

IN THE HIGH COURT OF NEW ZEALAND  
AT WELLINGTON

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

CIV-2023-485-000604

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                Electoral Commission  
**First Respondent**

Attorney-General  
**Second Respondent**

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**MEMORANDUM OF APPLICANT (INTERLOCUTORY APPLICATION)**

**5 October 2023**

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**FRONTLINE LAW**

Filed by Matthew Hague, counsel for the applicant

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## MEMORANDUM OF APPLICANT (INTERLOCUTORY APPLICATION)

### MAY IT PLEASE THE COURT –

1. This is an application by the Applicant (**NZ Loyal**) for the following orders:
  - 1.1 An interim order declaring that the Electoral Commission ought not to refuse to accept party list information of electoral list candidates of New Zealand Loyal.
  - 1.2 An interim order declaring that the Electoral Commission ought not to refuse to publish updated election information containing party list information of electoral list candidates of New Zealand Loyal.
  - 1.3 An interim order declaring that the Electoral Commission ought not to refuse to assign party list positions to electoral list candidates of New Zealand Loyal.
2. The Electoral Commission is an independent Crown entity, and is responsible for the administration of the 2023 General Election.

### URGENCY

3. This interlocutory application is made on a *Pickwick* basis. An urgent hearing to determine this interlocutory application is sought on an urgent basis.
4. The basis for this urgency is that voting in the General Election has commenced. Voters have been provided with material that does not show the full party list for NZ Loyal.
5. While it is not too late for the position of NZ Loyal to be preserved to a degree, the longer the status quo continues the greater the harm to the position of NZ Loyal.
6. NZ Loyal has acted diligently and quickly in seeking interim orders. Counsel was instructed on 15 September 2023, however suffered a serious and unexpected health emergency requiring hospitalisation, and current counsel was instructed on 1 October 2023.

7. The Electoral Commission has been on notice of this issue since 14 September 2023 and has received communication from counsel for NZ Loyal from 15 September 2023.
8. While the Electoral Commission will make its own submissions, it has been clear in its correspondence that it has been aware of the present issue from the outset.

## **BACKGROUND**

9. In the leadup to the 2023 General Election, the Electoral Commission accepts candidate information from registered political parties. This information is then published for the benefit of voters.
10. There are three categories of candidate information:
  - 10.1 Electorate candidate information, meaning information about electorate candidates who are standing for election only in their electorates.
  - 10.2 List only candidates, meaning information about candidates who are standing for election only as party list candidates and not in any electorate.
  - 10.3 Electorate candidates who are also standing as party list candidates, meaning candidates who are standing for election in their electorate and are also assigned a party list position.
11. Candidate information must be provided to the Electoral Commission within a certain timeframe.
12. There are two deadlines which are relevant to this matter:
  - 12.1 The deadline for submission of candidate information was noon on 14 September 2023 (**the Information Deadline**).
  - 12.2 The close for nominations was noon on 15 September 2023 (**the Nomination Deadline**).
13. In the lead up to the Information Deadline inadequate training was provided to secretaries for political parties without any explanation of how the different categories of candidate information should be dealt with.

14. In addition, the secretary for NZ Loyal (**the Secretary**) had issues accessing the online portal provided by the Electoral Commission for uploading information.
15. The Secretary uploaded electorate candidate information and list only information prior to the Information Deadline. However, the Secretary omitted to include party list priority numbers for electorate candidates (**the Party List Information**).
16. The Secretary followed guidance in the Electoral Commission Manuel (**the Manuel**) by not uploading a list of party list candidates where they were also electorate candidates.
17. The Secretary immediately realised her omission and on multiple occasions prior to the Nomination Deadline, asked the Electoral Commission to take corrective action. The Electoral Commission refused.
18. As a result of this issue, information has been published which shows NZ Loyal as having only three party list candidates, these being the list only candidates.
19. As well as harming the standing of NZ Loyal in the eyes of some voters, if NZ Loyal gains more than 5% of party votes, or otherwise is entitled to fill party list seat vacancies but is unable to provide sufficient electorate or list only candidates, these vacancies will be forfeit.

#### **APPLICABLE PRINCIPLES**

20. At any time before the final determination of an application, the Court may, on the application of a party, make an interim order of the kind applied for if, in its opinion, it is necessary to do so to preserve the position of the applicant.<sup>1</sup> The purpose of this part of the test is to give a right of protection on an interim basis to an applicant who may otherwise be unfairly prejudiced by reason of a delay in obtaining a final hearing.<sup>2</sup>

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<sup>1</sup> Judicial Review Procedure Act 2016, s 15(1).

