IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-409-3089

IN THE MATTER OF	an Election Petition relating to the Selwyn Electoral District
BETWEEN	ROGER JOHN PAYNE Applicant
AND	AMY ADAMS First Respondent
AND	JUDY KIRK Second Respondent
AND	ROGER BRIDGE Third Respondent
AND	JOHN SKINNER Fourth Respondent

Hearing: 6 & 7 April 2009

Court: Randerson, Chief High Court Judge J
Allan J
French J

Appearances: Applicant in person
P T Kiely for Respondents

Judgment: 7 May 2009

JUDGMENT OF THE COURT

This judgment was delivered by me on 7 May 2009
at 2.00 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Kiely Thompson Caisley, PO Box 7359, Auckland 1141
Copy To: R J Payne, Willowbank Farm, 73 Muff Rd, Orari, RD 26, Temuka, South Canterbury

Introduction

[1] In the 2008 general election, the first respondent Ms Amy Adams was elected as the member of Parliament for the Selwyn electorate. Ms Adams stood as the New Zealand National Party Candidate for the seat having gained selection against eight other nominees. One of the other nominees was the applicant Mr Roger Payne. His nomination was disapproved by the Board of the National Party under Rule 94 of the Party's constitution. This occurred prior to the pre-selection processes which ultimately lead to the identification of the successful candidate.

[2] Rule 94 of the Party's constitution provides:

> Final Approval of Nominations vested in Board
>
> (a) Within 3 clear days of the date of closing of nominations, the Electorate Secretary shall forward to the General Manager the prescribed forms for candidates together with any remarks the electorate committee and the Regional Chair wish to make about each candidate.
>
> (b) The Board shall consider the material submitted and shall have an unfettered discretion to approve or disapprove a nomination received. The Board may undertake an investigation on its own behalf of any candidate but shall not be bound to interview a candidate it rejects or assign any reason for rejection. The Board shall forthwith on a decision being made communicate it to the Electorate.
>
> (c) Nothing in these Rules shall derogate from the right of an electorate (subject to R. 87) to select a candidate from whomever is approved to stand, including a person challenging a sitting Member of Parliament.

[3] Mr Payne immediately complained about the disapproval of his nomination and sought an interim injunction to restrain the continuation of the selection process until his nomination could be fairly evaluated. Although Panckhurst J initially granted the interim injunction Mr Payne sought, the Judge rescinded it on 1 May 2008 after hearing full argument. Panckhurst J found there was no serious question to be tried. The judgment is now reported as [2008] 3 NZLR 233.

[4] The central issue before Panckhurst J was whether Rule 94 of the National Party Rules was contrary to s 71 Electoral Act 1993 which imposes certain

obligations on political parties designed to ensure that democratic procedures are followed in the process of candidate selection. Mr Payne did not seek an urgent substantive hearing of the injunction application but instead filed an appeal. For reasons we later discuss, the appeal was abandoned and the injunction proceedings have not proceeded to a substantive hearing.

[5] Following the general election, Mr Payne brought this election petition under s 229(1) Electoral Act seeking the following determinations:

> (a) That the National Selwyn candidate selection 2008 process was unlawful as it was in breach of the Electoral Act 1993 requirements for political parties to select candidates democratically, and/or natural justice and fairness;
>
> (b) This flawed process rendered the subsequent election of Amy Adams M.P. for Selwyn unlawful – through compounding of error;
>
> (c) The Selwyn Election process 2008 be re-run under democratic procedures and natural justice via a by-election in the public interest.

[6] There are four respondents: Ms Adams, Mrs Judy Kirk (President of the New Zealand National Party), Mr Roger Bridge (Chairman of the Canterbury-Westland Region of the National Party) and Mr John Skinner (the Electorate Chairman for the National Party in Selwyn).

[7] The principal grounds relied upon by Mr Payne to support his petition are:

a) Rule 94(b) of the National Party Rules is contrary to s 71 Electoral Act.

b) The disapproval of his nomination was contrary to natural justice in that he was not supplied with a copy of the rules; he was not interviewed nor given any opportunity to respond to or explain material held by the National Party which was potentially adverse to his nomination; and no reasons were given for disapproving his nomination.

c) The respondents either supplied or relied upon false or misleading information.

[8] The respondents deny Mr Payne's allegations and rely on the judgment of Panckhurst J. They also submit that Mr Payne does not have standing under s 230 Electoral Act to bring the petition and that the jurisdiction of this Court in trying an electoral petition does not extend to a challenge to the lawfulness of the selection of candidates by a political party. Rather, the respondents submit, challenges by way of electoral petition are limited to the lawfulness of the election process itself.

Issues

[9] Against that background, the issues for determination are:

a) Does Mr Payne have standing under s 230 Electoral Act to bring the petition?

b) Does the expression "unlawful election or unlawful return" under s 229(1) Electoral Act extend beyond corrupt or illegal practices as defined by the Act and, in particular, does it include challenges to the lawfulness of the selection of candidates by a political party?

c) Is Rule 94(b) of the National Party Rules 2007 (or the way in which that rule was utilised to disapprove Mr Payne's nomination as a candidate for the Selwyn electorate on 13 March 2008) contrary to s 71 Electoral Act?

d) Do the principles of natural justice apply to a decision made to disapprove a candidate's nomination under Rule 94(b) and, in particular, do those principles require the Board of the National Party to give the nominee an opportunity to comment upon material adverse to his approval as a nominee or to give reasons?

e) If so, was there a breach of natural justice when Mr Payne's nomination was disapproved on 13 March 2008 by failing to give him that opportunity or the failure to give reasons?

f) Are there any other grounds pleaded upon which the election of the first respondent as the member of Parliament was unlawful?

Background Facts

Events in the Rakaia Electorate 2002

[10] The Selwyn electorate is a new one comprising parts of the previous Rakaia and Banks Peninsula electorates. In order to understand the events surrounding the candidate selection process for the Selwyn electorate in 2007/2008, it is necessary to canvass briefly some matters relating to the Rakaia electorate at the time of the 2002 general election. At that time, Mr Payne was one of the nominees to be the National Party candidate for the Rakaia electorate. However, his nomination was unsuccessful following a decision of the pre-selection committee in March 2002.

[11] After that decision, five nominees remained including the candidate who was ultimately successful, Mr Brian Connell. On 12 March 2002, Mr Payne wrote to the then President of the National Party, Ms Michelle Boag. He complained that the National Party Rules then in force had been breached in a number of specific respects, indicating in each case the particular rules he considered had been breached. He also made a statement in disparaging terms about the five candidates who remained. He asked Ms Boag to declare that the pre-selection process was null and void and expressed the view that the process should be recommenced. His letter was copied to a number of persons including the then Chairman of the National Party Canterbury-Westland Region (Mr Bill Studholme).

[12] As a result of what Mr Payne considered to be a flawed selection process, Mr Payne resigned from the National Party and stood instead for the Christian Heritage Party in the Rakaia electorate. He frankly accepted before us that this action was a deliberate breach of a written undertaking he gave the National Party at the time of the 2002 election that, if his nomination for the National Party candidacy was unsuccessful, he would not stand against the National Party.

[13] In an affidavit sworn in the injunction proceedings on 10 April 2008, Mr Payne explained that he stood for another party despite the undertaking "because

I was operating on higher level responsibilities than National". He explained to us that he justified his actions on the footing that it was necessary to expose what he saw as corruption in the selection processes adopted by the National Party. Mr Payne's admitted breach of the undertaking in 2002 is significant because it was one of the principal reasons later given by the National Party Board for its decision to disapprove Mr Payne's candidacy for the 2008 general election.

[14] After Mr Connell's selection as the National Party candidate for Rakaia, Mr Payne provided a report dated 25 October 2002 to Mr John Carter MP (then senior whip of the National Party) and Mr Bill English MP (then leader of the National Party). The report was entitled "Investigation of Brian Connell MP Rakaia". There is some dispute about the provenance of this report. Mr Payne says that he and a colleague were "commissioned" by Mr Carter to prepare the report. This is denied by the respondents but it is unnecessary to resolve this issue. It is sufficient to find that Mr Payne could in no sense be regarded as presenting an independent view given his unsuccessful nomination for the Rakaia candidacy and his condemnation of Mr Connell as expressed in his letter to Ms Boag of 12 March 2002.

[15] In the report of 25 October 2002, Mr Payne accused Mr Connell of dishonesty about his background and also accused him of misleading Parliament in his maiden speech after his election to Parliament.

[16] The issues raised by Mr Payne about Mr Connell were publicised in the media. Mr English and Mr Carter published a rebuttal in the Ashburton Guardian on 22 November 2002 and Mr Studholme was quoted in the National Business Review of 29 November 2002 as stating there was no cause for any inquiry into Mr Connell. This evoked a letter from Mr Payne to Mrs Judy Kirk who, by then, was the National Party President. This letter was copied to the National Business Review, the Ashburton Guardian and Messrs English, Carter and Studholme. In the letter, Mr Payne accused Messrs English, Carter and Studholme of dishonesty and reiterated his view that Mr Connell was guilty of dishonesty in the pre-election period and in his maiden speech. Mr Payne maintains that his stand was later vindicated when Mr Connell was later suspended from the National Party Caucus.

