**IN THE SUPREME COURT OF SAMOA**

**HELD AT APIA**

**IN THE MATTER:** of Articles 2, 4 and 15(1) of the Constitution of Samoa

**A N D:**

**IN THE MATTER:** of the proviso to section 105(1) of the Electoral Act 1963 as amended by the Electoral Amendment Act 1995

**BETWEEN:** **AIONO SIA** of Fasitoouta matai and **MATATUMUA MAIMOAGA** of Faleasiu matai

**APPLICANTS**

**A N D:** **MAIAVA VISEKOTA PETERU**, of Faleasiu, matai

**FIRST RESPONDENT**

**A N D:** **CHIEF ELECTORAL OFFICER**

**SECOND RESPONDENT**

**A N D:** **ATTORNEY-GENERAL OF SAMOA**

**THIRD RESPONDENT**

**Counsel:** T S Apa for the Applicants
K Sapolu for the First Respondent
B P Heather for the Second & Third Respondents

**Hearing Date:** 21 August 1998

**Judgment Date:** 21 August 1998

---

**RESERVED JUDGMENT OF JUSTICE YOUNG**

---

**Introduction:**

The applicants ask this court to declare void as inconsistent with the constitution of Samoa s105(1) of the Electoral Act 1963 (as amended by s31 of the Electoral Amended Act 1995). This provision limits those who can challenge the result of an election by electoral petition to those who as candidates poll at least 50% of the votes of the successful candidate. (hereafter called the "proviso")

As an ancillary motion the applicants sought, ex parte an order suspending the Election Petition Rules. I ordered this notice of motion be on notice. This motion was designed to protect the applicant's position under the Electoral Petition Rules while the court ruled on the challenge to the proviso. References to "sections" in this judgment will be to the Electoral Act unless stated otherwise.

**Background Facts:**

A by election was held in the Territorial constituency of Aana Alofi No.1 on the 24 July 1998 to elect a new member of Parliament for that constituency. The two applicants and the first respondent were all candidates. On 25 July 1998 the Chief Electoral Officer announced the result of the by election result. The result of the voting was:-

| | | |
|---|---|---|
| Maiava Visekota Peteru | - | 1,019 |
| Aiono Sia | - | 248 |
| Maimoaga Matatumua | - | 189 |
| Tuifelea Faatoina | - | 172 |

Thus the first respondent was declared the successful candidate.

The applicants wished to challenge the election result. They say the first respondent and her agents committed acts of corrupt practice. It is alleged the first respondent gave voters in the electorate goods and/or money with the intent of influencing their vote. The first respondent denies these allegations of corrupt practice.

**The Law:**

Section 105(1) of the Electoral Act 1963 as amended by s31 of the Electoral Amendment Act 1995 provides as follows:-

> "Section 31 Election Petitions - Section 105 of the principal act is hereby amended by omitting the whole of subsection (1) and in substitution therefore the following:-
>
> Section 105 - An election petition may be presented to the Supreme Court by one or more of the following persons:
>
> (a) A person claiming to have had a right to be elected or returned at the election
> (b) A person alleging himself to have been a candidate at the election
>
> Provided however that no petition can be filed by a person who polled less than 50% of the total number of votes polled by a person elected or returned at the election."

The previous section 105(1) replaced by the 1995 s31 amendment read as follows:

**S105 Election Petitions -**

> "(1) An election petition may be presented to the Supreme 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 a right to be elected or return to the election
> (c) a person alleging himself to have been a candidate at the election"

Thus prior to 1995 any elector or any candidate in an election could challenge the election of a particular candidate by electoral petition.

The 1995 amendment removed the right of electors to challenge elections by electoral petition. Candidates could still challenge the result of elections by petition but only if they polled 50% or more of the total votes of the successful candidate.

**S104 of the Act provides,**

> "(1) No election and no declaration of result or report to the Head of State shall be questioned except by a petition complaining of an unlawful election or unlawful declaration or report presented in accordance with this Part of this Act. "

Sections 112 - 122 of the Electoral Act provide for electoral petitions, when elections are avoided, the effect on votes of corrupt practices, irregularities not invalidating elections, the report by the Supreme Court of corrupt or illegal practices and the effect of such a report. If the candidate is proved at the hearing of the petition to have been guilty of corrupt practise at an election then the election is void (s112).

