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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

CIV-2023-485-604

UNDER THE	Judicial Review Procedure Act 2016, the Declaratory Judgments Act 1908, and Part 30 of the High Court Rules 2016
IN THE MATTER OF	An application for judicial review
BETWEEN	NEW ZEALAND LOYAL Applicant
AND THE	ELECTORAL COMMISSION First respondent
AND THE	ATTORNEY-GENERAL Second respondent

RESPONDENTS' SUBMISSIONS

6 October 2023

Judicial Officer: Isac J
Next event date: Hearing on Friday 6 October 2023 at 2:15pm

**CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
Wellington 6140
Tel: 04 472 1719**

Contact Person:
Daniel Perkins / Sofija Cvitanovich



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SUMMARY

1. The Electoral Commission takes its responsibility to facilitate participation in the democratic process very seriously. It supports registered parties, officials and candidates to engage with the nominations process. However, it is fundamentally the responsibility of parties, officials and candidates to ensure they comply with relevant legal requirements.
2. The Electoral Commission refutes allegations that it failed to meet its statutory objective in its dealings with the New Zealand Loyal Party (**NZ Loyal**). But even if it had, the Commission had no power to extend statutory deadlines — in particular, to accept late nominations in the form of an amended or resubmitted party list. Nor does this Court have power to order the Commission to receive late nominations, based on alleged failures of service quality.
3. NZ Loyal's statutory construction arguments are misconceived. Section 164H of the Electoral Act 1993 permits limited amendments to the bulk nomination schedule of constituency candidates, not party list candidates. Section 128C permits withdrawal and resubmission of a party list, but only until noon on Thursday 14 September.
4. Section 12(b) of the New Zealand Bill of Rights Act 1990 is not engaged. NZ Loyal's constituency candidates remain qualified for membership of the House of Representatives. Indeed, they are contesting constituencies for election to it. Even if s 12(b) were engaged, the Electoral Commission's refusal to accept late nominations was "prescribed by law", ie s 127(3)(a) of the Electoral Act.

BACKGROUND

5. The 2023 General Election is underway. Overseas and telephone dictation voting commenced on Wednesday 27 September. Advance voting in New Zealand commenced on Monday 2 October. As at the end of Thursday 5 October, approximately 344,000 votes had been cast. Polling day is Saturday 14 October.

6. NZ Loyal is a registered political party. It successfully nominated 33 constituency (electorate) only candidates, and three party list only candidates.¹ It asserts it intended to nominate some or all of its 33 constituency candidates as party list candidates also.² However, this intention was not successfully executed.
7. Party lists, and bulk nomination schedules nominating constituency (electorate) candidates, were required to be submitted by noon on Thursday 14 September. At approximately 11:56am on Thursday 14 September, NZ Loyal submitted:³
 - 7.1 A party list, nominating three candidates; and
 - 7.2 A bulk nomination schedule, nominating 33 constituency candidates.
8. NZ Loyal asserts that after noon on Thursday 14 September — having realised it had not executed its intention of nominating some or all of its 33 constituency candidates as party list candidates also — it attempted to amend its party list, or withdraw and resubmit a new party list.
9. A party list cannot be “amended”. A party list could be withdrawn by noon on Friday 15 September.⁴ A withdrawn party list could be replaced by another party list — but only if it was resubmitted by the original deadline, i.e. noon on Thursday 14 September.⁵
10. The Electoral Commission refused to accept NZ Loyal’s late nominations, in the form of an amended, or withdrawn and resubmitted, party list. This refusal is the decision under review.⁶

¹ For a total of 36 candidates. That is, none of NZ Loyal’s constituency candidates successfully nominated as a party list candidate, and vice versa.

² Statement of claim at [24.1], [27]–[29].

³ Affidavit of Michele Smith affirmed 4 October 2023, Annexure MS-11.

⁴ Electoral Act 1993, ss 128C(1) and (2).

⁵ Sections 128C(3) and 127(3)(a). So in the 24 hours prior to noon on Friday 15 September, party lists could be withdrawn but not resubmitted.

⁶ Statement of claim at [30]–[33].