Mr Payne's Bankruptcy in 2005

[17] Mr Payne again came to public attention in 2005. In that year he was adjudicated bankrupt and, although his bankruptcy was annulled a few weeks later, the events surrounding the bankruptcy were later cited by the National Party Board as one of the reasons for the decision to disapprove his candidacy for the Selwyn Electorate in 2007/2008. Mr Payne had become involved in numerous court hearings over the period 1995 to 2005 in relation to a matrimonial property dispute involving his former family home in Wellington. The litigation included proceedings in the Family Court, the High Court and the Court of Appeal. He was adjudicated bankrupt on 25 May 2005 but the adjudication was annulled on 23 June 2005. When we questioned Mr Payne about the reasons for the annulment, he asserted that the bankruptcy petition was "malicious" and that it was annulled because there was never any question about his solvency and because the judgment on which the petition was founded was under appeal.

[18] We caused inquiries to be made to establish the facts from the bankruptcy file in the Wellington registry of this Court. The petition was presented by the Crown Solicitor in Wellington citing the Attorney-General on behalf of Family Court Judge Jill Moss as the judgment creditor. The petition recited that Mr Payne owed the judgment creditor the amount remaining unpaid on a final judgment obtained by the Attorney-General against him in the High Court at Wellington on 24 February 2004. The petition further recited that a bankruptcy notice had been served on Mr Payne on 25 August 2004 and had not been complied with. It is evident that the sum of $13,298.13 had been ordered by way of costs against Mr Payne in a proceeding he brought unsuccessfully against Judge Moss in her capacity as a Family Court Judge.

[19] On 23 June 2005 Associate Judge Gendall delivered a decision on Mr Payne's application for an order annulling his adjudication in bankruptcy. The Judge concluded that there was no basis for an annulment under s 119(1)(a) Insolvency Act 1967 since Mr Payne had exhausted all appeal and review rights he had with respect to the judgment on which the debt was founded; there was little chance of his having immediately realisable cash to settle his debts at the time of his adjudication; he had made it clear to the Court that he would not pay the costs at any

time; and he had failed to comply with a direction from the Court to provide a statement of his means.

[20] However, Associate Judge Gendall considered an annulment could be made under s 119(1)(b), noting that there was no opposition to the application for the annulment from the judgment creditor, the Official Assignee or the judgment creditor. The Judge stated that a sum of $239,501.74 "has just been paid into the Official Assignee's bank account from the former matrimonial home sale proceeds". Against that, there were debts, according to the Official Assignee's report, amounting to approximately $122,000. The Judge made an order for annulment on condition that the debts identified by the Official Assignee be paid (with the exception of a disputed interest figure of $24,784.76). In addition, Mr Payne was ordered to pay the petitioning creditor's costs of $8,812.51 and the Official Assignee's costs and disbursements of $9,021.28.

[21] In the light of the facts established from the bankruptcy file and the judgment of Associate Judge Gendall, it is evident that the description Mr Payne gave to us of the events surrounding his bankruptcy was misleading. First, there is no evidence that the bankruptcy petition was maliciously brought. Indeed, as Associate Judge Gendall found, it was properly brought and the bankruptcy order properly made at the time. Secondly, the judgment upon which the petition was founded was not under appeal at the relevant time according to the annulment decision. Thirdly, the annulment order was made on the basis that Mr Payne had "just" made a payment into Court and on condition that all the debts (including the amount payable under the judgment which founded the petition), were to be paid in full before the annulment order took effect.

[22] Mr Payne's bankruptcy came to public notice in an article published by the Dominion Post on 9 June 2005 under the headline "Deadline After Ten-Year Eviction Battle". It was stated in the article that Mr Payne had been through 70 Court hearings and had unsuccessfully sued three judges in an attempt to gain full title to the property in dispute. It was said that he had refused to budge from the home despite a High Court order putting it up for sale. The article went on to mention Mr Payne's bankruptcy "after failing to pay more than $13,000 in court

costs imposed after unsuccessful legal action against a Judge". The article mentioned that Mr Payne was challenging the bankruptcy through the courts and Mr Payne is reported as maintaining that he was a victim of "gross injustice". Also quoted was a statement said to have been made by the Court of Appeal in a decision given in March 2003 to the effect that:

> To a large extent the litigation has been driven by the appellant's own misunderstanding of the relevant law in relation to his payment into Court.

[23] The Dominion Post article went on to state that:

> Despite a Court of Appeal judge stating Mr Payne's chances of success in further appeals were nil he continues to contest rulings.

[24] Mr Payne contests the accuracy of Associate Judge Gendall's judgment. But no material has been placed before this Court to dispute its accuracy which we accept for present purposes. The fact that this matter came to public attention in 2005 is a matter to which we return.

Events in 2007/2008

[25] On 26 October 2007 Mr Payne completed a candidate application and nomination form to represent the National Party in the Selwyn Electorate in which, amongst other things, he formally undertook:

a) That he had read the current constitution and rules of the party and agreed to be bound by them.
b) To be loyal to the party, its elected officials and the chosen leader.
c) To abide by and comply in all respects with decisions of all bodies of the party involved in his potential selection as a parliamentary candidate.
d) If not successful in obtaining the nomination to:
    i) Support the candidate or candidates selected or nominated by the electorate.
    ii) Not work against that or those candidates.

iii) Not nominate or support another candidate against that or those candidates in respect of that electorate.

[26] In the candidate application and nomination form Mr Payne authorised the National Party to collect information concerning him from any other person or organisation who might be holding such information for the purpose of assessing his suitability as a candidate and verifying the information set out in his application.

[27] Mr Payne also specifically declared:

> I am not currently a bankrupt or have ever been adjudicated bankrupt, nor am I or have been subject to any Court Order concerning my affairs under the Insolvency Act or the Companies Act.

[28] On 2 November 2007 Mr Bridge wrote to Mr Payne advising that the Board of the National Party had met and considered his nomination but had declined it under Rule 96 (the provision in the National Party Rules 2003 equivalent to the current Rule 94). No reasons were given for this decision. Mr Payne immediately protested. He wrote on 6 November 2007 to Mrs Kirk demanding that the candidate selection process be halted. He again alleged corruption in the selection process. In material presented in support of his letter to Mrs Kirk, Mr Payne acknowledged he was aware of the content of Rule 96. Mr Payne complained, amongst other things, that he understood a false allegation of bankruptcy had been made against him. He maintained that all nominees, other than Mr David Carter, were being "blocked".

[29] Mr Payne reiterated his concerns in a further letter to Mrs Kirk dated 11 November 2007 and in a letter dated 19 November 2007 to Mr John Key (by then the leader of the National Party). This last letter also complained of corruption and selection fixing.

[30] The National Party decided to recommence the candidate selection process in Selwyn. The reasons for this are unclear. In an affidavit sworn in the injunction proceedings on 14 April 2008 Mrs Kirk simply stated that "because of administrative errors and concerns relating to the procedure the National Party decided to recommence the process". It is evident that Mr Carter decided not to stand for the Selwyn electorate.

[31] Mr Payne maintains that the recommencement of the selection process in Selwyn vindicated his stand. He also says that the events surrounding the abandoned selection process are relevant to his concerns about the fresh selection process which then followed. In particular, he maintains that the flaws he alleges in the abandoned selection process were carried forward and compounded by the later process.

[32] The nominations for the Selwyn selection reopened on 22 February 2008. On 5 March 2008, Mr Payne completed another candidate application and nomination form in similar terms to the form submitted on 26 October 2007. This time however he gave an explanation for his earlier declaration that he had never been adjudicated bankrupt:

> Back in 2005 there was a malicious attempt to bankrupt me, not based on fact, when clearly I had no debt. The High Court Wellington cancelled the attempt by a rare annulment process which means the attempt does not exist in law. While there is a Court record of what happened there is no public record of any bankruptcy against me.

[33] Mr Payne had given a similar explanation in a letter he had written to Mrs Kirk on 4 March 2008 seeking an opportunity to check for accuracy any information held by the National Party Board in respect of his candidacy. He also took the opportunity in this letter to explain his actions in 2002 in the Rakaia election asserting that he had displayed courage and professionalism in the best interests of the party. He drew attention to his referees and expressed his belief that he offered "a very strong challenge" for the National Selwyn MP role given what he described as his "long and distinguished career in both the public and private sector".

[34] For the reasons discussed at [21] above, Mr Payne's explanation given in the nomination forms about the circumstances surrounding his bankruptcy are misleading in part and untrue in others. In fact, the order for his adjudication as a bankrupt was properly made for the reasons canvassed by Associate Judge Gendall and the later annulment does not mean that the initial adjudication did not "exist in law". The assertion that there is no public record of any bankruptcy against him is also incorrect. The records provided by the New Zealand Companies Office show both the date of Mr Payne's adjudication and the date of the annulment. As well, the court file is a matter of public record and, of course, the matter came to public

attention by the article in the Dominion Post. Importantly, the National Party Board had before it Mr Payne's explanation for his bankruptcy as well as his account of the steps he took at the time of the general election in 2002 and his views about the abandoned selection process for the Selwyn electorate in November 2007.