Offences involving "corrupt practice" are set out in section 95, 96, 97 and 98 of the Act. The penal provisions are section 101. Corrupt practice carries a maximum sentence of one year imprisonment.

There are lesser offences of illegal practice defined in S99 of the Act. Time limits for the prosecution of corrupt practices are within 6 months from the alleged offence or where an electoral petition six months after the alleged offence or three months after the judicial report on the petition whichever date is the later (s119).

Outside the electoral petition process Members of Parliament can be removed by the declaration of a vacancy in the seat of a Member of Parliament. Section 10 of the Act provides in relevant part as follows:

> "(1) The seat of a Member of Parliament shall become vacant .... and in addition he shall be disqualified from holding his seat.
>
> (a) - (d) .....
>
> (e) If he is convicted in Western Samoa or in American Samoa of a crime punishable by death or by imprisonment for a term of two years or upwards or has been convicted in Western Samoa of a corrupt practice or is reported by the Supreme Court in its report of a trial on an election petition to have been proved guilty of a corrupt practice (as amended s5 1995 Amendment Act)."

Thus there are two methods, relevant to these proceedings, by which a Member of Parliament can be removed from office, by successful Electoral Petition or by a successful prosecution for electoral corrupt practice of the successful candidate.

Article 2 of the Constitution of Samoa provides as follows:

> "(1) This constitution shall be in the supreme law of Western Samoa
>
> (2) Any existing law and any law passed after the date of coming into force of this constitution which is inconsistent with the constitution shall to the extent of the inconsistency be void."

Article 4 of the constitution provides as follows:-

> "Remedies for Enforcement of Rights -
>
> (1) Any person may apply to the Supreme Court by appropriate proceedings to enforce the right conferred under the provisions of this part.
>
> (2) The Supreme Court shall have the power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this Part."

Article 4 is contained Part II of the Constitution. Thus where this court determines that any legislative provision is inconsistent with the constitution it may to the extent only of the inconsistency declare the provision to be void. The court has the power to secure to any person applying to the court the enjoyment of the rights given by Part II of the Constitution.

Article 15(1) of the Constitution (within Part II) is as follows:

> "Freedom from discriminatory legislation -
>
> (1) All persons are equal before the law and entitled to equal protection under the law.
>
> (2) Except as expressly authorised under the provisions of this Constitution no law and no executive or administrative action of the state shall either expressly or in its practical application subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social, place of birth, family status or any of them. "

For the purpose of this case subsections 3 & 4 are irrelevant.

Finally Part V of the constitution provides for the Parliament of Samoa and amongst other matters specifies how Members of Parliaments are to be elected, how their tenure of office can cease and allows for the system of franchise operating in Samoa. (see Articles 44, 45 & 46).

**Submission of the parties:**

Contained in this judgment are a detailed record of the submissions of counsel for the parties. This is recorded in more detail than would normally be required as an acknowledgment of the importance of this case for the parties.

It was common ground amongst all the parties that if I concluded that the proviso was inconsistent with Article 15(1) or (2) of the Constitution then I could declare the proviso void.

All parties agreed that in interpreting the Constitution the Court should give full recognition and effect to the fundamental rights and freedom the constitution contains, that the constitution should not be interpreted "in vacuo" and thus its interpretation can be effected by its historical context. And lastly the prime factor in interpretation are the words used in the constitution itself. (see Minister for Home Affairs v Fisher (1980) AC 319, Attorney General of Samoa v Saipa'ia Olomalu and others (1983) WSLR p41).

**The applicant's case:**

The applicant's submission was that, if they could show the proviso was discriminatory then it would by necessity violate Article 15(1) and this be inconsistent with the Constitution. The applicants said the essential factor in determining discrimination was ascertaining the intention of Parliament in enacting the proviso.