PLEADINGS

11. NZ Loyal has filed a statement of claim dated 3 October 2023. It has also filed an application for interim orders dated 5 October 2023, supported by two affidavits and a memorandum of counsel.
12. In view of the expedited hearing, the respondents have not yet filed a statement of defence or evidence.

SUBSTANTIVE SUBMISSIONS

The nominations process and terminology

Party lists

13. Registered political parties may nominate candidates for election on party lists (colloquially known as List Members of Parliament).⁷
14. Party lists must be submitted “not later than noon on the day *before* nomination day”.⁸ “Nomination day” is “the day appointed in the writ as the latest day for the nomination of candidates”.⁹ The latest day appointed in the writ for the nomination of constituency candidates was Friday 15 September.¹⁰ Hence the statutory deadline to nominate candidates for election as List MPs was noon on Thursday 14 September.
15. Party lists may be withdrawn by noon on the latest date for the nomination of constituency candidates.¹¹ That is, they may be withdrawn up to 24 hours *after* the submission deadline.
16. A withdrawn party list may be replaced by a new party list.¹² However, the power to resubmit may only be exercised up until the original submission deadline, ie noon on the day *before* nomination day.¹³ Hence a party list withdrawn in the 24 hours between noon Thursday and noon Friday may not be resubmitted.

⁷ Electoral Act 1993, s 127.

⁸ Section 127(3)(a) (emphasis added).

⁹ Section 3(1).

¹⁰ “Writ for General Election” *New Zealand Gazette* (10 September 2023) No 2023-vr4258.

¹¹ Electoral Act 1993, ss 128C(1) and (2).

Constituency (electorate) candidates: individual and bulk nomination routes

17. There are two routes by which constituency (electorate) candidates may nominate.¹⁴ Candidates may be nominated individually.¹⁵ Alternatively, the secretary of a registered party may bulk nominate that party's candidates.¹⁶
18. If a candidate is nominating individually, their nomination must be lodged by noon on nomination day.¹⁷ That is, Friday 15 September.¹⁸
19. If a registered party intends to bulk nominate constituency candidates, it must give notice of its intention.¹⁹ Such notice forecloses the individual nomination route for that party's candidates.²⁰
20. Bulk nomination schedules must be lodged by noon on the day *before* nomination day.²¹ That is, the deadline for parties to nominate constituency candidates using the bulk nomination route is the same as the deadline to nominate candidates for election as List MPs: noon on Thursday 14 September.
21. Until noon on nomination day, bulk nomination schedules may be amended to remedy defects or omissions.²² That is, parties have a 24-hour "grace period" within which to make limited amendments to their bulk nomination schedules. This "grace period" aligns with the deadline for constituency candidates using the individual nomination route. However, amendments to bulk nomination schedules in this "grace period" may not.²³

¹² Section 128C(3).

¹³ Section 128C(3) and 127(3)(a).

¹⁴ *Docherty v Peden* HC Wellington CIV-2008-485-2375, 6 November 2008 at [3].

¹⁵ Electoral Act 1993, ss 143–146.

¹⁶ Sections 146A–146L.

¹⁷ Section 143(4).

¹⁸ "Writ for General Election" *New Zealand Gazette* (10 September 2023) No 2023-vr4258.

¹⁹ Electoral Act 1993, s146B(1).

²⁰ Section 146C(2).

²¹ Section 146D(3)(b).

²² Section 146H(1). Examples of defects or omissions might include a misspelling of a name, or a discrepancy in a middle name between the bulk nomination schedule and the candidate's consent to be nominated.

²³ Section 146H.

- 21.1 substitute a different person as the party's candidate in any constituency; or
- 21.2 nominate a candidate for a constituency in which the party had originally not nominated a candidate.

The difference between *party lists* and *bulk nomination schedules* is important

22. Both party lists and bulk nomination schedules must be submitted by noon on the day *before* nomination day, ie noon on Thursday 14 September.²⁴

However:

22.1 *Party lists* are of candidates for election as List MPs.

22.2 *Bulk nomination schedules* are a means for a party secretary to nominate candidates for election across multiple constituencies, using a centralised method.

23. NZ Loyal's reference to noon on Thursday 14 September as an "Information Deadline", and noon on Friday 15 September as the "Nomination Deadline", has the potential to confuse.

