

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2017-404-002041
[2017] NZHC 2178**

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

BETWEEN GARETH HUW THOMAS MORGAN
Applicant

AND TELEVISION NEW ZEALAND LTD
Respondent

Hearing: 7 September 2017

Appearances: F M R Cooke QC and J B Orpin-Dowell for Applicant
S A Shortall, B A Davies and M J Ferrier for Respondent

Judgment: 7 September 2017

ORAL JUDGMENT OF VENNING J

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[1] Gareth Morgan is the founder and leader of The Opportunities Party (TOP). TOP was founded in November 2016. It is a registered political party contesting the 2017 general election. Television New Zealand Ltd (TVNZ) intends to broadcast a 90 minute minor party leaders' debate at 7.00 pm, tomorrow Friday, 8 September on TVNZ 1 and also plans to broadcast a 90 minute young voters' debate at 7.30 pm, Thursday, 14 September on TVNZ Duke channel.

[2] Mr Morgan and TOP have not received an invitation to participate in the debates. When TOP's media advisor Mr Plunket raised the matter with TVNZ he was advised by Ms Hills, the General Manager of TVNZ Corporate Communications, that TVNZ proposed to manage the number of parties taking part in the minor parties' debate by making the invitation subject to the following criteria:

1. The leaders of parties currently represented in Parliament.
2. Members of Parliament elected to Parliament in 2014 who are leaders of parties registered on the register of political parties.
3. The leaders of registered parties not represented in Parliament that score 3% in at least one of the two 1 News-Colmar Brunton polls preceding the debate.
4. Party leaders who have announced that they will not seek re-election will not be invited.

[3] The two qualifying polls were a poll of 31 August and the second which is scheduled for public release this evening.

[4] In the substantive proceedings TOP seeks a declaration that the decision to exclude Mr Morgan and TOP from the televised election debates and programmes is unlawful. Importantly for present purposes Mr Morgan seeks interim relief. He seeks an order prohibiting TVNZ from holding the proposed televised debates on Friday, 8 September and Thursday, 14 September which exclude the applicant.

[5] Mr Morgan and TOP argue that the criteria used by TVNZ to issue invitations to the debate are unreasonable in that they arbitrary. In particular the applicant argues:

- (a) the criteria has not been carefully developed and published in a way that is accessible and understandable by the relevant participants;
- (b) the criteria are arbitrary, unreasonable and partial given that the TOP party is polling higher than other political parties whose leaders are being invited;
- (c) relying on the poll results from a single polling company will not be accurate given that other polling companies will have different results, and that given that some poll results have registered TOP as having higher than three per cent support;
- (d) the margin for error in the poll results and the general uncertainty associated with poll results means that they cannot be relied on by themselves to decide who should be regarded as the recognised candidates for election;
- (e) poll results are inherently movable, and have moved considerably during election campaigns, including the present one;
- (f) the criteria needs to incorporate other factors in order to determine who the recognised contenders for the election are, including the performance of TOP as a newly established political party and should not incorporate a bias in favour of incumbents;
- (g) TOP and the applicant Mr Morgan have been regarded as main contenders for the general election in public debates surrounding the election to date, and the position of minor parties such as TOP are of particular significance in the election given the prospect minor parties may hold the balance of power; and
- (h) the absence of a reasonable basis for excluding a party or its leader as a recognised candidate will distort the outcome of the general election contrary to the public interest.

[6] Mr Morgan has filed an affidavit in support of the application and has also filed affidavits by Mr Plunket and Dr Bryce Edwards.

[7] Mr Morgan confirms that TOP are fielding 26 candidates in the 2017 general election. Five are standing on the party list with the remaining 21 contesting electoral seats. To date Mr Morgan has participated in television debates on both Māori Television and TV3 – Māori Television on 22 August and the TV3 minor parties' debate on 26 August. He has also been invited to appear in a one hour "Contenders Debate" on TV1 on the Marae programme along with representatives of National, Labour, Greens, NZ First, Māori, Mana and ACT parties.

[8] Mr Morgan also notes that TOP has not been included on the Back Benches show programme, a weekly political interview show broadcast on Wednesdays at 10.30 pm on Prime TV.

[9] For several months Mr Morgan says TOP has been the fifth highest polling party in major public opinion polls consistently behind National, Labour, New Zealand First and the Greens.