[35] When the nominations for the National Party candidacy for Selwyn closed on 7 March 2008, there were nine nominations including that of Mr Payne. The National Party Board met on 13 March 2008. Those present were Mrs Kirk, the Rt Hon. Wyatt Creech, Grant McCallum, Scott Simpson, the Hon. Dr Nick Smith MP and Mr Bridge. Mr Carter did not stand again. The minutes relating to the Selwyn nominations record:

> The President advised the Board that there were nine nominations for Selwyn. The delegated Board sub-committee had met via conference call on Tuesday 11 March and approved eight candidates to go to Pre-Selection.
>
> The President believed the full Board should consider whether the final candidate Mr Roger Payne should advance to Pre-Selection.
>
> The Board considered the material submitted considered its own investigations and exercised its discretion under Rule 94 and disapproved the nomination received from Mr Payne.
>
> **Moved:** Grant McCallum Seconded: Scott Simpson CARRIED.

[36] On 17 March 2008 Mrs Kirk wrote to Mr Payne in the following terms:

> Dear Mr Payne
>
> Thank you for your fax entitled *National Selwyn Candidate Selection Process* which was received in my office on 17 March 2008.
>
> The Board of the New Zealand National Party considered your nomination to stand as a candidate for the National Party in the Selwyn Electorate and pursuant to Rule 94(b) decided not to accept your nomination.
>
> The selection process for the Selwyn Electorate is being undertaken by Head Office and I am satisfied that the correct rules and procedures are being adhered to. The selection process will continue to run to its scheduled timetable.

[37] The following day, Mr Payne commenced his application for an interim injunction restraining the National Party from proceeding with the selection process for Selwyn. That application was ultimately unsuccessful as earlier noted.

[38] Although the letter from Mrs Kirk to Mr Payne of 17 March 2008 did not disclose any reasons for the disapproval of his nomination, Mrs Kirk summarised the Board's reasons for its decision in her affidavit in the injunction proceedings sworn on 14 April 2008:

a) Breach of his undertaking given at the time of his nomination as the National Party candidate for Rakaia in 2002 by standing for the Christian Heritage Party and thereby working against the interests of the National Party (a step which under Rule 12(a) of the National Party Rules 2007 can result in the cancellation or forfeiture of the membership of the offending party member).
b) The fact that Mr Payne had been embroiled in complex and on-going Family Court litigation involving his former wife (such litigation having included suing Family Court Judges).
c) The fact that this matter had attracted newspaper attention in the Dominion Post article in 2005.
d) Mr Payne's bankruptcy which was a matter of public record (while acknowledging that the Board was aware the bankruptcy was subsequently annulled).

The Statutory Framework

[39] The provisions relating to election petitions are contained in Part 8 Electoral Act 1993. An election or return to the House of Representatives may only be questioned by a petition complaining of "an unlawful election or unlawful return" presented in accordance with Part 8: s 229(1). Where the petition relates to the return of a member of Parliament representing an electoral district, the petition must be presented to the High Court and determined in accordance with ss 230 to 257 of the Act: s 229(3).

[40] Eligibility to present an election petition is governed by s 230(1). The onus of proof is on the petitioner to establish the unlawful element in question: *Peters v Clarkson* [2007] NZAR 610 at [55]. The standard of proof is the criminal standard

of beyond reasonable doubt: *Peters v Clarkson* at [58] endorsing *Re Wairarapa Election Petition* [1998] 2 NZLR 74, 115.

[41] Subject to the provisions of the Act, the Court has jurisdiction to inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit: s 236(4).

[42] Section 240 provides:

> **240 Real Justice to be observed**
>
> On the trial of any election petition,—
>
> (a) The Court shall be guided by the substantial merits and justice of the case without regard to legal forms or technicalities:
>
> (b) The Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the High Court.

[43] In terms of s 241, certain irregularities are not to invalidate an election provided the Court is satisfied that the election was conducted substantially in compliance with the law as to elections and that the irregularity did not affect the result of the election. However, where the Court finds that the elected candidate has been guilty of any corrupt practice (as defined in the Act), his or her election shall be void: s 237. Similarly where the Court finds that corrupt or illegal practices have prevailed so extensively in the election that they may reasonably be supposed to have affected the result: s 238(1). The Court may also disallow the votes of any elector who has voted for a constituency candidate found to be guilty of bribing, treating or unduly influencing the voter: s 239.

[44] At the conclusion of the trial of an election petition under s 229(3), the Court must determine whether the member whose election or return is complained of was duly elected or returned or whether the election was void. The Court must forthwith provide to the Speaker of the House a certificate in writing of the Court's determination: s 243. Where a charge is made of any corrupt or illegal practice having been committed at the election, the Court is also required to provide to the Speaker a certificate and report under s 244. The Court may also provide a special

report to the Speaker on any other matters arising in the course of the trial under s 245. All decisions of the Court on an electoral petition are final and conclusive. They may not be appealed or questioned in any way: s 242.

First Issue – Does Mr Payne have standing under s 230(1) Electoral Act to bring the petition?

[45] The basic form of s 230(1) Electoral Act is not materially different from its statutory predecessors dating back to the 19th century. It provides:

> **230 Election petitions to High Court**
>
> (1) An election petition to which section 229(3) of this Act applies may be presented to the High Court by one or more of the following persons:
>
> (a) A person who voted or had a right to vote at the election:
>
> (b) A person claiming to have had a right to be elected or returned at the election:
>
> (c) A person alleging himself or herself to have been a constituency candidate at the election.

[46] It is not in dispute that the petition is brought under s 229(3). Any person described in sub-paragraphs (a), (b) or (c) may bring a petition. The "election" referred to in s 230 is the election of the member of Parliament for the Selwyn electorate: see the distinction drawn in s 3 Electoral Act between the definitions of "election" and "general election".

[47] Mr Payne accepts he is not eligible to bring the petition under s 230(1)(a). He was not entitled to vote in the Selwyn electorate since he was not registered in that electorate but in the Rakaia electorate. Eligibility to vote depends upon being qualified to vote in the relevant electoral district under s 60 Electoral Act which in turn depends on qualification to be registered as an elector of that district. Mr Payne did not meet those requirements.

[48] Mr Kiely submitted that Mr Payne was not eligible to bring the petition in terms of s 230(1)(b) or (c). Mr Payne submitted to the contrary.

[49] We do not accept Mr Payne's submission that he is "a person claiming to have had a right to be elected or returned at the election" under s 230(1)(b). This submission requires a very strained interpretation of the provision and is not susceptible to the generous or non-technical approach to electoral petitions mandated by s 240 since it goes to the jurisdiction of the Court to entertain a petition. For Mr Payne to have had a lawful right to be elected as a constituency candidate for the National party he required:

a) An approved nomination for the National Party candidacy; and
b) His successful selection as the National Party candidate; and
c) The acceptance by the Returning Officer of his nomination as a constituency candidate under ss 143 to 146 Electoral Act; and
d) His achieving a majority of the votes validly cast.

[50] None of those steps occurred. Of course, Mr Payne maintains that, but for the disapproval of his nomination, he would have had the opportunity to be selected and, in his submission, he would have stood a good chance of doing so. But he did not have a lawful right to be elected or to claim he had such a right. At best, he had no more than the potential to have a right to be elected contingent upon the fulfilment of the matters identified in [49] above. Section 230(1)(b) is available to a person who, for example, claims that some irregularity at the polls meant they would have succeeded if the irregularity had not occurred.

[51] We also reject Mr Payne's submission that he was eligible to bring the petition under s 230(1)(c). He does not allege himself to have been a constituency candidate (as defined by s 3) in the Selwyn electorate. Rather, his complaint is that he was wrongly deprived of the opportunity to be selected as the constituency candidate. It would appear that s 230(1)(c) is available to a person who alleges himself or herself to have been a constituency candidate at the election but who does not claim under s 230(1)(b) to have had a right to be elected or returned at the election. That could arise where, for example, the candidate accepted he or she had insufficient votes to win the election but wished to make a complaint about the way in which the election was conducted or about some corrupt or illegal practice on the part of the successful candidate. The use of the expression "alleging" himself or

herself to have been a constituency candidate could cover, for example, a person claiming to have been left off the ballot paper in error or someone claiming to have been wrongly ruled to be ineligible as a constituency candidate under s 145.

[52] The result is that Mr Payne is not eligible to bring the election petition. However, in deference to Mr Payne's arguments we go on to consider the remaining issues nevertheless.

Second Issue - Does the expression "unlawful election or unlawful return" under s 229(1) Electoral Act extend beyond corrupt or illegal practices as defined by the Act and, in particular, does it include challenges to the lawfulness of the selection of candidates by a political party?

[53] Section 229(1) Electoral Act provides:

> **229 Method of questioning election**
>
> (1) No election and no return to the House of Representatives shall be questioned except by a petition complaining of an unlawful election or unlawful return (in this Act referred to as an election petition) presented in accordance with this Part of this Act.

[54] Mr Kiely submitted that the statutory process to challenge or question an election under s 229 was limited to defects or unlawful elements in the election process itself. Effectively, he submitted that the election of Ms Adams as the member of Parliament for Selwyn could not be challenged except by a petition under s 229 and such a challenge was not available since it related to the lawfulness of the prior process under which Ms Adams was selected as the National Party candidate for the electorate.