23.1 Noon on Thursday 14 September was the nomination deadline for nominating candidates for election as List MPs, and candidates for constituencies using the bulk nomination route.

23.2 Noon on Friday 15 September was the nomination deadline for nominating candidates for constituencies using the individual nomination route.

24. Having notified its intention to use the bulk nomination route, the only options available to NZ Loyal in the 24 hours between noon Thursday and noon Friday were to:

24.1 withdraw its party list (but it could not amend or resubmit it).

²⁴ Sections 127(3)(a), 146D(3)(b).

24.2 remedy defects or omissions in its bulk nomination schedule (but only to a limited extent).

First ground of review: service quality

25. The Court has directed trial of a separate question, namely:

If the facts pleaded by NZ Loyal are assumed to be true, can the Court make an order requiring the Electoral Commission to accept an amended party list that was submitted after noon on Thursday 14 September 2023.

26. The respondents do not object to NZ Loyal’s reformulation of the question as follows:²⁵

If the facts pleaded by NZ Loyal are assumed to be true, can the Court make an order requiring the Electoral Commission to accept *party list placement information relating to electoral candidates* that was submitted after noon on Thursday 14 September 2023.

27. Section 4C of the Electoral Act 1993 specifies the Electoral Commission’s objective.

4C Objective

The objective of the Electoral Commission is to administer the electoral system impartially, efficiently, effectively, and in a way that—

- (a) facilitates participation in parliamentary democracy; and
- (b) promotes understanding of the electoral system and associated matters; and
- (c) maintains confidence in the administration of the electoral system.

28. The Electoral Commission takes its responsibility to facilitate participation in the democratic process very seriously. It supports registered parties, officials and candidates to engage with the nominations process. However, it is fundamentally the responsibility of parties, officials and candidates to ensure they comply with relevant legal requirements.²⁶

²⁵ Memorandum of applicant (preliminary hearing) dated 6 October 2023 at [5].

²⁶ There are some parallels with *Docherty v Peden* HC Wellington CIV-2008-485-2375, 6 November 2008 at [39].

29. The Electoral Commission refutes allegations that it failed to meet its statutory objective in its dealings with NZ Loyal. If this application proceeds to trial, the Electoral Commission will lead evidence as to the quality of service it provided to NZ Loyal, and other registered parties. It will argue that it discharged its statutory objective.
30. But even if NZ Loyal's allegations were correct, the Electoral Commission had no power to extend statutory deadlines. In particular, the Electoral Commission has no power to accept late nominations in the form of an amended or resubmitted party list. To provide a level playing field for all electoral participants, and avoid unfairness, statutory deadlines must be rigorously observed.
31. Successful delivery of an election depends on deadlines being met. Ballot papers must be prepared. Party list information are distributed to voters and voting places. The accuracy of information provided to voters and candidates depends on the identity of those candidates being fixed and known.
32. Rigorous observance of the Electoral Act's requirements is a principal means by which impartial, efficient and effective administration of the electoral system is achieved, and confidence in its administration is maintained. Accepting late nominations, in the form of an amended or resubmitted party list, could demonstrate:
 - 32.1 partiality as between registered parties (which party's late nominations ought be accepted? How late can they be?)
 - 32.2 partiality as between candidates listed in different orders of preference on the timely, and the amended or resubmitted, party lists.
33. The appearance of such partiality, and evolving information as to who the candidates are, could impair confidence in the administration of the electoral process.

34. Nor does this Court have power to order the Commission to receive late nominations, based on alleged failures of service quality. The only basis NZ Loyal has identified to support this course of action is s 4C of the Electoral Act 1993.
35. But reference to generally expressed objectives of “facilitating participation” and “promoting understanding” cannot overcome clear statutory language. In the words of this Court, “the Electoral Commission’s ability to achieve its statutory objectives is constrained by the terms of the Act”.²⁷

Second ground of review: statutory construction

Section 146H

36. Section 164H of the Electoral Act 1993 may not be used for the purpose NZ Loyal contends, ie to amend its party list. There is no power in the Electoral Act to amend a party list. Amendments to party lists may only be effected by withdrawal and resubmission.²⁸
37. The Electoral Act deals with the nomination of party list candidates, and constituency candidates, in different parts.
- 37.1 The nomination of party list candidates is dealt with in ss 127-128C.
- 37.2 The nomination of constituency candidates using the individual nomination method is dealt with in ss 143–146.
- 37.3 The nomination of constituency candidates using the bulk nomination method is dealt with in ss 146A–146L.
38. Section 146H may only be used to amend bulk nomination schedules of constituency candidates — and even then, only in limited respects. That ss 146A–146L (including s 146H) are specific to the bulk nomination of constituency candidates, and not party lists, is clear from s 146A.