[10] Mr Morgan has annexed copies of TOP's polling results in previous 1 News-Colmar Brunton polls to his affidavit. They disclose the following results in the survey periods below:

| | |
|-------------------|-----------------|
| 18-22 March 2017 | TOP polled 0.4% |
| 27-31 May 2017 | TOP polled 1.4% |
| 1-5 July 2017 | TOP polled 1.1% |
| 22-27 July 2017 | TOP polled 1.5% |
| 12-16 August 2017 | TOP polled 2.1% |
| 26-30 August 2017 | TOP polled 0.9% |

[11] Mr Morgan makes the point that in the last three polls TOP had the fifth highest level of support and in each of those three polls its support was equal to or greater than the combined support of the Māori Party and the ACT Party.

[12] Mr Morgan also notes that while the Roy Morgan Research Polls only give support for parties currently in Parliament a media release summarising the results of the most recent poll conducted between 31 July and 13 August reported that TOP polled at 2%. Again that support was equal with the combined support of the Māori Party, ACT and United Future. TOP's results in the most recent Newshub Reid Research polls are 2% in the poll conducted 20 to 28 July 2017, 2% in the poll conducted 2 to 8 August 2017, and 1.9% in the poll conducted 22 to 30 August 2017. Again in these three most recent polls TOP was the fifth highest polling party. It polled higher than the Māori Party, ACT and United Future.

[13] Finally on the issue of polls Mr Morgan says he understands UMR conducts internal polling for the Labour Party. In an opinion piece reported in the media it had TOP polling at 3% between 2 and 6 August. TOP has been advised that in a more recent UMR poll conducted between 11 and 16 August 2017, TOP's support had risen to 3.5%.

[14] Mr Plunket, TOP's Director of Communications confirms in his affidavit that TOP had not received any invitation or correspondence from TVNZ regarding the debates until 4 September when he contacted TVNZ and asked why they had not been invited. In response he received the email from Ms Hills which set out the criteria referred to.

[15] The applicant has also filed an affidavit by Dr Bryce Edwards, a Senior Associate at the Institute for Governance and Policy Studies at Victoria University, Wellington and Director of Critical Politics, a political research organisation. Dr Edwards confirms that broadcasters have a strong role to play in covering elections and politics in general. What they choose to provide can have an impact on election results. He notes the most famous example in New Zealand was the 2002 leaders' debate in which the United Future leader Peter Dunne was judged to have performed particularly strongly. His party's poll results increased from 0.4% to 6.9% by the time of the election.

[16] Dr Edwards notes that no new political party has managed to get elected to Parliament since the first MMP election in 1996 apart from parties involving existing MPs splitting from their existing parties in Parliament.

[17] In Dr Edwards' opinion the broadcast media have a responsibility to ensure they are not adding to existing barriers for new political parties. He does however acknowledge that broadcasters must have some sort of criterion for excluding and including parties at debates. He notes that at the moment there are 16 registered political parties contesting the 2017 general election and acknowledges that overly accommodating criteria resulting in the involvement of a very large number of parties would be unwieldy and unworkable.

[18] Dr Edwards makes the following criticisms or observations about the TVNZ criteria:

- (a) In his view the 3% threshold is unreasonably high.
- (b) There is an internal inconsistency in the criteria. Minor parties polling much less than 3% are included in the debate simply because they have in the past won electorate seats.
- (c) There is a danger parties may be excluded because of a polling error.
- (d) Such criteria is generally self-perpetuating and anti-democratic.
- (e) This year's election campaign in particular is proving extremely volatile.
- (f) Different polls have different methodologies which can predispose into particular results. The 1 News-Colmar Brunton poll historically under-estimates the vote for New Zealand First for example.
- (g) Minor parties are set to play a pivotal role in this year's election as they are likely to hold the balance of power which makes it

particularly important the public is given sufficient exposure to their leaders and policies.

[19] In Dr Edwards' opinion if the debates proceed without Mr Morgan and TOP it would have a significantly negative impact on TOP's chances to be taken seriously by those members of the public looking to vote for a party other than Labour and National. It would send a strong signal to voters TOP is not a viable candidate for voting consideration and may seriously affect TOP's electoral chances.