The applicant's submission was that Parliament's intention in passing the amendment to s105 and thus eliminating the right of voters to challenge elections by petition and limiting the rights of candidates to do so could not in fact be ascertained by any reading of Hansard or in any other way. Copies of Hansard detailing the Parliamentary debate concerning the 1995 amendment were annexed to the affidavit of Mase Toia Alama filed on behalf of the Attorney General. Also produced in that affidavit was a letter from Chief Justice AJ Ryan (a previous Chief Justice of Samoa) reporting to the Speaker of the House (as he was required to do, s11

Electoral Act) subsequent to several election petitions he heard expressing concern about the number of petitions filed and not proceeded with. He suggested legislative amendment to limit the availability of electoral petitions.

The applicants submissions was that the letter of the previous Chief Justice should not be used by this court to assist in ascertaining parliament's intention and that in any event no connection between that letter and the subsequent change by parliament could be made.

Where Hansard should be available and if so for what purpose in such a case as this was not the subject of any detailed submissions by counsel. All counsel accepted it was proper to refer to Hansard to assist to ascertain Parliament's intention in passing the amendment. Mr Apa submitted that in fact no Parliament intention could be ascertained reading Hansard. That appears correct. When the Bill was first introduced into Parliament the amending provision eliminated voters as potential petitioners but allowed all candidates to challenge the election by petition. When the bill was reported back from Committee for its second reading the "proviso" was included. The second reading debate contains no reference to the "proviso" nor an expressed rationale for its introduction.

In the applicant's submission several important points flow from this lack of an identifiable intention.

Firstly they say the court should not substitute its rationale for Parliaments expressed lack.

Secondly they submit that equality of treatment, fundamental to equal protection under the law is violated if the distinction to be drawn has no objective and reasonable justification. Here Mr Apa for the applicants said that Parliament had expressed no objective and reasonable justification to distinguish between candidates who received more or less than 50%. Indeed the applicants submitted that none of the "tests" of equality of treatment were met in this case because of the absence of any expressed justification by parliament for the proviso.

This the applicants said was fatal to the proviso. On the face of it the proviso was discriminatory they submitted in that within a class of persons (candidates for election) their right to challenge an election by electoral petition was unevenly granted, that is, only to those who obtain 50% of the votes of the winning candidates. Thus having established, the applicants said, that the proviso was discriminatory, the next step was a search for an objective and reasonable justification. Here the applicants said Parliament had expressed no such justification and the result was a discriminatory provision without justification. Thus the applicants were denied it was submitted equal protection before the law.

Ms Sapolu for the First Respondent took a different tack. She submitted that Article 15(1) had limited meaning. Particularly the use of the phrase "before the law" she submitted was limited to persons appearing before a Court of Law. And "equal protection under the law" she submitted related to the availability of the sanction of the law to any aggrieved person and the "protection" provided was equality of treatment.

In support she quoted from the debates of 1960 Constitutional Convention, convened to discuss Samoas Constitution at its inception. The basis for using this document as an aid to interpretation can be found in Attorney General v Saipaia Olomalu & Others (1980-1993) WSLR41. Here the Court of Appeal observed that while the convention debates were not properly primary aids to interpretation they could be used as confirmatory once the court has a view of the proper interpretation of the constitutional provision.

Secondly Ms Sapolu submitted on the authority of the Attorney General v Saipaia Olomalu that Article 15 protection did not cover electoral rights.

Thirdly she submitted that using the analogy of a similar provision in the Canadian Charter that "discrimination" in the context of Article 15 must relate to the personal characteristic of the individual group. (see Barrette v Attorney General of Canada 1134 DLR (4) 623) and Andrew v Law Society of British Columbia (1989) 36 CCR 193). Thus Ms Sapolu said it was not because of the personal characteristics of the applicants that they were affected by the proviso but because they did not receive enough votes to qualify to challenge.

The Attorney General did not support Ms Sapolu's submission that the Saipaia case removed all electoral questions from challenge under Article 15.

The Attorney General stressed the need to consider Article 4 challenges to the electoral law in a way in which recognised the clear practical need for finality and certainty. This she stressed was important for the orderly conduct of the country.

The Attorney General submitted that Parliament's intention in passing the 1995 amendment was clear. She said it was to place a limitation on those who could challenge the result of elections by petition.