[55] Mr Kiely accepted there was no definition of the expression "unlawful" in s 229(1) but initially submitted that, in the context of the Electoral Act, unlawfulness was limited to issues of corrupt or illegal practices under Part 7 or other offences under the Act such as those relating to the conduct of the ballot or electoral funding offences. However, Mr Kiely acknowledged in argument that unlawfulness in terms of s 229(1) could extend, for example, to the qualifications and eligibility of a candidate, the qualification of electors, or unlawfulness in the counting of votes or in

the conduct of a Returning Officer. But Mr Kiely submitted that, save for section 71 (which we deal with separately below), the Electoral Act does not control candidate selection processes and any unlawfulness in that respect was not intended to be subject to challenge by petition under s 229.

[56] As we understood it, Mr Payne's submission to the contrary was that any unlawfulness in the candidate selection process necessarily flowed on to Ms Adams' selection as the candidate and therefore rendered unlawful both her selection as the candidate and her election as the member of Parliament for the Selwyn Electorate.

[57] The resolution of this issue requires a consideration of some of the statutory history of electoral law in New Zealand as well as an analysis of the structure and purposes of the Electoral Act. The New Zealand Constitution Act 1852 (UK) established a system of representative government for New Zealand. The statutory predecessors of the current Electoral Act include the previous Electoral Acts of 1893, 1902, 1905, 1927 and 1956. In the 19th century the relevant legislation was somewhat fragmented and included (in addition to the Electoral Acts) the Electoral Petitions Acts of 1858 and 1880 and separate legislation such as the Corrupt Practices Prevention Acts of 1858, 1881 and 1895 and Representation Acts of 1860, 1870, 1875 and 1881.

[58] The Electoral Act 1902 was a consolidating statute bringing all the previously separate electoral legislation under one umbrella.

[59] The early electoral legislation in New Zealand was modelled on United Kingdom counterparts. The first Election Petitions Act of 1858 referred to a complaint of "an undue election or return" or a complaint of "no return". Similar language was used in successive legislative instruments until s 155(1) Electoral Act 1956 introduced the expression "unlawful election or unlawful return" in language identical to that of the current s 229(1).

[60] It is unclear why the language was changed but the change of language may not be material. While corrupt and illegal practices have been defined in electoral legislation in New Zealand for more than 150 years, there has never been any

definition of the expressions "undue" or "unlawful" in the statutory provisions relating to election petitions. In *re Surfers Paradise Election Petition* (1975) Qd R, 114, Dunn J held at 119 that the words "undue election":

> ...take their meaning from the history of disputed elections. An "undue election" is one in which there has been a departure from the prescribed method of election or one in the course of which there has been misbehaviour or mismanagement of a kind which, history has shown, may result in the selection of a candidate otherwise than by the will of the constituency (examples of such misbehaviour and mismanagement are given in *Halsbury's Laws of England,* 3rd ed., vol. 14, at pp. 244-5).

[61] The Fourth edition of *Halsbury's Laws of England* Vol. 15(4) at para 759 provides further examples of the grounds upon which a complaint of undue election or undue return may be made. None relate to the candidate selection processes of political parties. There is a useful discussion on the same topic by Mr Andrew Geddis in his work *Electoral Law in New Zealand: Practice and Policy* (Lexisnexis, Wellington, 2007) at para 13.2.

[62] While election law in New Zealand is largely statutory, the power of the courts at common law to declare a Parliamentary election to be void on an election petition may still exist except to the extent that it has been clearly excluded or modified by statute. In *re Hunua Election Petition* [1979] 1 NZLR 251 this Court stated at 260:

> Mr Temm for the petitioners had argued that the power of the Court to declare an election void was limited to the circumstances referred to in ss 163 and 164. We do not accept this view and are of the opinion that the common law power to declare an election void still exists subject to the limitations expressed in the circumstances referred to in s 167. We are confirmed in this view by the decision of a New Zealand Electoral Court comprising Williams and Denniston JJ in *Akaroa Election Petition* (1891) 10 NZLR 158, where Williams J, delivering the judgment of the Court, said at pp 160-161:
>
> > "The English Courts are governed in their decisions by the common law applicable to parliamentary elections. We also are governed by the same law, unless it clearly appears that the provisions of any statute are intended to supersede the common law in any particular. There seems to us no more indication of any intention in our statutes to supersede the common law than there is in the English statutes on the same subject."
>
> We consider that this is still the situation at the present day. The rights of this Court to declare an election invalid at common law remain subject only

> to such qualifications as are imposed by provisions of the Electoral Act 1956.

[63] In the *Akaroa* election case the court relied upon the early English authority of *Woodward v Sarsons* (1875) L.R.10 C.P 733 where the Court of Common Pleas held that an election could be declared void at common law if it were so conducted that there was "no real election at all, or that the election was not really conducted under the subsisting election laws" (at 743).

[64] We would not rule out the possibility of common law jurisdiction of the kind referred to in these authorities but, in practice, attention is most likely to be focused on a breach of one or more of the statutory obligations under the Electoral Act including such matters as the validity and qualifications of candidates, issues relating to electoral rolls, the qualification of voters, the counting of votes including the validity thereof, the conduct of Returning Officers and the existence of corrupt or illegal practices as defined in the Act.

[65] The focus of electoral petitions on the election process itself is evident from the powers of the Court upon hearing a petition. For example: s 234(4) and (5), (6) and (7) (which deal with the counting and disallowance of votes, entitlement to vote, the electoral roll and corrupt or illegal practices); ss 237, 238 and 239 (the Court's power to declare the election void); s 241 (irregularities relating to timeliness and forms, defects in the appointment of officials and mistakes or breaches of duty by officials); and ss 243 and 244 (reports as to outcome of the election).

[66] We turn now to consider the provenance of s 71 as introduced by the Electoral Act 1993 and address the question whether a breach of s 71 is capable of amounting to a ground of challenge for unlawfulness under s 229(1).

[67] The current Electoral Act was preceded by a report of the Royal Commission on the Electoral System entitled "Towards a Better Democracy" published in 1986. Until the passage of the 1993 Act, there were no statutory provisions affecting the selection of candidates and few controls on the role of political parties in the electoral process: see the helpful article by Andrew Geddis *The Unsettled Legal Status of Political Parties in New Zealand* (2005) 3 NZJPIL 105, 112. In general,

statutory duties were directed at individual constituency candidates. However, the introduction of the MMP electoral system provided for by the 1993 Act brought major changes to New Zealand's electoral system and introduced statutory obligations relating to the registration of political parties as well as controls on the nature and extent of funding for electoral purposes. For the first time, political parties were required to make provision in their rules for the participation of members in the candidate selection process.

[68] The provisions relating to the registration of political parties are contained in Part 4 Electoral Act. To be eligible for registration, a party must have at least 500 current financial members who are eligible to enrol as electors: s 62 and the definition of "eligible political party" in s 3. Application for registration is to be made to the Electoral Commission and, subject to the Commission being satisfied that the party is eligible and other formal requirements, the party must be registered: ss 66 and 67.

[69] Part 4 Electoral Act also contains s 71 which provides:

> **71 Requirement for registered parties to follow democratic procedures in candidate selection**
>
> Every political party that is for the time being registered under this Part of this Act shall ensure that provision is made for participation in the selection of candidates representing the party for election as members of Parliament by—
>
> (a) Current financial members of the party who are or would be entitled to vote for those candidates at any election; or
>
> (b) Delegates who have (whether directly or indirectly) in turn been elected or otherwise selected by current financial members of the party; or
>
> (d) A combination of the persons or classes of persons referred to in paragraphs (a) and (b) of this section.

[70] This section will be considered in more detail below. For the present, it is sufficient to note the location of this provision in Part 4 is one of the statutory indicators tending to support the proposition that Parliament intended selection processes to be dealt with discretely from the election processes found in Part 5 (Registration of Electors), Part 6 (Elections) and Part 7 (Corrupt and Illegal Practices).

[71] The remaining provisions in Part 4 are sections 71A and 71B which complement s 71. Section 71A requires the secretary of any political party to supply to the Electoral Commission an annual declaration stating that the party intends at general elections to submit a list of candidates and/or have one or more constituency candidates standing for the party. The declaration must also state whether the party continues to have at least 500 current financial members eligible to enrol as electors. The Electoral Commission does not have any obligation or power to approve or disapprove the rules of political parties registered under the Act. Section 71B merely requires copies of the rules governing membership of the party and the selection of candidates for election (and any changes to the rules) to be supplied to the Commission within one month after notice of registration is given or the date of any rule change.

[72] Until the Electoral Finance Act 2007 was enacted, controls over election spending and donations were contained in Part 7 Electoral Act and various corrupt and illegal practices by political parties and individual candidates were defined relating to such matters. Under the Electoral Finance Act, new provisions were enacted and the provisions previously contained in the Electoral Act were repealed But offences continued to be categorised as corrupt and illegal practices for electoral purposes under the Electoral Act and capable of complaint by petition under s 229. It is logical that corrupt and illegal practices of this type (as well as other such practices described in the Electoral Act) should be capable of challenge by election petitions since they relate directly to the election process. The Electoral Finance Act has been repealed subsequent to these events but it remains an indication of Parliamentary intention in this context.