²⁷ *Taylor v Attorney-General* [2014] NZHC 2225 at [56].

²⁸ As to which, see paragraphs 41–42.3 below.

146A Purpose of sections 146B to 146L

Sections 146B to 146L provide an alternative to the procedures set out in sections 143 to 146 by which people can be nominated as candidates for election for electoral districts.

39. It is also clear from s 146H's heading:

146H Amendment of bulk nomination schedule

40. Even if s 146H were available to amend NZ Loyal's party list, the power to amend may not be used to nominate candidates who were not originally nominated.²⁹

Section 128C

41. Section 128C permits withdrawal and resubmission of a party list — but only by noon on Thursday 14 September. NZ Loyal accepts its attempts to withdraw and resubmit a party list occurred after noon on Thursday 14 September.³⁰

42. After this time, party lists could be withdrawn in the subsequent 24 hours.³¹ But if withdrawn, they could only be replaced in accordance with s 127.³² That is, a replacement had to be submitted by noon on the day before nomination day, ie Thursday 14 September.³³ So:

42.1 A party list could be withdrawn and replaced by noon on Thursday 14 September.

42.2 But a party list could only be withdrawn (and not replaced) in the 24 hours between noon Thursday and noon Friday.

42.3 And if withdrawn in that 24 hours between noon Thursday and noon Friday, a party list could not be resubmitted.

²⁹ Electoral Act 1993, s 146H(4)(b).

³⁰ Statement of claim at [30]–[32].

³¹ Electoral Act 1993, ss 128C(1), (2).

³² Section 128C(3).

³³ Section 127(3)(a).

Third ground of review: Bill of Rights Act

43. Section 12 of the Bill of Rights Act provides:

12 Electoral rights

Every New Zealand citizen who is of or over the age of 18 years—

- (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
- (b) is qualified for membership of the House of Representatives.

44. Section 12(b) is not engaged. Qualification for membership of the House is regulated by s 47 of the Electoral Act. It provides:

47 Registered electors may be members, unless disqualified

- (1) Subject to the provisions of this Act, every person who is registered as an elector of an electoral district, but no other person, is qualified to be a candidate and to be elected a member of Parliament, whether for that electoral district, any other electoral district or as a consequence of the inclusion of that person's name in a party list submitted pursuant to section 127.
- (2) Notwithstanding anything in subsection (1), if a person is disqualified for registration as an elector, that person shall not be qualified to be a candidate or to be elected.
- (3) Regardless of anything in subsection (1), a person is not qualified to be a candidate or to be elected unless he or she is a New Zealand citizen.

45. There is no suggestion NZ Loyal's candidates have been deprived of their qualification for membership of the House. Indeed, that they are qualified has been confirmed by the acceptance of their nominations as constituency candidates.

46. The procedural provisions of the Electoral Act regulate how a person qualified for membership of the House may be elected to it. Those procedural provisions do not limit their qualification *per se* — they simply regulate the means by which they might convert qualification into membership.

47. Even if s 12(b) of the Bill of Rights Act were engaged, the Electoral Commission's refusal to accept late nominations was "prescribed by law". That law is the Electoral Act, which:

- 47.1 Does not provide for amendment of party lists; and
- 47.2 Only permits withdrawal and resubmission of party lists by noon on Thursday 14 September.³⁴

DISPOSITION

- 48. Given the time-sensitive electoral context, the Court might consider delivering separate results and reasons judgments. This would allow for either prompt appeal, or implementation of the Court's orders.

First ground of review

- 49. If the Court answers the preliminary question of law on the first ground of review "yes", a prompt trial of NZ Loyal's allegations will be required. Ideally this would be completed, and judgment delivered, before the Electoral Commission declares candidates elected from party lists (likely to be on Thursday 9 November).³⁵
- 50. If the Court answers the preliminary question "no", the applications for declarations remain on foot.³⁶ The Court should fix a date after the election by which NZ Loyal must indicate whether it still pursues the declarations, or wishes to discontinue the proceeding.