On the question of whether the proviso was discriminatory the Attorney General submitted that the threshold for bringing an electoral petition is based upon at least five factors. They were - the total number of votes, the total number of candidates, the number of votes cast for each candidate, the number of votes cast for the candidate with the most votes, and the number of votes cast for the candidates with second and third numbers of votes.

Thus it was submitted that the proviso merely described who would have access to the petition process and who in fact would have access would depend in any particular election on a range of factors. These would significantly include how many votes a particular candidate was able to obtain. Such provisions it was submitted in analogous Canadian provisions were not seen as being discriminatory (see Barrette v Attorney General of Canada @ 628).

If there was any discrimination in the proviso it was based on the voters decision as to which candidate to vote for.

**The Decision:**

The first question to be asked is whether Article 15 was intended to apply to a Parliamentary classification of who can challenge an election by petition. And as an essential part of this

question did the Court of Appeal in Attorney General v Saipaia decide challenges such as this were outside the ambit of Article 15.

The Court of Appeal in Saipaia were faced with an appeal from a decision from the Supreme Court which had declared provisions in the Electoral Act relating to matai suffrage as void by reference to Articles 2, 15(1) & 15(2) of the Constitution. The Court of Appeal reversed the decision.

I reject the submission that the true impact of Attorney General v Saipaia in the Court of Appeal is all electoral provisions are outside Article 15 challenge, and particularly those relevant to this decision.

The Saipaia Judgment was concerned with a narrow electoral issue, albeit a vital one, that of matai versus universal suffrage. Matai suffrage and its place in Samoan culture features strongly in the decision, especially considering the preamble to the constitution, which speaks of a state based in part on Samoan custom and tradition.

The decision observes (p58) that Part II of the Constitution, headed "Fundamental Rights" does not include universal suffrage.

The court considered that a change from Matai suffrage (the then existing situation) would be a significant constitutional change which should only be brought about by a clear and direct expression by Parliament. No where, it said, could a clear change to universal suffrage be found in the Constitution or in the debates of the convention.

The court concluded (P59-60)

> "In short we are satisfied that the Article (Article 15) was not intended and does not relate to voting at general elections ..... Parliamentary electoral qualifications are a special subject, outside the preview of Article 15 and not dealt with at all in Part II of the Constitution."

The court saw reinforcement in its view in the provision of Part V of the Constitution especially Articles 44 and 45. Article 44 provided for Members of the Legislative Assembly and would permit a "matai franchise". Article 45 by its silence the court observed did not deal with what qualification for voting was required. And finally the court found support for its view in the Constitution Convention debates.

In particular the court considered Professor Davidsons commentary to Article 15(2) as follows:

> (P62-63) "In other words this clause seeks to ensure that everyone has equal rights before the ordinary law of the country but does not impose equality in regard to political rights."

The Court then went on to say (P 23):

> "It is true that Professor Davidson did not specifically mention the right to vote. But he was not purporting to give a complete list of those political rights which he said were untouched by prohibition of discrimination. And the right to vote is clearly a political right."

And finally the court said the constitution convention debates made it clear that universal suffrage had been considered and rejected.

It is worthy of note that the universal suffrage has now come about in Samoa but those who may stand for election as members of parliament must be registered matai.

Articles 46 and 47 are relevant to this case. Article 46 provides for vacancies of parliamentary seats. Article 46 amongst other matters provides the seat of a sitting Member of Parliament becomes vacant.

"(2) .....

(d) If he becomes disqualified under the provisions of this Constitution or any Act."

Article 47 provides that the Supreme Court shall determine all questions arising from the right of a person to be or remain a Member of Parliament.

There are two primary reasons why Attorney General v Saipaia can be distinguished from this case.

Firstly the Saipaia decision was concerned with a unique situation relating to suffrage. It is very much connected to Samoan custom particularly given the way the matai system is bound up with Samoan tradition and culture. In contrast the right to challenge an election by petition is quite outside such fundamental voting rights and without apparent connection to Samoan custom.

