

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

**CIV 2014-404-001972  
[2014] NZHC 1875**

BETWEEN COLIN CRAIG  
Plaintiff

AND MEDIAWORKS LIMITED  
Defendant

Hearing: 8 August 2014

Appearances: J A McKay and J W J Graham for the Plaintiff  
D H McLellan QC and A J Steel for the Defendant

Judgment: 8 August 2014

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**ORAL JUDGMENT OF GILBERT J**

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## Introduction

[1] Mr Craig applies for an interim injunction to restrain MediaWorks Ltd from screening an election debate on its television show “The Nation” tomorrow morning. The planned debate includes the leaders of six minor parties,<sup>1</sup> but excludes Mr Craig, the leader of the Conservative Party. The issue is important because the general election is to be held in six weeks time, on 20 September 2014.

[2] “The Nation” is a news programme that is broadcast weekly and is predominantly devoted to covering political issues. As part of TV3’s (MediaWorks’) election coverage, “The Nation” is running a series of political debates. MediaWorks selected the participants for the minor parties’ debate based on whether their party won a seat in Parliament in the last election.<sup>2</sup> Mr Craig was excluded on that basis.

[3] Mr Craig claims that MediaWorks’ decision to exclude him from the debate is arbitrary and unreasonable given that:

- (a) his party polled higher at the last election than four of the parties which have been invited to the debate;
- (b) his party has polled higher than those same four parties since the last election;<sup>3</sup> and
- (c) the Conservative Party has enjoyed a significant media profile in the lead up to the election.

[4] Although the Conservative Party did not win a seat in the last election, Mr Craig notes that the ACT Party, which has been invited to participate, no longer has a sitting Member of Parliament following the resignation of the Honourable John Banks in June of this year. Mr Craig complains that there can be no proper basis for

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<sup>1</sup> Namely the Green Party, New Zealand First, the Internet Mana Party, the Maori Party, United Future and the ACT Party.

<sup>2</sup> Defendant’s Notice of Opposition at [3(c)].

<sup>3</sup> Based on the average of the results of opinion polls conducted by Reid Research, Roy Morgan and Colmar Brunton.

inviting the ACT Party but excluding the Conservative Party from the debate in circumstances where, he says:

- (a) Neither ACT nor the Conservative Party has an MP in Parliament;
- (b) The Conservative Party won more votes in the 2011 election than ACT; and
- (c) The Conservative Party has consistently polled higher than ACT since the last election.

[5] In response, MediaWorks argues that in televising the debate it is not performing a public function or exercising powers of a public nature that will have important public consequences. Accordingly, it argues that its decision on who to invite to the debate is not reviewable. In any event, MediaWorks argues that its selection criterion was reasonable and that its decision was neither unreasonable nor arbitrary. Finally, it claims that Mr Craig will not be unfairly or unreasonably prejudiced as a result of being excluded from the debate. It says that 34 minutes have been allocated to the debate and that each politician will therefore have a little more than five minutes to speak.

### **Is the decision reviewable?**

[6] The first issue is whether or not the decision is arguably reviewable. There is clearly a public interest in the proposed leaders' debate. It will provide an opportunity for the electorate to consider the views expressed by the leaders of the various minor parties standing for election. It will also provide an important opportunity for the leaders of the minor parties to promote their policies to the electorate.

[7] In *Dunne v CanWest TVWorks Limited*, Ronald Young J held that the decision of a media organisation selecting candidates for a televised leaders' debate close to an election was a reviewable decision.<sup>4</sup> For the reasons expressed in that case, I

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<sup>4</sup> *Dunne v CanWest TVWorks Limited* [2005] NZAR 577 (HC) at [36].

consider it is at least arguable that the present decision is similarly amenable to review.

**Does Mr Craig have an arguable case?**

[8] The second issue is whether Mr Craig has a seriously arguable case. The public interest is in hearing from leaders of parties which have a realistic prospect of gaining one or more seats in Parliament at the election. Any decision on which parties should be invited to participate in the debate must, arguably, have regard to this prospect. In my view, it is at least arguable that the decision cannot be made solely by considering whether a particular party was successful in gaining one or more seats in the last election. For example, it would not serve the public interest to invite a party that was not intending to contest the next election, simply because it had a sitting MP.

[9] I consider that it is at least arguable, as Mr Craig contends, that a decision of this type should have regard to relevant events that have occurred since the last election. These arguably relevant considerations were not taken into account by MediaWorks in this case.

[10] I therefore consider that Mr Craig has an arguable case that MediaWorks acted unreasonably in basing its decision solely on which parties gained seats in Parliament at the last election. Given that the Conservative Party is polling higher than four of the invited parties, and given that one of these parties also does not have a sitting MP, it is at least arguable that the decision to exclude Mr Craig was unreasonable and failed to take account of relevant considerations. I emphasise that it is not my function at this hearing to determine whether the decision was unreasonable, merely to decide whether it was arguably so.

[11] I therefore conclude that Mr Craig has met the threshold issue of establishing that there is a serious question to be tried; his case is arguable.

### **Where does the balance of convenience lie?**

[12] I turn now to consider where the balance of convenience lies. If Mr Craig is excluded from the debate, his prospects and those of his party at the forthcoming election are likely to be diminished. He is therefore likely to suffer irreparable damage which cannot be adequately met by an award of damages. The public will gain the impression that MediaWorks has determined that Mr Craig does not “make the cut” and is not eligible to participate in the minor leaders’ debate.

[13] MediaWorks says that in order to stay within its budget, it intends to use “in house” resources and facilities for the planned debate. It says that it cannot conveniently accommodate more than six participants at this venue. Mr Watkin, the executive producer, deposes that:

If we were to have more than six we would be unable to have all participants in frame on wide shots, or to provide broadcast suitable studio lighting. Furthermore, *The Nation* only has six podiums.

[14] Mr Jennings, the director of News, deposes:

The facilities at the Flower Street studios can accommodate and adequately light only six participants at an absolute maximum. While this might sound surprising, another constraint is that there are a maximum of six lecterns available at the Flower Street studio. If more participants were to be included in the Minor Leaders’ Debate, it would be necessary for the debate to be held at an external location using external resources. This would not fit within the funding, resourcing and time available, so holding the Minor Leaders’ Debate would not be commercially viable.

[15] It is against this evidence that I must stand back and assess where the balance of convenience lies. I have to balance the harm that will be suffered by Mr Craig if I decline to grant the injunction against the cost or inconvenience that MediaWorks will suffer if the injunction is granted.

[16] It seems to me that the additional cost and inconvenience to MediaWorks of rescheduling the debate at another venue, if necessary, is clearly outweighed by the harm that Mr Craig is likely to suffer if the injunction is not granted. The public interest is another factor that appears to weigh in favour of granting the interim injunction sought.

## **Result**

[17] I therefore conclude that the overall interests of justice require that an interim injunction in the terms sought should issue. I therefore order, until further order of the Court, that MediaWorks is restrained from holding the proposed televised debate between the leaders of the six political parties referred to above, which excludes Mr Craig.

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M A Gilbert J