[20] The applicant generally submits that TVNZ's exclusion of TOP from the debates was arbitrary and irrational.

TVNZ's position

[21] TVNZ opposes the application. It argues that it is not a public body and is not exercising any public function, power or duty that is amenable to review. Alternatively if found to be exercising a public function it says that the criteria it has developed from inviting participants to the multi-party leaders' debates are reasonable, rational and lawful.

[22] Ms Ahern, the Executive Producer of Back Benches responds to Mr Plunket's affidavit. She takes issue with his recollection of the discussion she had with him. However, nothing really turns on those matters. The focus in this proceeding is on the criteria for invitation to the scheduled debates.

[23] Mr McAnulty, the General Counsel and Corporate Affairs Director at TVNZ has confirmed TVNZ's intention to hold the debates referred to. The criteria TVNZ has applied to the invitation to the debates are the same it applied in the 2011 and 2014 elections. Mr McAnulty has confirmed that TVNZ accepts polls are not exact and they will adopt a practice, as they did in the last two elections, to round up, for example from 2.5% to 3.0% so that in reality parties can poll at 2.5% and still qualify for the debates on that aspect of the criteria.

[24] Mr McAnulty has confirmed that in setting the criteria TVNZ took account of

- (a) the *Dunne v CanWest* decision;¹
- (b) the public interest in hearing from leaders of parties which have a realistic prospect of gaining one or more seats in Parliament;
- (c) the different way parties come to Parliament (new parties, through party change by sitting MPs, and as incumbent parties); and
- (d) the desire to be as fair and balanced as possible within the context of a commercial enterprise with resource constraints.

[25] Mr McNulty referred to the TVNZ internal document which discusses the establishment of the criteria. That includes the statements that:

Our objective is to be inclusive, rather than exclusive. It is to allow parties potentially able to win a place in the next parliament an opportunity to debate their policies in a moderated forum.

Having said that, we are hosting a debate constrained by commercial duration and format. A reasonable airing of views cannot be achieved – and the main parties will likely decline to appear – if the criteria are so broad that any registered political party, however minor, can demand inclusion. We have to set some limits, so the following criteria apply.

An explanation then follows each of the particular criteria together with examples.

[26] As to the threshold of 3% Mr McNulty says 3% was chosen because it effectively allows a party with momentum in the build up to an election to be included in the debates. Two qualifying polls eliminates the chance of a one-off rogue poll. Colmar Brunton has been chosen as it has a 22 year relationship with 1 News. He makes the point that if the criteria was set on too broad a basis with too many parties qualifying TVNZ would have to consider whether to continue to host the debate at all.

[27] Mr McNulty also addresses in his evidence the issue of recent poll results. In his evidence he has summarised the outcome of the 12 most recent nationwide public polls, they being polls by 1 News-Colmar Brunton, Roy Morgan Research,

¹ *Dunne v CanWest TV Works Limited* [2005] NZAR 577 (HC).

and Newshub Reid Research. Those results show that from May this year until the last polls on 26 to 30 August the TOP party has polled, when recorded, between a low of 0.8% and a high of 2.1%. As he says TOP has been consistently in the 1 to 2% range give or take a few decimal points.

[28] It is fair to observe that taken overall the polls do not, as Mr McAnulty observes, appear to support Mr Morgan's assertion that TOP's polling continues to trend upwards.

Issues

[29] The application for interim relief essentially raises the following principal issues:

- (a) Is TVNZ's decision to not issue an invitation to TOP reviewable?
- (b) If it is reviewable is there a prima facie case that TVNZ's criteria is unreasonable as arbitrary or irrational?
- (c) If so where does balance of convenience or overall justice lie in that event.

Jurisdiction

[30] Mr Morgan and TOP have no legally enforceable private right to participate in the TVNZ debate.² The right they seek to enforce must arise from public interest.

[31] Ms Shortall argued that TVNZ's decision was not reviewable. She submitted that the situation was different to that which was before Ronald Young J in the *Dunne* decision in 2005.³ She noted that the Judge's decision in that case relied in large part, in her submission, on an obiter comment of the Court of Appeal from the *Royal Australasian College of Surgeons v Phipps* decision.⁴ She submitted that effectively the world had moved on since 2005 and that there were now a number of

² *R (Pro-Life Alliance) v British Broadcasting Corp* [2008] UKHL 23, [2004] 1 AC 185.