[73] Having considered the statutory history, structure and purposes of the Electoral Act 1993, we conclude that a complaint about the process by which a political party has selected a candidate for electoral purposes may not be the subject of a petition complaining of "an unlawful election or unlawful return" under s 229(1) Electoral Act. Election petitions under Part 8 are concerned with the validity of elections. They relate to the processes of the election or returns in each electorate and the existence of any element of unlawfulness which relates to those processes. On any such petition, the Court is concerned with corrupt or illegal practices as

defined by the Act, issues directly affecting the outcome of the election such as the eligibility of candidates and electors, the counting of votes, or the conduct of Returning Officers.

[74] While the Court's powers under s 236(4) are wide, they do not extend beyond matters which may properly be the subject of a petition under s 229(1). We consider it is significant that no penalty is prescribed for a breach of s 71 nor is a breach of that section, if established, deemed to be an illegal or corrupt practice. This may be contrasted with other provisions such as those discussed relating to the provision of funding by political parties for electoral purposes and the making of donations to political parties. This is another statutory indicator that Parliament did not intend election petitions under s 229 to cover an alleged breach of s 71.

[75] We note too, that s 71 and the other provisions relating to the rules of political parties are discretely contained within Part 4 of the Act, remote from other provisions directly affecting the electoral process such as those in Parts 5, 6 and 7 which immediately precede the election petition provisions in Part 8.

[76] We are also influenced in our conclusion on this issue by the availability of remedies prior to an election where a person seeking nomination as a constituency candidate for a political party is dissatisfied with the election process. Just as Mr Payne did in the present case, any person dissatisfied with the election process is entitled to apply to the Court for declaratory or injunctive relief. By such means, any such person would be able to challenge, for example, the lawfulness of the rules of the political party or whether the rules had been followed in a particular case. This is consistent with the observations of the Royal Commission and Parliamentary records as we shortly relate.

[77] Mr Payne's complaint does not concern the lawfulness of the election or the return in the Selwyn electorate. Rather, it is a complaint that he was wrongly deprived of the opportunity to obtain the nomination as the National Party candidate for that election. We find that such a complaint cannot be the subject of a petition under s 229(1) Electoral Act.

Third Issue – Is Rule 94(b) of the National Party Rules 2007 (or the way in which that rule was utilised to disapprove Mr Payne's nomination as a candidate for the Selwyn Electorate on 13 March 2008) contrary to s 71 Electoral Act?

[78] We have already touched briefly upon the genesis of s 71. It is evident that both the 1986 Royal Commission and Parliament recognised the advantage enjoyed by a constituency candidate who has the endorsement of a political party. Both also recognise the degree of influence which a political party may bring to bear on the selection of candidates. There was an acceptance by the Royal Commission and by Parliament that an unduly centralised selection process in a political party could have the potential to deprive rank and file members of the opportunity to participate in the selection process. This in turn had the potential to lead to undemocratic outcomes. Concern about this potential was heightened by the introduction of party lists under the proposed new MMP system, by which process list candidates may reach Parliament without being directly elected by those entitled to vote in the electorates.

[79] The origins of s 71 were canvassed in detail in the judgment of Panckhurst J delivered on 1 May 2008. We gratefully adopt and endorse his summary of the background and his conclusions:

> [44] The origins of the section are apparent from the Royal Commssion's Report, "Towards a Better Democracy". Under the heading "Candidate Selection" appears this:
>
> > "9.24 The selection of candidates by political parties has traditionally been left entirely in the hands of the individual party organisations and is not in any way regulated by electoral law. The Electoral Act treats candidates as individuals standing for election in their own right and makes virtually no reference to the fact that, in most cases, they are standing as members of particular political parties. However, as most voters are expressing a preference for a party rather than an individual candidate, it is the parties' prior selection of candidates which, especially in safe seats, effectively determines who is to become the electorate's representative. In the same way, political parties also determine which groups in the community will be represented in Parliament and in what number. It can be argued that the voters' power of choice is seriously curtailed by this process and that they should all be allowed a say in the party selection. The Electoral Act could require that party candidates be selected according to certain procedures which would guarantee a degree of public involvement or accountability in the manner of selection, e.g., by a meeting which all registered party members or their representatives could attend. Thus, West Germany requires that party candidates be selected by a meeting of constituency

party members or by a meeting of representatives themselves chosen by a meeting of constituency party members."

[45] Then followed discussion concerning the desirability of a more representative Parliament in terms of members from ethnic minorities and women members. At para 9.28, headed "Party selection rules", the Report included this:

> "We therefore recommend that if our recommendation for MMP is accepted, the law should specifically require that anyone who stands as a candidate for a particular political party should be selected according to procedures which allow any member of the party, either directly or through representatives themselves elected by members of the party, to participate in the selection of candidates for whom they are eligible to vote, such procedures to be adopted by an Annual General Meeting of the party. The rules setting out the procedures would be subject to challenge by a member of the party, with the Electoral Commission (which we later propose; para. 9.131) having responsibility to determine whether the rules are appropriate. The decisions of the Electoral Commission would be subject to appeal to the High Court. A precedent is to be found in the German Party Law. An important element in the drafting and operation of such legislation would be the balance between the regular members of the party and central party officials. In the 2 main New Zealand parties, the central party organisations have some (possibly more in the case of Labour than National) influence in candidate selection. This can have a beneficial effect on the overall quality and representativeness of the parliamentary teams and could be even more significant with the introduction of party lists. *We would not wish to prevent such procedures, provided they are acceptable to the party as a whole and provided party officials are themselves chosen by all party members or their representatives.* Because the regulation of candidate selection is a new development, we recommend that whatever legal requirements are introduced be reviewed by Parliament on the advice of the Electoral Commission after they have been in place for 2 elections." (Emphasis added)

[46] On the same page a number of recommendations taken from the preceding chapter were set out including:

> "44. If the recommendation concerning the Mixed Member Proportional system is adopted, the Electoral Act should require that candidates standing for a political party should be selected according to procedures which allow any member of the party, either directly or through representatives themselves elected by members of the party, to participate in the selection of candidates for whom they are eligible to vote. These procedures should be adopted by an Annual General Meeting of the party and be subject to challenge before the Electoral Commission. The above requirement should be reviewed (after it has been in operation for 2 elections) by Parliament on the advice of the Electoral Commission. (para 9.28 [of the report])."

[47] The Electoral Reform Bill was referred to the Electoral Law Committee by resolution of the House in December 1992. Subsequently that Committee under the chairmanship of the Honourable Murray McCully reported back to the House. At para 2.3 the report stated:

"Party candidate selection rules under MMP

2.3.1 Many submissions addressed the issue of selection procedures to be adopted by political parties. The majority advocated the introduction of a requirement for what may be broadly termed "democratic party rules". The essential idea encapsulated by that expression is that political parties should be required to select candidates by democratic means and that there be some means of ensuring the selection procedures of each party are consistent with this principle.

2.3.2 Officials provided to the committee a summary of candidate selection procedures for a number of political parties. The summary revealed a wide range of selection procedures. In light of the advice from officials and the substantial amount of comment contained in submissions, the committee has recommended that a provision be inserted into the bill which ensures that political parties adhere to democratic procedures in selection rules. This recommendation is contained in new clause 84A of the bill as reported back from the committee.

2.3.3 The effect of this new provision in terms of redress is that some form of review can be sought in the High Court (by individuals with proper standing, such as party members and candidates) seeking a declaration that a party's rules or procedures are unlawful. If the court found in favour of the plaintiff it might direct a party to change its procedures or rules. The provision reflects the views of the Royal Commission but differs to the extent that the responsibility for determining whether the rules are appropriate rests solely with the judiciary, rather than the proposed electoral commission."

[48] The Minister of Justice, the Hon Douglas Graham, in introducing the Bill upon its second reading referred to a large number of submissions addressed to the need for democratic procedures in relation to the selection of candidates by political parties. He continued:

"A new provision has been inserted into the Bill to address the issue. The provision expressly requires registered political parties to follow democratic procedures in selecting their candidates. However, the Electoral Commission has not been given the task of determining whether party rules on selecting candidates are appropriate. Instead, any party failing to meet the requirements of the provision now included in the Bill would be open to challenge in the courts. The Committee considered that the oversight of such requirements was more appropriately a matter for the courts than the bureaucracy. (3 August 1993) 537 NZPD 17088."

[49] The above extracts demonstrate the genesis of, and thinking behind, s71. The nomenclature "democratic procedures" attained currency in the Royal Commission's Report. Although at first blush there may be a tendency to equate the reference to democratic procedures in s71 with the principles of natural justice, the origins of the phrase suggest otherwise. The word "democratic" was, I think, deliberately chosen to capture the notion identified in "Towards a Better Democracy" and subsequently endorsed by the Electoral Law Committee and by speakers in the House. What the Royal Commission, and subsequent adherents, had in mind was a requirement that

> the selection of candidates by political parties would be participatory; that members of the party may participate in the selection process, whether directly or through representatives (delegates) themselves elected by the membership at large.
>
> [50] But the Royal Commission expressly recognised the influence of the two main parties in candidate selection. This was considered to have "a beneficial effect". There was no desire to prevent such influence, provided the party officials exercising that influence were elected to office and provided the procedures were acceptable to the party as a whole.
>
> [51] This approach survived subsequent scrutiny. The only change was that, whereas the Royal Commission envisaged that any conflict between the requirement for democratic procedures and the terms of a rule adopted by a political party would be adjudicated upon by the Electoral Commission, Parliament opted for scrutiny to lie with the courts.