<sup>2</sup> *Woodhouse v Auckland City Council* (1984) 1 PRNZ 6 (HC).

21. In cases for which the Crown is the respondent, the Court may make an interim order declaring that the Crown “ought not to” take any further action that is, or would be, consequential on the exercise of the statutory power.<sup>3</sup>
22. An order may be made subject to such terms and conditions as the Court thinks fit; and be expressed to continue in force until the application is finally determined or until such other date, or the happening of such other event, as the Court may specify.<sup>4</sup>
23. In *Carlton & United Breweries Ltd v Minister of Customs*, Cooke J held:<sup>5</sup>

In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief- which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.
24. Once the applicants have demonstrated that an interim order is necessary to preserve their positions, the Court exercises a broad discretion to consider the circumstances of the case and decide whether an order should be granted, taking into account:<sup>6</sup>
  - 24.1 The strengths of the application for judicial review,
  - 24.2 Public and private repercussions of granting relief; and
  - 24.3 The overall balance of convenience and justice of the case.

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<sup>3</sup> Judicial Review Procedure Act 2016, s 15(3)(b)(1).

<sup>4</sup> Section 15(4).

<sup>5</sup> *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at [430].

<sup>6</sup> *ENZA Ltd v Apple & Pear Export Permits Committee* HC Wellington CP266/00, 18 December 2000.

## **SYNOPSIS OF ARGUMENT**

25. The case before the Court is an application for judicial review of the Electoral Commission's decision to refuse to accept the Party List Information before the Nomination Deadline (**the Decision**).
26. There are three parts to NZ Loyal's argument that the Decision was unlawful, each is set out below.

### **Section 146H(1) of the Act**

27. The first part of the argument is that s 146H of the Electoral Act 1993 (**the Act**) provides that the Secretary could, any time prior to the Nomination Deadline, provide to the Electoral Commission any information to remedy the defect or omission in the schedule, or any document required to be lodged with the schedule.
28. The Electoral Commission required the Secretary to enter information relating to electoral candidates only once, and not separately as party list candidates. The Secretary complied with this direction.
29. The party list placement for electorate candidates was required to be added to this single entry, and this is what the Secretary omitted. This is the Party List Information referred to in these submissions.
30. Because the Electoral Commission combined party list placement information with the electorate candidate information, it was effectively included within the bulk nomination schedule.
31. The refusal to accept the Party List Information Section 146(H)(1) was contrary to s 146H(1) of the Act and therefor unlawful.

### **Section 128C of the Act**

32. As a second part advanced in the alternative to the first part, NZ Loyal relies on s 128C of the Act.
33. Section 128C provides that the Secretary could, prior to the Nomination Deadline, withdraw a list of party (list) candidates and submit another one in accordance with s 127 of the Act.

34. It is submitted that as a matter of law, s 127(3)(a), which requires that a list of party candidates must be submitted before the Information Deadline, does not apply when this provision is used in relation to s 128C.
35. Reasons in support of this position are:
  - 35.1 It is consistent with s 146H(1), which allows amendments to electoral candidates until the Nomination Deadline.
  - 35.2 Section 6 of the New Zealand Bill of Rights Act 1990 (**NZBORA**) requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning. The relevant right is at s 12 of NZBORA, and not to adopt the suggested interpretation would limit this right.
  - 35.3 A purposive interpretation with reference to the objectives of the Electoral Commission at s 4C favours the suggested interpretation, as this would facilitate participation in parliamentary democracy.

#### **Section 4C of the Act**

36. As the third part, s 4C of the Act sets the statutory objectives of the Electoral Commission, which is to administer the electoral system impartially, efficiently, effectively, and in a way that—
  - 36.1 facilitates participation in parliamentary democracy; and
  - 36.2 promotes understanding of the electoral system and associated matters; and
  - 36.3 maintains confidence in the administration of the electoral system.:
37. The failure of the Electoral Commission to provide adequate training and support, which as set out in the Statement of claim was in breach of the objectives at s 4C and an unlawful act.
38. This is important context to the wider case and is also relevant in this interlocutory application in that if this unlawful act caused harm to NZ Loyal that is appropriate for interim relief.