³ *Dunne v CanWest TV Works Ltd*, above n 1.

⁴ *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1.

different ways for parties to promote themselves and for these matters to be publicised. She raised the prospect of the potential for a number of judicial review applications given the now extensive number of debates and fora for the parties and leaders to be heard.

[32] Despite Ms Shortall's submission, and largely but not exclusively for the reasons given by Ronald Young J in *Dunne & Anderton v Canwest TV Works Ltd* I accept that there is jurisdiction to review TVNZ's decision.⁵ Although commercially funded TVNZ is a state-owned broadcaster. In conducting the debates, TVNZ is performing a public function with important public consequences. Its decision as to who to invite to participate in the debates should be susceptible to review in those circumstances, particularly bearing in mind that when matters of public importance are discussed s 4 of the Broadcasting Act 1989 requires broadcasters to ensure reasonable opportunities are given to present significant points of view. There is also a recognition in that Act that in performing certain functions broadcasters are subject to statutory control because of a public function and nature of the broadcast. The situation in the present is quite different from the case that was before Lang J in the case of *Mangu v Television New Zealand Ltd*.⁶

[33] Mr Cooke QC also referred to s 12(2)(b) of the Television New Zealand Act 2003. I note that section was amended in July 2011 to remove references to providing in-depth coverage and analysis of news and current affairs. I do not consider the current wording of s 12 of that Act adds much to the important considerations under s 4 of the Broadcasting Act that I have referred to.

[34] The evidence of Dr Edwards satisfies me that TVNZ and other broadcasters have an important role in informing potential electors of the character of the leaders of the parties and the parties' policies and will help inform voters how to vote. The public function is an important one in a free and democratic society as was acknowledged by the Court in *TV3 Network Ltd (in rec) v Eveready New Zealand Ltd*.⁷

⁵ *Dunne v CanWest TV Works Ltd*, above n 1.

⁶ *Mangu v Television New Zealand Ltd* HC Auckland CIV-2005-404-004875, 9 September 2005.

⁷ *TV3 Network Ltd (in rec) v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA).

[35] There is the related issue, which is what the applicant in this case must establish to obtain the relief sought. In *Minister of Fisheries v Antons Trawling Co Ltd* the Supreme Court noted that on an application for interim relief:⁸

[3] Before a Court can make an interim order under s 8 of the Judicature Amendment Act 1972 it must be satisfied that the order sought is reasonably necessary to preserve the position of the applicant. If that condition is satisfied the Court has a wide discretion to consider all the circumstances of the case, including the apparent strengths or weaknesses of the applicant's claim for review, and all the repercussions, public and private, of granting interim relief.

[36] Mr Cooke submits that there can be little doubt in this case Mr Morgan and TOP have a position to protect. However I consider he overstates the position in the submission that TOP's prospects will be irretrievably harmed in the event the relief sought is not granted. While TOP would be affected and would miss an opportunity to promote its cause and policies the evidence discloses there have been a number of other debates involving party leaders, including Mr Morgan already and there are other means of promotion.

[37] There is a further factor for consideration at this stage. While this is an application for interim relief the decision of this Court or a court on appeal on this application for interim relief will effectively determine the proceeding. In such a case the Court of Appeal have said that the Court should take a more robust attitude.⁹ The degree of likelihood the applicant would succeed at full trial is a factor to be considered. Mr Cooke realistically accepted that while technically there may be life in the substantive proceeding the reality was that the plaintiff has put his best case forward at this stage. McGechan on Procedure suggests that in such circumstances the plaintiff may be required to demonstrate a prima facie case rather than demonstrating a serious question to be tried.¹⁰ Ms Shortall submitted the applicant should be required to establish its case for relief on the balance of probabilities. In *Craig v MediaWorks Limited*,¹¹ Gilbert J did not directly address the issue, but in

⁸ *Minister of Fisheries v Antons Trawling Co Ltd* [2007] NZSC 101 (footnote omitted).

⁹ *McKay Electrical (Whangarei) Ltd v Hinton* [1996] 1 ERNZ 501 (CA) at 507; *Wilfred v Gan* [2013] NZCA 457 at [21].

