

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

UNDER The Judicial Review Procedure Act 2016 and
Part 30 of the High Court Rules 2016

BETWEEN **Gareth Huw Morgan**

Applicant

AND **Television of New Zealand Limited,**

Respondent

AFFIDIVAT OF BRYCE DAVID EDWARDS

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I, Bryce David Edwards, Senior Associate at the Institute for Governance and Policy Studies at Victoria University of Wellington and Director of Critical Politics, a political research organisation, do solemnly and sincerely affirm:

Introduction

- 1 I have been asked to provide expert evidence to assist the Court on matters relevant to an application for judicial review brought by Gareth Huw Thomas Morgan in relation to the exclusion of The Opportunities Party (TOP) from TVNZ's minor parties' debate on Friday 8 September 2017 and the young voters' debate on Thursday 14 September 2017.

Code of conduct

- 2 I have read the code of conduct for expert witnesses set out in Schedule 4 of the New Zealand High Court Rules. I agree to comply with it.

Background

- 3 As part of my academic work and my media work, I have been closely following this year's election campaign and the coverage of it, and have been appearing regularly in the media and writing regular columns summarising and commenting on key developments and issues, including those relating to the applicant and TOP. I am therefore very familiar with the background to this case.

Instructions

- 4 I have been instructed that it will be relevant to the Court's assessment of this case for the Court to understand the likely effects on TOP and the wider electorate of TVNZ's decision to exclude TOP from the minor parties' debate and the young voters' debate. I have also been asked to examine and comment upon the reasons TVNZ has given for that decision. That includes an assessment of TVNZ's use of a 3% threshold based on polling data from current Colmar Brunton polls.

My qualifications

- 5 I am a Senior Associate at the Institute for Governance and Policy Studies at Victoria University of Wellington and the Director of Critical Politics, a political analysis organisation providing material to the public and media about New Zealand politics.
- 6 Until May 2017 I was a political scientist at the University of Otago, where I had been teaching and researching New Zealand politics since 2007. My scholarship on New Zealand politics relates mainly to political parties, public policy, and political communication. My recent research has focused on elections, political scandals, digital politics, and the work of professional political party public relations experts.
- 7 I have a PhD in Sociology from the University of Canterbury, which was on the history of political parties in New Zealand. I regularly participate in public debate about contemporary New Zealand politics via media interviews, and columns for various mainstream media outlets. These regularly include appearances on TV3 and TVNZ, interviews given on National Radio and Newstalk ZB and articles published in the New Zealand Herald.

The role of broadcasters in democracy

- 8 Broadcasters have a strong role to play in covering elections and politics in general. Their coverage is one of the main ways in which the public get information about the election contestants. What the broadcasters choose to provide to their audience can therefore have an impact on the election result.
- 9 This is particularly the case with the leaders' debates, which are the pinnacle of broadcast coverage leading up to polling day. These debates can receive a very large audience, compared to regular political programmes on television. And there is a large public interest in how leaders perform in these. Although this is much truer for the leaders'

debates involving the major parties, it also applies to the minor party leaders' and young voters' debates too.

- 10 Both locally and internationally, there is plenty of evidence and many case studies of leaders' debates having a large impact on election campaigns, and therefore on the final election results. The most famous example in New Zealand was the 2002 leaders' debate in which United Future leader Peter Dunne was judged to have performed particularly strongly, and his party's poll results increased from 0.4 per cent to 6.9 per cent in the election. There is no doubt that, in general, the leaders' debates are widely reported and discussed. Even those members of the public who do not view the debates are often aware of their outcomes via media reportage.
- 11 It is axiomatic, therefore, that political parties generally want to be involved in the broadcast debates. This is particularly true for the minor parties, which often struggle to get media coverage, compared to the major parties. And it is even more so for newly-established political parties outside of Parliament – they often fail to get established because they do not have the public platforms available to get into public debate.
- 12 It is therefore not surprising that no new political party has managed to get elected to Parliament since the first MMP election in 1996, apart from those involving existing MPs splitting from their existing parties in Parliament. The barriers to entry are simply too great. This contributes to an anti-democratic environment in which incumbent parties are protected against the rise of newer parties.
- 13 In my view, the broadcast media have a responsibility to ensure that they are not adding to the existing barriers for new political parties. By excluding some of the small parties from the minor party leaders' and young voters' debates, they risk doing this.
- 14 There is always going to be a need for broadcasters that host leaders' debates having some sort of criterion for including and excluding parties.

But the broadcasters need to ensure that this is not too restrictive or too accommodating.

Configurations for leaders' debates

- 15 New Zealand television companies are particularly prone to coming up with poor criteria for deciding upon which political parties will appear in leaders debates. In my view the broadcasters do not put adequate care and attention into this issue. The criteria are often arbitrary, and the resulting list of who is included and excluded brings up some irrational results.
- 16 This has meant that previous elections have seen successful judicial attempts by excluded minor parties to obtain representation in these minor party debates. This was the case in 2005 for the United Future and Progressive parties, and then in 2014 for the Conservative party.
- 17 There is no doubt that decisions do have to be made about inclusion and exclusion. And there seems to be a consensus that overly-accommodating criteria resulting in the involvement of a very large number of parties would be unwieldy, and that some of the parties with minimal public support are not worthy of inclusion. And at the moment, there are 16 registered political parties that are contesting the 2016 general election, and hence although a minor party leaders' debate might technically be expected to include 14 of these parties, this would be impractical.
- 18 Similarly, restricting the minor party leaders' or young voters' debates to only those parties that met the five per cent MMP threshold in the previous election would be too restrictive. After all, that would mean in 2016 there would only be two political parties involved: the Greens and New Zealand First.
- 19 I understand that the criteria that TVNZ has used includes political parties that are below the five per cent threshold at the previous election, but which have won electorate seats. In 2017 this includes the Maori Party, Act Party, and United Future.