Second and third grounds of review

- 51. If either the second or third grounds of review are made out, and the Court makes the mandatory order,³⁷ a question arises as to the version of the party list the Electoral Commission must accept.
- 52. The Party Portal did not permit party lists to be uploaded after noon on Thursday 14 September. Counsel is instructed that notwithstanding communication between NZ Loyal and the Electoral Commission in the ensuing 24 hours, it did not actually submit any amended or new party list.

³⁴ Electoral Act 1993, ss 128C(3) and 127(3)(a).

³⁵ Electoral Act 1993, s 193(5). An erroneous declaration can be amended: s 193A. However, the respondents respectfully submit that to promote public confidence in the administration of the electoral system, unnecessary reliance on the amendment power should be avoided.

³⁶ Statement of claim at [53.1]–[53.3].

³⁷ At [53.4].

53. The only evidence as to the composition of NZ Loyal's amended or new party list is in the Affidavit of Michele Smith. Ms Smith says:

[26] The party list with the electorate candidates included is at **[MS-16]**. This is the final version list that the EC refused to accept.

54. It is not clear on the evidence when this party list was finalised, and when (or if) it was actually submitted to the Electoral Commission. The Court should proceed with caution before directing the Electoral Commission to accept Annexure MS-16 as NZ Loyal's party list. With respect, Ms Smith's evidence is a slender basis upon which membership of the House of Representatives might be determined.³⁸

Some clarifications

No guarantee of eligibility

55. Counsel is instructed that 27 of the candidates on NZ Loyal's amended or new party list have only consented to nomination as constituency candidates. That is, they have not consented to nomination as party list candidates. Such consent is a condition of nomination.³⁹ It should not be assumed that a mandatory order to accept NZ Loyal's amended or new party list would result in all candidates on such a list being determined eligible.

Only limited publication would be possible

56. The mandatory order would only require the Electoral Commission to accept the amended or new party list. This would change the identity of candidates to be elected from NZ Loyal's party list, should the election results be such that the party is entitled to more than one List MP.⁴⁰

³⁸ For example, NZ Loyal's party list candidates currently in second and third position have, on the amended party list, been demoted to 15th and 35th positions respectively.

³⁹ Electoral Act 1993, s 127(4)(a). Cf s 146E(3)(a), which required consent to nomination as a constituency candidate.

⁴⁰ The candidate in first position is identical on the party list that was accepted, and the amended party list.

57. As currently framed, the mandatory order would not require the Electoral Commission to proactively publish the amended or new party list. A mailout of EasyVote packs to 3.4 million registered electors, containing information as to party list candidates, is already well underway.
58. It would be practicable for the Electoral Commission to update its website to reflect the amended party list. However, at this point in the election it would not be practicable for the Electoral Commission to stop or re-conduct the EasyVote mailout.

INTEIRM ORDERS

59. NZ Loyal notes its application for interim orders remains before the Court.⁴¹ If the Court answer the preliminary question of law on the first ground of review “no”, and dismisses the second and third grounds of review, the application for interim orders must fall away.

COSTS

60. There are several different permutations as to the result of this stage of the proceeding. Costs should be reserved, for the parties to make brief written submissions in light of the Court’s reasons.

6 October 2023



D J Perkins / S Cvitanovich
Counsel for the respondents

⁴¹ Memorandum of applicant (preliminary hearing) dated 6 October 2023 at [3].

LIST OF AUTHORITIES**Statutes**

1. Electoral Act 1993
2. Judicial Review Procedure Act 2016
3. New Zealand Bill of Rights Act 1990, s 12

Cases

4. *Docherty v Robert Peden, Chief Electoral Officer* HC Wellington CIV-2008-485-2375
5. *Simpson v Attorney-General* [1955] NZLR 271 (SC and CA)
6. *Taylor v Attorney-General* [2014] NZHC 2225, (2014) 10 HRNZ 31, [2015] NZAR 705 at [56].

Other

7. “Writ for General Election” (10 September 2023) New Zealand Gazette No 2023-vr4258