¹⁰ Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers,) at [HRPt7.53.05(2)].

¹¹ *Craig v MediaWorks Limited* [2014] NZHC 1875, [2014] NZAR 973.

*Dunne*¹² Ronald Young J acknowledged that a higher standard of proof was required on the applicant for interim relief in that case for the reasons I have been discussing.

Is TVNZ's criteria unreasonable?

[38] The real issue in this case is whether the criteria TVNZ has applied to the issue of invitations to the debate is unreasonable so that it is reviewable. Dr Edwards acknowledges that some criteria must be applied as did Mr Cooke. Mr Cooke's criticism was of what he described as the bright line test applied by TVNZ with the lack of discretion.

[39] Mr Cooke submitted that the current test or criteria applied by TVNZ was unreasonable because it was irrational, dependent on arbitrary criteria and ultimately partial. He suggested a range of factors should be considered. He submitted the problems were compounded by the fact that TVNZ has retained no discretion in deciding who to invite to the debates in order to ensure the policy does not produce irrational results. He argued that TVNZ could not demonstrably justify that the exclusion of TOP was reasonable.

[40] I turn to the specific issues raised in the statement of claim in support of the application for interim relief.

The criteria has not been carefully developed and published in a way that is accessible and understandable by the relevant participants.

[41] From a procedural point of view it is difficult for the applicant to say that the criteria is itself arbitrary or was developed in an arbitrary way. The evidence before the Court as to its development supports a conclusion that TVNZ have developed the criteria in a reasonable way from a process point of view. TVNZ developed the criteria in response to earlier litigation on these issues and in light of decisions of this Court and reasonable practical constraints. The criteria are readily understandable and easy to apply, albeit that the applicant may not agree with them. The fact that the applicant was not aware of them until recently cannot affect whether the criteria are unreasonable or arbitrary. If the criteria are reasonable and the applicant could

¹² *Dunne v CanWest TV Works Limited*, above n 1.

satisfy them by reaching 3% in this evening's poll (or 2.5%), then he would have received an invitation to the debate. If they are not reasonable then his application will succeed and whether he was aware of them or not the fact he only received notice of them recently is irrelevant.

Are the criteria unreasonable given that TOP is polling higher than other minor parties that have been invited?

[42] As noted Dr Edwards has made the point and Mr Morgan has emphasised that TOP is the only party consistently polling above 1.0% that will not be invited to participate in the minor party leaders' debate.

[43] Mr Cooke submitted the present criteria established by TVNZ appears to be an amalgam of the two approaches found to be unreasonable by the Court in the *Dunne* and *Craig* cases.¹³ He submitted that combining them did not create a reasonable rule but rather made it worse. The effect of the decision was to invite to the Friday's leaders' debate, apart from National and Labour, the parties polling third, fourth, sixth, and seventh, together with a party not registering in the polls at all, but not the party polling fifth, the TOP party. A Mr Light will represent the United Future Party. Mr Cooke submitted he was unknown. He submitted that was not a rational approach and criticised reliance on the existing Parliamentary makeup.

[44] In relation to the appearance of Mr Light on behalf of United Future I note that the application of criteria led to the appearance at previous debates at previous elections of Jamie Whyte of the ACT Party in 2014.

[45] Given the reliance on the *Dunne* and *Craig* cases by the applicant it is necessary to examine reasoning on this issue in those cases. In the *Dunne* case the invitation to the debate was based on one poll result.¹⁴ Significantly at the time both Mr Dunne and Mr Anderton's parties, United Future and the Progressive Party, were represented in Parliament – United Future had eight members and the Progressive Party, two. United Future was itself only two decimal points behind ACT which was in sixth place at 1.6% in the poll. An important factor in Ronald Young J's finding

¹³ *Dunne v CanWest TV Works Limited*, above n 1; and *Craig v MediaWorks Limited* above n 11.

¹⁴ *Dunne v CanWest TV Works Limited*, above n 1.

that the selection process was arbitrary was that it was limited to one poll result. Nor did it take account of the existing seats held by the minor parties. The Judge suggested obiter that a selection process might be based on a number of criteria. Existing Parliamentary numbers may be one, or if the criteria was to be poll based, figures over a significant period might provide some rational basis with care needed to resolve the error factor. He considered as the error rate in the case before him well exceeded the difference between the fifth and eighth parties and excluded existing parties it was arbitrary.