- 20 I also understand that TVNZ makes provision for small parties that are receiving significant support in opinion polls leading up to the debates, presumably because restricting inclusion to parties already represented would be unfair to parties that were not successful or perhaps not existing at the previous election. For TVNZ, I understand the measure of this is whether a party has secured three per cent support in at least one of the most recent two Colmar Brunton polls.

The TVNZ criteria

- 21 I have been asked to comment on the democratic implications of the TVNZ criteria. I want to make seven observations. First, in my view, TVNZ's three per cent threshold is unreasonably high. It will naturally produce a restrictive result in terms of how many parties are included in the debates. A new party that receives one or two percent support – which is no mean feat – will be ruled out of contention. This seems unjust to such parties, and in my view also does a disservice to the voting public. The parties are denied the opportunity to explain their policies in a forum which offers perhaps their best chance to influence electors, and the public are denied the chance to understand and assess their solutions to the nation's problems.
- 22 Second, I believe there is an internal inconsistency in the TVNZ criteria that creates unfairness. Minor parties polling much less than three percent support are included in the debate, simply because they have won electorate seats. Other parties polling much higher than them are excluded if they fall below three percent in a particular polling company's results. Indeed, in this election TOP is the *only* party consistently polling above one per cent that will not be invited to participate in the TVNZ minor party leaders' debate. In my view, it would be better for TVNZ to adopt a more holistic approach, taking into account a range of factors, such as a variety of recent polls, party membership, the number of candidates a party is standing, and its representation in Parliament and support at the last election, where relevant.

- 23 Third, there is a danger that parties may be excluded because of a polling error. After all, the methodology of the opinion polling produces a margin of error that is very relevant at this level of support. Polling is imprecise. It is quite plausible that a party might have significantly greater support than Colmar Brunton is measuring in their polling. In fact, the polling companies themselves explicitly state that the figures they produce should not be understood as precise figures: that is, on the mathematical logic of the poll, a party registering a little under three percent has a significant chance of being at or even above three percent support.
- 24 Fourth, in my view the use of such criteria is self-perpetuating and anti-democratic. A party that is excluded from the debates has little chance of making headway in the polls. What is more, I think that excluding them from the debates sends the message to viewers that their views and policies are not worthy of consideration. I think this is dangerously undemocratic.
- 25 Fifth, this year's election campaign is proving extremely volatile. Political scientists and commentators appear to be in consensus that we are witnessing the greatest polling volatility yet recorded in an election campaign in New Zealand. Therefore, it seems unreasonable to take two Colmar Brunton polls as a snapshot of likely outcomes in the election – the flux is just too great at the moment in politics to regard such polling to be definitive.
- 26 Sixth, different polls have different methodologies, which can predispose them to particular results. For example, Colmar Brunton historically under-estimates the vote for New Zealand First.¹ My general point here is to note the dangers of relying on one polling company, or on one or two polls alone.
- 27 Finally, the minor parties seem set to play a pivotal role in this year's election as they are likely to hold the balance of power after the election.

¹ See <http://ellisp.github.io/blog/2017/03/21/house-effects>

In my view, this makes it particularly important that the public is given sufficient exposure to their leaders and policies.

- 28 All political commentators agree that the contest is remarkably competitive – both major parties are seen to have a strong chance of forming a government after the election. But there is also a high awareness that the minor parties are going to play a crucial role in deciding whether the Labour or National party will lead the next government. Commentators and the public appear to now be focusing much more than usual on the place of the minor parties in governing arrangements.
- 29 The success or otherwise of the minor parties is therefore likely to have a vital role in this year's election, not only for the parties themselves but for the makeup of the next government. This makes the upcoming minor party leaders' and young voters' debates of great importance. It is crucial that TVNZ gets the configuration of the participating parties right.

The exclusion of TOP

- 30 In my view TVNZ's exclusion of TOP would do a disservice to democracy.
- 31 If TVNZ proceeds with minor party leaders' and young voters' debates without The Opportunities Party (TOP), this will have a significantly negative impact on TOP's chances to be taken seriously by those members of the public looking to vote for a party other than Labour and National. It will send a strong signal to voters that it is not a viable candidate for voting consideration. It may seriously affect TOP's electoral chances. And given the inclusion of less popular parties, it would be arbitrary and irrational.
- 32 TVNZ might contend that parties such as TOP will be covered in other TVNZ coverage or other media or forums. But in my view, it is extremely difficult for any political party to obtain media coverage at the moment, especially given the increased focus on the two major parties.

Affirmed at)
on 6 September 2017)
before me:) _____

A Solicitor of the High Court of New Zealand