Secondly the Court of Appeal in Vaai v Tavui Lene and Mase Toia (CA 6/96) considered the "constitutionality" of S117 of the Electoral Act in part challenged under Article 15(1) of the constitution. While not specifically mentioning its own Saipaia's decision the court considered the substance of the "discrimination" (Article 15) argument in relation to S117 of the Electoral Act. Section 117 prohibits appeals from the Supreme Court to the Court of Appeal when the Supreme Court is exercising its electoral petition jurisdiction. The Court of

Appeal considered the challenge to S117 (through Article 15) and concluded that there was nothing discriminatory about S117. It did not exclude consideration of an Article 15 challenge to s117 based on the principle of Attorney General v Saipaia, that "electoral" matters were outside Article 15(1) challenge.

There are clear similarities between S117 and Section 105(1). Each are procedural provisions limiting challenges to elections, one by limiting appeals the other by limiting those who can file electoral petitions. There are both fundamentally different from the clear political rights such as suffrage dealt with in the Attorney General v Saipaia.

The Saipaia decision concluded that (universal suffrage) such an important change to the suffrage system would have to be clearly authorised by the constitution (which it was not) and that political rights including suffrage were excluded as being subject to challenge throughout Article 15. None of these circumstances apply either to s105 or s117 of the Electoral Act. These sections do not reflect the exercise of political rights but are procedural rights. None could be seen as existing rights grounded in Samoan culture nor did the debates on the constitution consider and reject these provisions. This decision proceeds on the basis therefore that the Saipaia decision does not prohibit Article 15(1) challenge to the proviso.

Ms Sapolu submitted that Article 15(1) was limited to equality before Courts of Law or the impartial administration of justice. In support she quoted from P221 of the convention proceedings with Professor Davidsons explanation of Article 15(1) rights as follows:

> ".... clause(1) of this article sets out what is one of the most important rights of any individual in any country that is governed under a system of law. The words "all persons are equal before the law" mean that if one appears before a Court charged

> with an offence, the court is concerned only with the fact of whether one is guilty or not and not whether one is a matai or a taule'ale'a a woman, a foreigner living in this country and so on. Similarly if someone does a wrong to one, such as committing assault or stealing ones property, then one can go to the police for protection regardless of one's personal status. It is one of the most important provisions giving effect to the words appearing in the preamble to the Constitution guaranteeing the impartial administration of justice."

I reject this argument limiting the meaning of Article 15(1) in the way proposed. The plain words of Article 15(1) do not limit the meaning in the way proposed by the first respondent. If the framers of the Constitution had meant to limit Article 15(1) to equality before Courts of Law they could easily have said so.

Limiting the meaning in one way proposed would not accord with the interpretation principles to be applied to constitutions, those of giving full effect to fundamental rights and freedoms and ensuring the plain words of the document have primacy.

Nor does this court consider professor Davidson was proposing Article 15(1) be limited only to Court proceedings. He was using Court proceedings as an example of how equal protection under the law could apply to the life of ordinary citizens. He does not say nor imply Article 15(1) only applies to Court proceedings.

And finally neither the Court of Appeal in Attorney General v Saipaia or in Va'ai v Tavui Lene and Mase Toia (Court of Appeal Samoa 6/96 unreported) nor the Canadian courts in considering their analogous provisions (Barrette v Attorney General of Canada) saw Article 15 as being limited in the way proposed.

Article 14 of the European Convention on Human Rights provides that the enjoyment of the rights and freedom set out in the convention "shall be secured without discrimination on any ground". While expressed differently through Article 15 of the Samoan Constitution it is of similar intent.

In the "Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (The Belgium Linguistic Case (No.2) EHRR252 (European Human rights Reports.) The court identified three questions to consider whether the principle of equality of treatment is violated.

Firstly the equality can be violated if the distinction drawn has no objective and reasonable justification.

Secondly proportionality between the means employed and the aim sought to be realised must be present.

Thirdly the distinction in treatment should be founded on an objective assessment of essentially different factual circumstances and should be based on public interest, striking a fair balance between the interests of the community and the safeguards of the convention (constitution).

Dealing with these three principles it was stressed that it is not for the court to put itself in the place of the legislature and questions of social policy are for the legislature. I adopt these

three "tests" as an appropriate way (amongst others) to assess whether the proviso infringes Article 15.