[80] Panckhurst J concluded:

> [52] ...The text of the section, read in light of the Royal Commission's Report, was clearly intended to provide a defined level of participatory democracy. Candidates to represent the party at general elections are to be selected by current financial members of the party from the particular electorate or by delegates of that class of persons. But, the participatory requirement was, I think, deliberately framed so as to leave scope for the overarching influence of senior officials of the party, provided that they too were democratically elected by the party membership.
>
> [53] Once the section is read in a broader context I do not consider there is any tension between the heading and the text. The term "democratic procedures" means what it says. The promise of the heading is that candidate selection will be participatory. The text of the section delivers in this regard. There is only a tension if the phrase "democratic procedures" is read more broadly than was intended, so as to evoke the notion that such procedures are to be equated with the principles of natural justice.

[81] Again, we endorse Panckhurst J's conclusions in this respect.

[82] Before Panckhurst J and before us, Mr Payne and Mr Kiely referred to academic commentaries on s 71. Mr Kiely drew attention to the chapter entitled "Selecting Candidates" in Raymond Miller's text *Party Politics in New Zealand* (Oxford University Press, Auckland, 2005). Mr Miller expressed the view (at p110) that political parties were able to retain selection mechanisms that were "both highly centralised and restrictive". Mr Miller considered there were strong grounds for retaining a selection process that was essentially private and internal.

[83] On the other hand, Mr Payne relied upon the article by Andrew Geddis already mentioned at [67] above. In this thoughtful article, Mr Geddis discusses the thorny issue whether political parties should be treated as public or private organisations (at 107 et seq) suggesting the question is:

> ... whether political parties should more properly be consigned to the category of "public" entities subject to a range of public law controls and oversight imposed from outside of the organisation, or "private" entities which are entitled to govern their own activities according to these rules the organisation itself chooses to adopt.

[84] Mr Geddis highlights the dual nature of political parties combining elements of both the public and private spheres:

> On the one hand, they are inextricably involved in the foundational moment of our entire system of lawmaking – the election of representatives to our Parliament and hence the formation of a government and apportionment of state power. Yet political parties are also voluntary membership organisations, consisting of individuals who have chosen to form a common cause on the basis of some shared political ideology which they wish to advance in their own fashion.

[85] Mr Geddis, correctly in our view, expresses the view that the wholesale categorisation of a political party as either a public or private entity is likely to be flawed. Instead, the issue of how political parties should be regulated in any given case requires a functional analysis of the precise role those institutions play in the electoral process. The proper approach is likely to be dependant on the facts as Mr Geddis notes at 108-109:

> For instance, a conclusion as to whether the actions of political parties when selecting candidates at election time should be amenable to judicial review on public law principles may not be applicable to those actions when disciplining members of a party faction.

[86] At 110 Mr Geddis continues:

> If political parties are left entirely to their own devices, then they may become a cloak that allows some interests in society to gain an advantage in the country's general law-making processes that would not be accepted generally were their influence to be widely known to, and subject to debate by, the members of that society.

[87] Nevertheless, Mr Geddis accepts at 111 that different conclusions might reasonably be reached as to the point at which the internal procedures of a political party have implications for the integrity of the wider electoral process.

[88] Referring to s 71 itself, Mr Geddis notes at 117 the uncertainty about how the duty under s 71 imposed on registered political parties is to be enforced. He concludes that:

> ...at most the section provides a mechanism by which an aggrieved individual could challenge in court either the party's refusal to endorse him or her as its constituency candidate, or the placement he or she is given on the party list, through a claim that the party's selection method failed to meet the required "democratic procedure" standard.

[89] Mr Payne also referred us to the following passage from Mr Geddis' article at 121:

> The candidate selection requirements contained in section 71 of the 1993 Act seek to combat a fear akin to that underlying the financial duties outlined above. Parliament was again responding to concerns that particular individuals might be able to exercise a disproportionate amount of influence over who is elected to Parliament or over those representatives once elected. However, rather than external donors exerting influence over the parties and their candidates, the relevant fear here was that some individual (or individuals) could exercise illegitimate influence through controlling the internal workings of the political parties when endorsing candidates at election time. Requiring political parties by law to follow "democratic procedures" when choosing their candidates was intended to prevent a party's leadership from insulating itself from the wishes of the grass-roots membership. Candidate selection must be a collective effort which gives an opportunity for the opinions of all party members to be canvassed, rather than an exercise in which a self-selected cabal decides amongst itself which individuals will represent the political party.

[90] Mr Geddis goes on to observe at 122 that the statutory changes introduced by the Electoral Act 1993:

> ...appear to render obsolute Fisher J's observation [in *Peters v Collinge* [1993] 2 NZLR 554] that New Zealand's political parties should not be subjected to the principles of public law judicial review because they "have no statutory or public duties".

[91] He notes however that any expanded role of the Courts may well involve claims of a highly political nature and poses the question "whether New Zealand's

Courts will be prepared to take a step into the political thicket by subjecting the internal activities of political parties to higher standards of public law review."

[92] In his decision of 1 May 2008, Panckhurst J considered the implications of the decision of the Supreme Court in *Awatere Huata v Prebble* [2005] 1 NZLR 289. That case was not concerned with s 71 but rather with the "party hopping" provisions then in force (ss 55A to 55E Electoral Act). Panckhurst J noted that Elias CJ had touched upon the status of political parties in the MMP environment when she stated:

> [37] Both ACT New Zealand and the parliamentary party derived from it are unincorporated associations which exist for political purposes. They are organised under the rules adopted by their members. While a Court will enforce the agreement between the members of such bodies, including implied terms importing requirements of procedural fairness, associations will typically have wide freedom in their internal arrangements, including in the determination of their own membership and the achievement of their objects.
>
> [38] The Constitution and Rules of ACT New Zealand confer discretion on the board of the party to refuse any applicant for membership. Membership can be terminated by a majority of 75 per cent of the board, after notice and the opportunity of a hearing is given to the member. The power to expel in this way extends to any member who is a member of Parliament. The rules provide that expulsion is "an appropriate remedy for conduct that the Board considers may bring the Party into disrepute".

[93] In his 1 May 2008 judgment, Panckhurst J went on to conclude:

> [57] These observations tend to indicate a traditional approach to the status of political parties; that they remain private entities which exist for political purposes and which are only susceptible to the oversight of the courts to enforce the agreement between the party and the members which the rules represent. Otherwise parties enjoy wide freedom with reference to their internal affairs, including with reference to the determination of their membership.
>
> [58] To my mind it is a short step from these observations to the conclusion that political parties are similarly free to regulate how they will go about the selection of constituency candidates at general elections. The freedom to structure their own arrangements for candidate selection, however, was made subject to the requirements of s71 in the 1993 Act. But, for the reasons discussed earlier at para [52], I do not consider that the requirement to adopt democratic procedures with reference to candidate selection affected the ability of parties to empower the hierarchy to veto, or filter, the nominations for each electorate. In the case of the National Party it could empower the Board to reject the nominations, provided that the membership of the Board was democratically elected.

[94] While the observations of the Chief Justice in *Awatere Huata* may, strictly speaking, be *obiter*, they nevertheless constitute an endorsement of the traditional approach of the Courts in challenging decisions of unincorporated associations which is essentially based on a contract model. Such associations have substantial freedom in their internal arrangements including the making of rules. The Courts will intervene at the instance of a member of the association to enforce the express or implied terms agreed by the members to be those governing the organisation.

[95] This approach and that adopted by Panckhurst J in his decision of 1 May 2008, follows the line adopted by Fisher J in *Peters v Collinge* (above) which is the only decision cited to us which has considered a rule of the National Party expressed in similar terms to the current Rule 94. At 566, Fisher J endorsed the contractual model as the correct conceptual approach in the case of review of the decisions of unincorporated associations.

[96] Mr Payne correctly submitted however, s 71 and the other statutory obligations on political parties introduced by the Electoral Act 1993 were not in force at the time of Fisher J's decision in *Peters v Collinge* and did not fall for consideration in *Awatere Huata v Prebble.* As Panckhurst J recognised, the freedom of political parties to structure their own arrangements for candidate selection is expressly subject to the requirements of s 71.

[97] Before examining the National Party Rules for compliance with s 71 we make the following observations:

a) While the heading to the section refers to a "Requirement for registered parties to follow democratic procedures in candidate selection", the scope of the "democratic procedures" is defined by the operative parts of the section itself. In other words, there is no general requirement to follow some undefined "democratic procedures". Rather, the procedures to be adopted are those specified in the section.

b) The section does not preclude the operation of a veto power such as that contained in Rule 94. Instead, it requires that "provision is made for participation" in the selection of candidates by the means defined

in s 71(a) or (b) or a combination of both. The extent of the provision is not defined and is left to the Party to determine.

c) The current financial members of the party referred to in s 71(a) must be those entitled to vote for the candidates in the electorate concerned i.e. this provision does not refer to current financial members of the party at large. Eligibility to vote is determined by the provisions of Part 5 including in particular ss 72-74.

d) The persons referred to in s 71(b) are "delegates" (not defined in the Act) who have (whether directly or indirectly) been elected or otherwise selected by current financial members of the party. The financial members referred to in this provision may be drawn from the local electorate or from the Party at large or a combination of both.

e) Section 71(c) contemplates participation in the selection of candidates by a combination of persons who meet the requirements of s 71(a) or (b).