[46] In the *Craig* case Gilbert J considered the broadcaster was acting unreasonably in basing its decision solely on which parties had gained seats in Parliament at the last election, noting that the Conservative Party had polled just under 5% or was polling higher than four of the invited parties and given that one of those invited parties did not have a sitting MP.¹⁵ The ACT Party no longer had a sitting member following the resignation of John Banks. As noted Gilbert J found Mr Craig had an arguable case the selection criteria was unreasonable.

[47] The present case is different in my assessment to the case of *Dunn* and *Craig*. In the present case TVNZ's criteria takes into account whether a party currently has an electorate seat or is otherwise represented in Parliament and also whether it is a realistic contender for reaching the 5% threshold. The criteria reflects the practicality that under the MMP system there are two ways for the party to obtain representation in Parliament; to win an electorate seat or to cross the 5% threshold or both.

Relying on the poll results from a single polling company

[48] The applicant next argues that the results from one polling company will not be accurate. There is a difference between the poll results. Mr Cooke submits that some poll results have registered TOP as having higher than 3% support. In response TVNZ makes the point that unlike the *Dunne* case its criteria rely on two poll results. Further it is only the UMR polls, the internal polls of the Labour Party, which suggest the TOP party has been polling at 3% or better. Those poll results and

¹⁵ *Craig v MediaWorks Limited* above n 11.

methodology in relation to the polling are not before the Court. Other poll results are consistent with TOP being at less than 3%. Indeed taking the 1 News-Colmar Brunton polls since March this year the high point for TOP was when it reached 2.1% in early August, but it has slipped back from that subsequently. Its average result over the six Colmar Brunton polls is 1.25%.

[49] On Mr McAnulty's evidence any reference to the other official polls does not assist the TOP party in that, as noted, other official polls show or disclose TOP has been consistently in the 1-2% range.

The margin for error in the poll results

[50] The applicant argues that general uncertainty associated with poll results means they cannot be relied on by themselves to decide who should be included in the debate. The criteria are not limited to poll results. Further, while the margin for error centred on TOP's best poll result at 2% might just exceed the 3% but that would be at the far margin of any bell curve.

Poll results are inherently movable and changeable

[51] The debates are to take place within the next week or two. Recent poll results are more relevant than earlier poll results. But even looking back through to the start of March 2017 and tracking poll results from that date does not assist TOP. It does not support the argument that TOP is building momentum towards the 5%. At its high point, as noted, it reached 2.1% on the official polls.

The criteria should incorporate other factors

[52] Given how parties gain representation in Parliament, the principal relevant criteria must be existing electorate seats or representation in Parliament and the state of a party's polling. The only other obvious criteria for a new party might be the substance of the party and the number of candidates it was promoting.

[53] The applicant's expert, Dr Edwards, talked of a holistic approach being taken and suggested the criteria could take into account a range of factors, such as a variety of recent polls, party membership, the number of candidates a party is standing in its

representation in Parliament and support at the last election where relevant. As noted the existing criteria applied by TVNZ takes into account recent polls, albeit limited to the Colmar Brunton one, but even expanding that to other official polls, does not assist TOP. Current representation in Parliament is not relevant in TOP's case. That leaves, from Dr Edwards' list, party membership and the number of candidates a party is standing.

[54] In his evidence Mr McAnulty addressed this issue. He says that TVNZ would not be able to make an objective assessment on the basis of party membership. It is an internal rather than a public metric. The Electoral Commission does not require or maintain a record of registered party memberships. There is no publicly available complete information from all parties about current party membership so there is no point of comparison. As to the number of candidates, Mr McAnulty has prepared a table which demonstrates that there are difficulties with selecting participants for a debate on the basis of the number of candidates. He notes New Zealand First has consistently fielded an extensive list of both electorate and list candidates which does not reflect the portion of their party vote or success in electorate voting. Relevantly TOP is fielding the same number of list candidates as the Democratic Party for Social Credit, a party which does not feature on most public opinion polls.

[55] While Dr Edwards accepts that there should be some criteria to effectively cull parties from the 16 parties he says that there should not be a bias in favour of incumbents. But the decision in *Dunne* makes it clear that the Court and indeed TVNZ in its criteria should consider the position of existing parties which are currently represented in Parliament.