## **STRENGTH OF APPLICATION**

39. In *Esekielu v Attorney-General*, Hammond J said that it was enough if there was a real contest between the parties, and that the applicant has a respectable chance of succeeding in that contest.<sup>7</sup> Hammond J cited a decision of the High Court of Australia, which said that how strong the probability of success needs to be, depends upon the nature of the rights asserted, and the practical consequences likely to flow from the order sought.<sup>8</sup>
40. In this case, the grounds of review and nature of the rights asserted are fundamental and are of constitutional importance. The breach of those rights, along with the other grounds of review, will result in significant and irreparable prejudice to the Applicant.

### **Position to Preserve**

41. NZ Loyal has a clear position to preserve. The 2023 General Election is happening now and voting closes 14 October.
42. There are two aspects to the position of NZ Loyal:
- 42.1 First, that the standing of NZ Loyal is harmed in the eyes of some voters, and
- 42.2 Second, if NZ Loyal gains more than 5% of party votes or otherwise is entitled to fill party list seat vacancies but is unable to provide sufficient electorate or list only candidates, these vacancies will be forfeit.
43. The first aspect is the more immediate issue, however the second aspect will have effect immediately after the close of voting.
44. Even if the Court decides that it is too late for interim relief for the first issue, NZ Loyal has a legitimate interest in filling all party list seats if it gains a sufficient share of the vote.

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<sup>7</sup> *Esekielu v Attorney-General* (1993) 6 PRNZ 309 (HC), at [313].

<sup>8</sup> *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622.

### **Serious Questions to be Tried**

45. There are serious questions to be argued, as set out above. These grounds of review are issues relating to fundamental rights and are of constitutional importance, and they are serious questions to be tried.

### **PUBLIC AND PRIVATE REPERCUSSIONS**

46. If interim relief is not granted, the ability of NZ Loyal to participate in the 2023 General Election will be harmed. In addition, it will be unable to fill party list seat vacancies it may be entitled to fill if it is unable to provide sufficient electorate or list only candidates.
47. There are few issues of greater fundamental importance than the ability of political parties to take part in a general election. Further, New Zealanders are entitled to vote freely and the issue faced by NZ Loyal prevents them from doing so, either because they do not have correct voting information, or their party vote may be a nullity if NZ Loyal seat vacancies are unable to be filled.
48. On the other hand, the impact of the interim relief sought on the Electoral Commission relate solely to resourcing and administrative burden. It is submitted that this falls far short of the harm sought to be avoided or mitigated by the interim orders sought. It is also relevant that the Leader of NZ Loyal has given an undertaking as to damages in the event that interim relief is granted.
49. There does not appear to be any meaningful adverse impacts on third parties which could be caused by the interim orders.
50. The public and private repercussions of granting interim relief favour the Applicant.

### **OVERALL BALANCE OF CONVENIENCE AND INTERESTS OF JUSTICE**

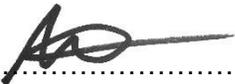
51. This is a case in which NZ Loyal has repeatedly attempted to resolve this issue directly with the Electoral Commission. The Electoral Commission has refused to accept that it has acted unlawfully, resulting in NZ Loyal seeking intervention by the Court.

52. Stepping back and viewing this application holistically, the balance of convenience favours NZ Loyal because:
- 52.1 NZ Loyal has a position to protect, as does the wider public.
  - 52.2 The interim orders are necessary to protect the position of NZ Loyal, if they are not granted and the Court eventually upholds the application for judicial review, it will be a pyrrhic victory.
  - 52.3 If the interim orders are not granted, the impact on NZ Loyal will be substantial, as will the impact on the wider voting public. The impact on the Electoral Commission will be administrative and potentially economic, neither of which are significant relative to the harm to NZ Loyal.
  - 52.4 The case of NZ Loyal is strong and certainly arguable, and relates to issues of fundamental democratic importance.
53. The overall balance of justice favours NZ Loyal, and to a significant degree.

## **CONCLUSION**

54. For the reasons set out above, NZ Loyal seeks the following orders:
- 54.1 An interim order declaring that the Electoral Commission ought not to refuse to accept party list information of electoral list candidates of New Zealand Loyal.
  - 54.2 An interim order declaring that the Electoral Commission ought not to refuse to publish updated election information containing party list information of electoral list candidates of New Zealand Loyal.
  - 54.3 An interim order declaring that the Electoral Commission ought not to refuse to assign party list positions to electoral list candidates of New Zealand Loyal.

55. NZ Loyal wishes to be heard in relation to costs.

Signature:.....

(counsel for the applicant)

Date: 5 October 2023