[98] It is evident from our analysis of s 71 that the obligation to provide for participation in the selection of candidates is flexible in scope and allows room for a registered political party to meet its obligations by one or other of the defined means or a combination of them. Importantly, the extent of the participation required by the identified groups is left for determination by the political party. It may be expected that the rules governing registered political parties will provide for their adoption by the membership. By that means, the members themselves will determine the nature of the rules and the extent of the provision for participation by the identified persons or classes of person under s 71.

The Constitution and Rules of the New Zealand National Party 2007

[99] The current rules of the National Party are extensive, running to some 137 provisions. The Party is described as "a non-profit making, unincorporated group, established to undertake political activity". The rules set out an organisational purpose as well as a statement of the Party's vision and values. One of the key operational objectives described in Rule 5(d) is to:

> Ensure the best possible candidates are selected to represent the party in Parliament.

[100] By Rule 7, all members of the party have equal rights. Each member agrees to be bound by and to observe the rules of the Party. An annual conference is held at which, amongst other things, the members of the National Party Board are elected. At all conferences, each electorate is entitled to a defined number of delegates which are to include the Electorate Chair; any National MP for the electorate; and any National List MP who is a member of the electorate. The other delegates from an electorate are to be elected at the electorate's annual general meeting. Members of the Board of the Party are also delegates and each delegate is entitled to exercise one vote at the conference.

[101] The Party is governed by the Board of Directors elected by the Party membership and "is responsible for the direction and control of the Party's activities and compliance of the Party with the relevant laws of New Zealand" (Rule 32). The powers and duties of the Board are set out in Rule 33 and include:

> (vi) Participating in the candidate selection process ... as provided for in these rules.

[102] Any powers exercised by the Board shall be subject to the rulings of an annual or special conference. The Board is required to report annually to members including a report on candidate selection. Under Rule 35, the Board comprises nine persons including seven members elected by the Party at its annual conference, the Leader of the Party and one member of the Parliamentary section of the Party. The candidates for the seven elected members of the Board are drawn from persons nominated by the electorates. Board members are voted for by all delegates to the annual conference on a preferential voting basis.

[103] The Party's rules also define the regional and electorate structures of the Party and their powers and duties.

[104] Candidate selection is governed by Rules 87 to 118. We are content to adopt the description of these rules given by Panckhurst J in his judgment of 1 May 2008:

> [59] ...Rule 89 provides for the Board to establish a candidates' college, which is to provide training to enrolees who may subsequently seek candidate selection.
>
> [60] Before the selection of a constituency candidate in an electorate proceeds, r91 requires that the Board must satisfy itself concerning the electorate's party organisation, the availability of suitable candidates, the timing of the selection process and whether a "universal suffrage" approach to selection is feasible in that electorate. Rule 92 requires that nominations shall be called for by newspaper advertisements or other means and prescribes the minimum periods for the receipt of nominations. In order to qualify for nomination a candidate must have been a financial member of the party for 12 months and must be nominated by 10 members resident in the particular electorate who likewise have been members for at least 12 months (r 93). Once nominations have closed, r 94 provides for the approval of candidates by the Board. I have already referred to the terms of subcl (a) and (b).
>
> ...
>
> [62] Returning to the electorate selection process, r 98 provides for the convening of a pre-selection committee, having responsibility to reduce the number of candidates to five, in the event that more than this number are approved by the Board pursuant to r 94. The committee shall comprise nine members, being the Electorate Chair, four persons elected at the previous electorate annual general meeting, two persons appointed by each of the Regional Chair and the President, being members from outside the electorate: r 98(d).
>
> [63] Following the preselection process, the selection of the candidate to represent the party within a particular electorate may be undertaken by a selection committee comprising delegates drawn from the branches within the electorate, or by the universal suffrage method. Rule 114 governs the second alternative and provides for members of the party to select the constituency candidate by a progressive voting system (r 113) following a series of "Meet the Candidates" meetings (r 102) and a final selection meeting (r 114(e)).

[105] We agree with the conclusion reached by Panckhurst J in his 1 May judgment that the rules of the National Party comply with the obligations imposed by s 71 Electoral Act. The following points are relevant. First, as Mr Kiely submitted, in exercising its powers to approve or disapprove nominations under Rule 94(b), the Board members are delegates who have been selected by the current financial members of the Party in terms of s 71(b).

[106] Secondly, the members of the pre-selection process in the electorate are a mixture of elected and appointed members who meet the requirements of s 71(b). In the final selection process adopted in the Selwyn electorate, the universal suffrage

voting method was adopted under Rule 114 which involves all current financial members of the Selwyn electorate being entitled to take part in the selection of the party candidate. As such, this stage of the process complied with s 71(a). As earlier indicated, s 71 permits a registered political party to comply with the obligation to make provision for participation in the selection of candidates by a combination of the methods in s 71(a) and (b). In our view, the overall effect of the National Party Rules is to provide for just such a combination.

[107] For the reasons already stated, there is nothing in s 71 preventing a provision in the rules of a registered political party such as Rule 94(b) which permits the Board or other central governing body to veto one or more nominees for selection as an electorate candidate. There is nothing undemocratic in doing so in the sense in which that expression is used in s 71. There may be very sound reasons for preventing one or more nominees from proceeding further in the selection process. It is not difficult to envisage that a particular nominee may be unsuitable by reason of some form of physical, mental or intellectual disability; a past record likely to materially diminish the candidate's prospects of success; or a candidate whose loyalty to the Party is in question or who does not support the values or vision of the Party. The evidence establishes that rule 94(b) has been a long standing part of the candidate selection process and that other major political parties also exercise similar centralised control as part of their selection processes.

[108] While we accept Mr Payne's submission that a provision such as Rule 94(b) has the potential for abuse, the members of the Party have the power at the Party's annual conference to hold the members of the Board to account for their actions.

[109] Finally under this heading, for reasons which we canvass more fully when considering the natural justice issues, we are not persuaded there was any breach of s 71 in the way in which the power available under Rule 94(b) was utilised to disapprove Mr Payne's nomination.

Fourth Issue - Was there a breach of natural justice when Mr Payne's nomination was disapproved on 13 March 2008 by failing to give him that opportunity or the failure to give reasons?

[110] The issue of the possible application of the rules of natural justice to the Board's decision to disapprove Mr Payne's nomination was not canvassed in argument before us in any detail. But it was discussed by Fisher J in *Peters v Collinge* and by Panckhurst J in his 1 May decision. Fisher J concluded in *Peters v Collinge* that the nature and extent of any obligation to comply with the rules of natural justice in relation to an unincorporated society such as the National Party must be found in the express or implied terms of the contract between the members and will be a matter of construction of the rules. The requirements of natural justice are context-specific, vary with the subject matter and may be excluded by implication by the rules themselves. Relevant considerations include "the very strong assumption that in certain circumstances, and in the absence of clear indications to the contrary, it will be assumed that the parties intended that natural justice would apply" (at 566). Other relevant factors include the nature of the interest at stake, whether an adverse decision would amount to a finding of misconduct and the severity of the sanction which the body is empowered to impose (at 567).

[111] Fisher J was considering a provision in an earlier version of the National Party Rules expressed in similar terms to the present Rule 94(b). After noting there was a difference between expelling or disciplining a person and deciding whether or not to endorse him in a political campaign, Fisher J concluded at 568:

> Politics is a notoriously volatile, not to say fickle, business. Just as ideas and policies change, so must there be room for changes in allegiances and loyalties. Those who enter politics must surely do so in that knowledge. No one can expect to have a mortgage over a party's support or over a parliamentary seat. I do not think that the analogy of expulsion or disciplinary proceedings in trade situations is an apt one. It is also stretching the restraint of trade concept too far. Whether a political party is so out of sympathy with its Member of Parliament that it no longer wants him as a candidate is something which one would expect the party to be free to decide from time to time with relatively little constraint. It is essentially a political question in which one would expect a robust level of discussion, lobbying and preconception. The result does not necessarily reflect upon honesty,

> behaviour or ability. One of the reasons for failing to secure approval could be nothing more than philosophical incompatibility. That a political party and a Member of Parliament have come to the parting of the ways might reflect more discredit on the party than upon the departing individual.
>
> Against that background of rules and subject-matter I think that a relatively rudimentary standard of procedural fairness must suffice when considering whether to approve a sitting Member of Parliament under r 108. In my view the individual would have to be told what matters adverse to his or her interests the national executive proposed to consider and would have to be given the opportunity to comment upon them. I do not think that the national executive could be forced to hold a formal hearing with the parties present and represented by counsel. The matter could be handled in writing by an exchange of letters and any associated written material.