It is therefore relevant to consider the legislative policy which underlines the proviso. I reject Mr Apa's submission that in the absence of help from Hansard no purpose can be ascertained. The purpose to the amending legislation and the proviso is clear from the obvious result of the new provision. The amending provision significantly reduces the potential petitioners in electoral petitions from the hundreds to probably no more than 2 or 3. Prior to the amendment all electors and all candidates could bring a petition, potentially numbering in the hundreds. With the amending provisions all voters and all candidates with less than 50% of the successful candidates votes are eliminated. Typically there will be no more than 2 or 3 candidates in this class although this will depend on a range of factors including the total number of votes, the number of candidates and the respective popularity of the candidates. Thus the purpose of the new legislation is self evident, the reduction in the numbers of election petitions by reducing those who can petition.

Clearly it is in the interests of stable government to limit litigation arising from elections. Stable government will be enhanced with the least possible delay in concluding election results and bringing government together. This state objective is not unreasonable.

Restricting access to the electoral petition process is common in electoral statutes outside of Samoa (eg. New Zealand Electoral Regulation 1957/223 and New Zealand Electoral Act 1963 S.230).

Thus I conclude there is a government policy behind the proviso which is an objective and reasonable justification in a democratic society, the reduction in electoral petitions.

Secondly, is there within this amending Electoral Act legislation a reasonable relationship of proportionality between the means employed and the aim sought to be realised ? The aim sought to be realised has been identified as the reduction in electoral petition challenges to election results. The method of achieving the result has been to limit those who can bring such petitions. As can be seen above this has been a legislative device used in other democratic countries. Parliament in Samoa decided to restrict access to the electoral petition process to those who may be seen to have the most "interest" in ensuring the election is "fair" - the most successful of the loosing candidates. Parliament could also have restricted electoral petitions by narrowing the grounds of challenge by limiting the definition of corrupt practice. If limiting electoral petition challenge was the aim then limiting who can claim rather than changing the definition of electoral corruption may be seen as better protecting equitable election processes and thus better preserve democracy. Thus it can be seen that there is a reasonable relationship between the desire to limit petitions and the way it was done - limiting those who can petition

Finally distinctions in treatment are sustainable if they are founded on an objective assessment of essentially different factual circumstances balancing protecting community interests and the rights and freedom in the Constitution. Here the court should consider the scheme of the Electoral Act and consider whether as regards challenges to elections a reasonable balance is struck.

It is relevant therefore to mention the criminal sanctions against corrupt practice and the grounds to remove Member of Parliaments. Independent of electoral petitions an MP who is elected and subsequently convicted of corrupt practice can be removed using the provisions of the Electoral Act. (see SS 95-98 and S.10(e)). Any person can bring a private criminal prosecution alleging electoral corrupt practice (See Section 11 Criminal Procedure Act 1972). If proved the subsequent conviction requires the removal of the Member of Parliament. (Section 10(e) Electoral Act). This has similarities to the electoral petition process. Both require proof of corrupt practice, both no doubt to the standard of beyond reasonable doubt. Both result in the removal of the MP and the requirement for a further election. Electoral petitions are required to be filed expeditiously (S106), dealt with expeditiously (S111(3) 1990 Amendment), and are to be guided by the substantial justice amendments of the case (S115). The major distinguishing features are that private prosecutions can be taken by citizens without the restrictions in Section 105, and with a right of appeal in contrast to Section 117. It is difficult therefore to conclude that the private prosecution route to remove an MP is disadvantageous when compared with the electoral petition process. Both have their advantages and disadvantages.

If the Electoral Act is considered as a whole therefore it can hardly be said that there is any lack of balance in protecting the community by unreasonably limiting those who can challenge the election of a member of parliament. The Electoral Act in fact allows all citizens to challenge electoral corrupt practice and if the challenge is successful the corrupt Member of Parliament will be removed. While there may be advantages and disadvantages for corrupt practice private prosecution, over all a reasonable balance is struck between the rights of the community in exposing electoral corruption and the interests of the state in finality of election

results. It could not be said that electoral corruption will remain unexposed if one considers the totality of the Electoral Act.

