COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2020/PUB/jrv/00031

BETWEEN:

(1) ALEXANDER BURROWS JR.
(2) ARISON WILSON
(3) MARTHA MACKEY
(4) MARILY CARTWRIGHT
(5) LEOTHA COLEBY
(6) JUDY HAMILTON
(7) ADEL GAY
(8) THEOPHILUS DEAN
(9) JEFFREY HENFIELD
(10) QUINCY STRACHAN

Applicants

AND

JOHN PINDER
DIRECTOR OF LABOUR
(Registrar of Trade Unions)

Respondent

AND

BAHAMAS PUBLIC SERVICES UNION

Interested Party

Before: The Hon. Mr. Justice Loren Klein

Appearances: Mr. Bjorn Ferguson for the Applicants
Mr. Basil Cumberbatch with Ms. Raquel Whyms for the Respondent
Mr. Kahlil Parker with Ms. Roberta Quant for the Interested Party

Hearing Dates: 4, 18 December 2020

RULING

Klein, J.

Industrial Relations Act ("IRA") (Ch. 321) – Trade Union leadership elections – Validity – Certification of election results by Registrar – Judicial review of Registrar's certificate – Alleged irregularities in conduct of elections – Alleged failure to supervise conduct of elections by Designated Officer pursuant to s. 20 of IRA – Failure of Designated Officer to sign ballots – Whether breach of s. 20 requirements – Circumstances in which Registrar's Certificate may be set aside – Whether Registrar may rescind certification *ex proprio*

motu – Interpretation and General Clauses Act (Ch. 2), s. 36 (2) (c) – Implied Powers – Power of Registrar to direct new elections under s. 21 of IRA – Judicial review – Affected party – ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organize Convention, 1948), art. 3

INTRODUCTION

[1] This is an application for judicial review by a losing leadership faction in recently contested elections for the executive leadership of the Bahamas Public Services Union ("BPSU"). The applicants, who call themselves the "POWER" team ("People Organizing With Effective Results), seek to overturn the results of the election which they lost to the incumbent President Kimsley Ferguson and his team ("the Workers Team"). They allege that the election was marred by irregularities, which included breaches of the Union's rules and the Industrial Relations Act ("IRA" or "Act").

[2] While challenges to union elections are not an unfamiliar occurrence in the fractious climate of industrial relations in this country, this case is somewhat unusual. For one, the respondent Registrar of Trade Unions ("the Registrar"), who is the official charged with statutory responsibility for the supervision of union elections under the IRA, agrees with the applicants that the results should be set aside and the election re-run. This is so notwithstanding that he certified the poll as having been properly conducted. But he says he made a mistake in doing so, in that information came to light subsequent to his certification which threw doubt on whether the election was properly supervised in accordance with s. 20 of the IRA.

[3] This claim raises an issue that has reared its troublesome head on more than one occasion before the courts, and it is this: what is the proper role of the Registrar or designated officer in the supervision of union elections? In particular, it requires the court to consider in what circumstances it may be appropriate to set aside election results certified by the Registrar, and whether the Registrar can voluntarily rescind his certification and direct fresh elections.

Factual Background

[4] The BPSU is one of the largest unions in The Bahamas. It represents persons employed directly by the Government in its various departments, persons employed by public boards, committees and corporations, and persons employed by the Union itself. As the bargaining agent for a large number of public servants with the responsibility for negotiating the terms and conditions of their employment directly with Government, it has pride of place among unions.

[5] In recent times, the governance of the Union has been plagued by much infighting which has led to litigation (see, for example, *Peter Outten (as Trustee of The Bahamas Public Services Union) et. al. v. Kimsley Ferguson (President of the Bahamas Public Services Union*) [2019/COM/lab/00034]. This is also not the first time that the Union's election results have been challenged (*Davis v Bahamas (Director of Labour)* Nos. 383 of 114 and 620 of 1994 [1994] BHS J. No. 85).

