decision. No serious criticism can be made of it, and whilst it is said no reasons were given the Authority has recorded that it directed itself to the appropriate section of the Act and acted accordingly.

It follows from what I have said that in my view there is no serious issue to be tried and no injunction should issue. If I am wrong in my view of the strength of the plaintiff's case, I do not think the balance of convenience calls for an injunction. One is required to stand back and look at the overall events and the consequences of an order being made. Whilst an injunction may hold the payment meantime, before I can direct a review the parties affected, and in particular the two major parties, would have to be heard and a considered decision given. Minister of Education v De Luxe Motor Services (1972) Ltd 1 C.A. 193/89 21 December 1989 where the failure to serve a party likely to be affected by the decision resulted in the proceedings being rendered a nullity. Only after such a hearing could a review be ordered. Allowing time for the authority then to convene and reconsider puts a final resolution of the matter into next week at the best. Commitments may have been already made or may not be able to be made so close to the election date. Whilst the Court does not

like to refuse relief on the ground of time alone I think this is a case where it is manifestly in the public interest that the allocation be used as presently divided, rather than not at all. Any substantial delay in the allocation should in my view be avoided.

As I have already said, there will be an opportunity post the election to have these issues argued in much greater detail and with all interested parties represented. From that may emerge some overall consideration of these new provisions similar to the procedural steps taken to clarify difficulties with voting papers and the counting of votes. Wybrow v Chief Electoral Office [1980] 1 NZLR 147.

It follows from what I have said that the application for interim injunction is refused. I reserve the question of costs.

Solicitors
Margaret Powell, Solicitor, Wellington for the Plaintiff
Brandon Brookfield for the Defendant

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