It must be acknowledged there is an element of capriciousness in drawing the line at the 50% figure. Why not 25% or 75%? But all such lines are by their nature arbitrary and any restriction can be seen as capricious. Here the legislature has complied with the Belgium Linguistic test of equality of treatment and where it has decided to draw the line is a legitimate exercise of its legislature authority.

The drawing of lines in equal rights matters has been considered by Canadian Courts in relation to the Canadian Charter of Rights. Section 15 of the Canadian Charter of Rights is similar to Article 15 in the Samoan Constitution in part it says:

> S15(1) "Every individual is equal before and under the law and has the right to equal protection to the equal protection and equal benefit of the law without discrimination....."

Section 15 of the Canadian Charter in relation to electoral law was considered by the Puebec Court of Appeal in Barrette v Attorney General of Canada. The Canada Elections Act provided that those candidates obtaining more than 15% of votes in an electorate were entitled to partial reimbursement of their electoral expenses. The provision was challenged as being inconsistent with Section 15(1) of the charter, the equal rights provision. McCarthy JA in p628 said:

> "I am unable to see in the 15% threshold for partial reimbursement of election expenses any discriminatory purpose or effect within the meaning of s15 of the Charter. Unsuccessful candidates who do not obtain at least 15% of the valid votes cast are not in my view a "discrete and insular minority". Nor are they a

> "disadvantaged group in Canadian society". If the 15% threshold discriminates against them, such discrimination is not based on any of the grounds enumerated in s15 or on any analogous ground. For the same reasons, the 15% threshold involves no prohibited discrimination against voters who if they are more fully informed, might vote differently".

And further per Mailhot JA p632:

> ".... the measure chosen by the legislator seems to be a reasonable restriction, if it can be called a restriction."

Thus in Barrette's case the ability of the candidate to use the legislative authority for reimbursement of election expenses depended upon the candidates ability to obtain popular votes. And in an analogous way the ability to challenge an election result by petition is also dependant upon the ability of the candidate to obtain votes. There is in this case no discriminated against group especially when one considers the whole of the legislation regime.

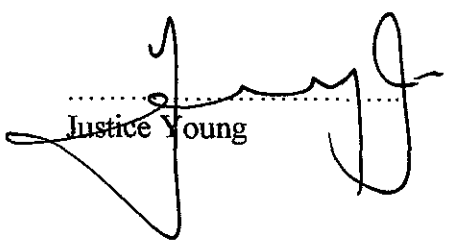
The proviso could have the effect of rewarding the wealthy and dishonest successful candidate. That is if enough electors could be corrupted by a successful candidate then the successful candidate could ensure there will be no unsuccessful candidate receiving 50% or more of the vote. This is a legitimate concern. But if such an unusual situation should occur the alternative procedure of prosecution to challenge the MP's election is still available, and is available to all. If electoral corruption occurs on such a scale as considered here there is likely to be a prosecution of the successful candidate in any event. This adequately meets the concern.

In each individual election prior to the casting of votes it will of course be impossible to tell which of any of the unsuccessful candidates may be able to challenge the election by electoral petition. So at the time of the election all candidates start from the same position. As has

been pointed how the proviso restricts the ability of each individual candidate to challenge the result by the petition will not be known until the result of the election. It may restrict none of the candidates as all unsuccessful candidates could receive more than the 50% threshold. Alternatively, as in this case, none of the successful candidates could gain 50% of the winning candidates vote and thus no election petition challenges will be possible. Ultimately voters will effectively determine the availability of electoral petition challenge in a particular election.

There is nothing therefore that this court can see by applying the Belgium Linguistic test or in considering any other factors relevant that convincingly show that the proviso is inconsistent with Article 15 of the Constitution.

I therefore reject the applicants motion that the proviso to S105(1) of the Electoral Act is inconsistent with Article 15(1) of the Constitution. As a result the applicants motion to suspend the Electoral Petition Rules is also rejected. As to costs I will hear submission from counsel at 9.00 a.m., Wednesday 2 September 1998.



Justice Young