TOP and Mr Morgan have been regarded as main contenders

[56] It is correct that Mr Morgan and TOP have had an opportunity to participate in other debates. That may suggest that even in the absence of participation in the current proposed debates by TVNZ, TOP has managed to engage with the media. As yet that does not seem to have flowed through to a surge in poll results.

The absence of a reasonable basis for excluding the party's leader as a recognised candidate from the debate will distort the outcome of the general election

[57] With respect, this objection assumes the correctness of the applicant's case. It is speculative and dependent on finding that there is no reasonable basis. If there is a reasonable basis for exclusion the applicant's case cannot succeed.

[58] While minor parties may well hold the balance of power after the election this point does not itself assist the Court in determining whether the criteria which leads to the exclusion of TOP from the participation in the minor parties' debate is reasonable or not. As Dr Edwards acknowledges there must be some basis or criteria for selection.

[59] As Mr Cooke also accepted, broadcasters including TVNZ, must be able to make decisions on who to include in the leaders' debates. His argument was that the decisions must be justified given the potential impact they have on the actual process and that a television network could only justify the exclusion of leaders of parties who genuinely do not have a realistic prospect in the election. But that selection should be based on reasonable and objective criteria. For the reasons given above, I consider the criteria chosen by TVNZ to be transparent and workable. Mr Cooke submitted that TVNZ is effectively deciding who the viable candidates for election are. But as Ms Shortall submitted it is not TVNZ that suggests Mr Morgan or TOP will not reach the threshold to gain a seat in Parliament rather it is the current poll results.

[60] The strongest point for the applicant is that TVNZ's criteria is limited to existing parties and the 3% threshold without having regard to the likelihood of a party breaking through the 5% threshold. The difficulty for the applicant is that he has not been able to suggest an alternative workable criteria to identify those issues. Essentially TOP's argument is that the level should be at 1% or 2%, rather than 3% in the polls, but as noted, there are good reasons for not reducing the level below the 3%, particularly given the number of minority parties and given the element of discretion applied by TVNZ in rounding up the poll results from 2.5% in the event that was achieved.

[61] Mr Cooke also submitted that to exclude Mr Morgan and TOP from the debate has the potential to distort the election outcome. He submits that in deciding to engage in leaders' debates televised free to air TVNZ has to act responsibly and in a way that will not interfere with the integrity of the election process and has a responsibility to conduct the debate, including the selection process in a reasonable way. That is undoubtedly correct and that is what I have been attempting to address in the above discussion.

[62] I do not place any weight on Mr Cooke's submission to the effect that there is a public interest in the decisions of the Courts affecting election campaigns being consistent to the effect that this Court should grant the relief sought as was the case in *Dunne* and *Craig*. While the principles are the same, as I have acknowledged, the outcome of each case is to be determined on its own facts. The criteria in the present case are different to the criteria in the cases before Ronald Young J and Gilbert J. Further as noted I do not consider there is any force in the argument that Mr Morgan and TOP were unaware of the criteria until recently.

[63] A final general consideration is that, as Ronald Young J, noted the Court is reluctant to effectively direct how a television programme is to be presented. However, I accept that there will be no practical difficulty for TVNZ including Mr Morgan in the debate if that was the outcome. Indeed, as noted, TVNZ have accepted that if he had reached 2.5% in the threshold in the 1 News-Colmar Brunton poll this evening he would be included in the debates.

Result

[64] Standing back and looking at the matter overall and having regard to the above matters I am not satisfied that the applicant has made out its case that the criteria applied by TVNZ are unreasonable. I decline the application for judicial review.

Costs

[65] Costs should follow the event on a 2B basis.

Review

[66] There will be a telephone conference at 9.00 am on Wednesday, 13 September 2017 to review the state of the substantive proceeding.

Venning J

Addendum

[67] Mr King representing the Internet party of New Zealand had filed papers shortly before the hearing commenced seeking to join the proceeding. The papers had not been served on either the parties to this proceeding. In the circumstances I advised Mr King I was not prepared to deal with his application to join. Mr King's proceedings will be called at the same telephone conference at 9.00 am, on Wednesday 13 September. As discussed with him he is to serve the papers in the meantime.

Venning J