[112] Panckhurst J did not consider that Rule 94(b) as presently drawn required the Board to provide Mr Payne an opportunity to counter adverse material which it proposed to consider. While accepting the subject matter of the decision was important, Panckhurst J considered that the rule expressly or impliedly dispensed with any requirement to provide Mr Payne with an opportunity to counter adverse material. After referring to s 12 New Zealand Bill of Rights Act 1990 (which confers on all New Zealand citizens over the age of 18 the right to be elected to Parliament) Panckhurst J concluded:

> [76] But what is at stake here is not that electoral right, but rather whether a political party will allow a particular person to represent it at an election. As to that issue I agree with the observations of Fisher J previously quoted from *Peters v Collinge* (see para [39]). The question is a political one. Are the party and the nominee philosophically compatible? Or, to borrow Fisher J's phrase, are the two "out of sympathy"? This, I think, is the assessment to be made. It is not a question of expulsion, or discipline, but rather of compatibility. Rejection of a nomination does not necessarily reflect upon a nominee's personal attributes and abilities, although, unfortunately, in this instance the affidavit of Mrs Kirk does use the language of personal fitness.
>
> [77] More specifically the rule itself does not suggest a requirement of notice, followed by an opportunity to be heard. All the indications are the other way, and indicate to me the exclusion of even this rudimentary level of natural justice. The board is clothed with an unfettered discretion, and is absolved of the need to interview a candidate, or even to assign reasons for rejection. This indicates a power of veto in the widest of terms.
>
> [78] I conclude, therefore, that there is no serious question to be tried based on a contractual breach of r 94(b).

[113] We are reluctant to reach a final conclusion on this aspect of the case because we have not had the benefit of full argument on it and because we have reached the conclusion that any breach of natural justice is immaterial since the Board had

proper grounds to disapprove Mr Payne's nomination. However, we would venture some observations on this subject. First, the Board will have before it the prescribed nomination forms for the candidate together with any remarks made by the electorate committee and the regional chair about each candidate under Rule 94(a). Secondly, the Board may undertake its own investigations on behalf of any candidate if further information is required. This could include seeking further information from the nominee or from third parties including any referees provided by the nominee. Thirdly, the rules expressly provide that the Board is not bound to interview a candidate. This specifically excludes any requirement for a hearing at which the candidate is present. Fourthly, the rules clearly confer a broad ("unfettered") discretion to approve or disapprove the nomination and also expressly provide that the Board is not required to assign any reason for rejecting a nomination.

[114] All of this suggests that if there is any requirement of natural justice it could be no greater than the rudimentary obligation identified by Fisher J to afford an opportunity to the nominee to respond to any adverse material. Given Fisher J's observations about the nature of the political process, we have sympathy with the view expressed by Panckhurst J that a Court would be unlikely to impose even the rudimentary obligation postulated by Fisher J (who was dealing with a case of a sitting MP whose nomination was disapproved).

Fifth Issue - Was there a breach of natural justice when Mr Payne's nomination was disapproved on 13 March 2008 by failing to give him the opportunity to comment upon adverse material or by the failure to give reasons?

[115] As already signalled, we are of the view that even if there were some degree of natural justice obligation, we do not consider any breach in that respect would have been material to the outcome since there were ample grounds to support the Board's decision to disapprove Mr Payne's nomination. Any further representations by him were highly unlikely to have changed the outcome.

[116] We do not propose to rehearse in detail the grounds relied upon by the Board but, in our view, any one of them would have afforded a sufficient foundation for the Board's decision. First, his conduct at the time of the 2002 election was, as he

admitted, a deliberate breach of the written undertaking he gave the National Party at that time not to stand against it. The Board was entitled to treat this as a serious breach of Mr Payne's obligation of loyalty to the party. Secondly, the issues associated with Mr Payne's bankruptcy were such as to raise serious questions about his suitability as a member of Parliament. The protracted litigation in connection with his matrimonial property dispute and the fact he had unsuccessfully sued at least one Family Court Judge were all matters of public record which would inevitably have been raised by opponents if he had been elected and which carried the risk of political and electoral damage. In various respects, the Board was entitled to have doubts about Mr Payne's honesty given the untruthful and inaccurate statements he made in his applications for nomination for the Selwyn electorate. Thirdly, Mr Payne's allegations of dishonesty against sitting MPs and his vituperative correspondence with senior party officials also afforded grounds upon which the Board was entitled to exercise its discretion to disapprove his application. In relation to these issues, he was clearly a person who was "out of sympathy" with the National Party.

[117] Importantly, Mr Payne was not unaware of the principal grounds upon which the Board ultimately disapproved his nomination. Prior to the decision of the Board about which he complains, Mr Payne had explained in his letter to Mrs Kirk of 4 March 2008 the background to his bankruptcy and the fact that it had subsequently been annulled. He also gave an explanation to Mrs Kirk for his actions in 2002 at the time of the Rakaia election. The Board contacted Mr Payne's referees (who we assume were supportive of him). Notwithstanding those inquiries the Board decided to disapprove his application. There were proper grounds for the Board to do so.

Sixth Issue - Are there any other grounds pleaded upon which the election of the first respondent as the member of Parliament was unlawful?

[118] Mr Payne submitted that he was disadvantaged because he did not have a copy of the 2007 version of the National Party Rules. Mr Payne coupled this complaint with a submission that the 2007 rules were invalid because they were not lodged with the Electoral Commission within the one month time limit imposed by s 71B Electoral Act.

[119] We are not persuaded that these points have any validity. First, it is clear from Mr Payne's own correspondence that he was not unfamiliar with the National Party Rules, the previous versions of which were expressed in similar terms to the current Rule 94(b). Secondly, while Mr Kiely accepted that the 2007 Rules were not lodged within the one month time limit imposed by s 71B, we accept his submission that the failure to do so does not invalidate the rules. Section 71B does not state what consequences may follow from breach of the obligation under that section. In particular, the Act does not provide that the rules will be invalid if not lodged in accordance with the section. As already noted, the Electoral Commission has no power or obligation to approve the rules of a political party. The notification requirement under s 71B is intended to provide an opportunity for the public to inspect the Rules in terms of s 71B(4). The rules in question did not effect major changes to the previous rules of the National Party and were lodged as soon as the matter was drawn to the Party's attention. There is no evidence to suggest that Mr Payne was materially disadvantaged and nothing to suggest that the rules should be treated as invalid on the ground alleged.

[120] Mr Payne also submitted that the respondents had relied on false or misleading information about him in an "attempt to unjustly defame" him. The petition alleged Ms Adams had filed an affidavit in the injunction proceedings and had attempted to sustain the "flawed" selection process, thereby associating herself with the process. We reject this allegation. The process was not flawed for the reasons given and Ms Adams' affidavit did not address the selection process.

[121] Mr Payne alleged against Mrs Kirk that she had relied on false or misleading information. There is no evidence to support this allegation. Nor is there any evidence to support Mr Payne's assertion that Messrs Bridge and Skinner were parties to "selection fixing". The fact that they were involved in the selection of a candidate in the Selwyn electorate is accepted but their participation was by virtue of their respective offices in the National Party under its rules. The mere fact that they took part is not evidence of "selection fixing" in the pejorative sense Mr Payne alleges. There is nothing to support Mr Payne's further allegation that Mr Skinner gave false information to the National Party about Mr Payne's bankruptcy and

annulment. To the contrary, the information provided was correct and is a matter of public record.

[122] Mr Payne also submitted that the members of the Board who dealt with the November 2007 selection of David Carter should not have decided in March 2008 to disapprove his nomination. It is not clear to us that the same Board members were involved on both occasions but, assuming they were, there is nothing before us to suggest this was in any way improper.

[123] The final issue raised by Mr Payne was that he was wrongly advised by Panckhurst J that he could challenge the selection process after the election. It is necessary to examine what happened after Panckhurst J's 1 May judgment. On 9 May 2008, Mr Payne advised Panckhurst J he intended to proceed with his substantive claim in the High Court. Mr Payne filed an urgent appeal on 27 May 2008. On 12 June 2008, Panckhurst J issued a minute in which he noted that both Mr Payne and the National Party had accepted the appropriate course was to "park" the substantive proceeding pending resolution of the appeal. Mr Payne says this was because he was advised by Panckhurst J that the substantive proceeding could not be heard by the High Court until after the election.

[124] Issues arose about security for costs on the appeal and the matter came before Arnold J in the Court of Appeal on 10 September 2008 on Mr Payne's application to review the Registrar's decision refusing to grant Mr Payne a dispensation from the requirement to provide security for costs on the appeal. Arnold J declined the application and observed that Mr Payne should not have appealed but should have pursued a substantive hearing in the High Court. Arnold J expressed the view that there was no reason why the substantive hearing could not have been concluded before the election.

[125] We can only agree. Mr Payne's best course was to seek an urgent fixture in the High Court and pursue the substantive relief he sought. If Panckhurst J advised Mr Payne he could still pursue the substantive issue in the High Court after the election, that advice was correct.

[126] Mr Payne may not have been aware that the election result could only be challenged after the election by way of petition. But as matters have turned out, our findings are such that Mr Payne would not have succeeded under the substantive proceeding or an electoral petition. He has had the opportunity to air his concerns fully before us.

Determination and Certificate to the Speaker of the House of Representatives

[127] No grounds are established to question the lawfulness of the election of the first respondent as the member of Parliament for the Selwyn electorate. The petition is therefore dismissed.

[128] Pursuant to s 243 Electoral Act 1993 we determine and certify to the Speaker of the House of Representatives that the first respondent Amy Adams was duly elected as the member of Parliament for the Selwyn electorate at the general election in 2008.

[129] The question of costs is reserved. The respondents may submit a memorandum within 14 days of the date of this judgment and the applicant within 14 days thereafter.

DATED this 7th day of May 2009.

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A P Randerson J
Chief High Court Judge

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Allan J

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French J