[6] On 29 September 2020, the Union conducted its triennial election for its executive body in New Providence and the Family Islands. Kimsley Ferguson, the incumbent President, and his team were elected by handy margins, although it was a keenly contested poll. Pursuant to its Constitution, the BPSU is required to hold elections for its officers at its third annual General Meeting, which is required to be conducted during the month of July but no later than the 30 September of the triennium. Thus, the Union's election was conducted within a hair's breadth of the constitutionally mandated period.

[7] According to the results certified by the Registrar, the votes cast for the contestants were as follows (asterisk denotes winner):

<u>President</u>	
Kimsley Ferguson	827*
Alexander Burrows Jr.	582
Ivan Thompson	55
<u>Vice President</u>	
Ernest Tillie Burrows	779*
Marilyn Cartwright	581
Peter Outten	92
<u>Executive Vice-President</u>	
Craig Bethel	826*
Arison Wilson	617
<u>Vice President Northern Region</u>	
Latoya Bernadette Cartwright	817*
Martha Mackey	578
Elizabeth Sillamae Williams	57
<u>Secretary General</u>	
O'Neil Thurston	751*
Leotha Coleby	563
Cindira Bain	165
<u>Assistant Secretary General</u>	
Valarie Florence Percentie	805*
Judyann Hamilton	647
<u>Treasurer</u>	
Phillip Greenslade	840*
Adell Huylor-Gay	609
<u>Trustees</u>	
Tyrone Anthony Coakley	774*
Roderick Denver Hanna	686*
Steven Stretch Culmer	684*
Theophilus Dean	629
Jeffrey Henfield	609
Quincy Strachan	589

[8] But as is often the case with hotly contested leadership races, the election was not uneventful. Just days before the election, on 25 September 2020, Mr. Alexander Burrows, Presidential Candidate for the POWER team, sent an email to the Registrar raising concerns with the symbol used by the Workers Team.

[9] Then, following the election, on 30 September 2020, Mr. Burrows sent a follow up letter to the Registrar urging that the poll should not be certified as having been properly taken. That letter, *inter alia*, reiterated the concerns about the symbols, alleged that several persons who ran as candidates were ineligible, cited various irregularities with respect to the ballots, and alleged bias and conflict on behalf of the Registrar.

[10] By letter dated 7 October 2020 the Registrar indicated that he had investigated the concerns and did not think they compromised the integrity of the election. In this regard, he had issued a certificate dated 5 October 2020 declaring that the poll had been properly taken in accordance with s. 20 of the Act.

[11] Following the Registrar's certification of the election, the applicants "appealed" by letter dated 12 October 2020 to the Minister ("the appeal letter"), in which they reiterated and elaborated on the pre-election complaints made to the Registrar and the complaints in the 30 September letter. It does not appear from the evidence that there was any response to this letter. This is probably explained by the fact that while s. 13 of the Act (set out below) grants to an "aggrieved person" a right to appeal to the Minister against the Registrar's refusal to certify an election, it does not grant a corresponding right to appeal where the Registrar certifies the poll as having been properly taken.

The Judicial Review Application

[12] On 9 November 2020, the POWER team filed an *ex parte* summons for leave to commence judicial review of the Registrar's decision of the 5 October 2020 to certify the elections. The Application sought, *inter alia*, the following relief:

> "(1) Judicial review in the form of an Order of Certiorari quashing the decision made on the 5th day of October 2020, A.D. 2020 wherein the Respondent issued a Certificate of Results of a Ballot under the purported authority of Section 20 of the Industrial Relations Act (IRA);
> (2) An order of mandamus directing The Bahamas Public Services Union (BPSU) to hold new elections;
> (3) A declaration that the 29 September 2020 Bahamas Public Service Elections was unfair and that the decision to certify the election in the circumstances is irrational;
> (4) A declaration that [the] Respondent has acted unfairly and with bias towards the Applicants;
> (5) A declaration that the Applicants had a legitimate expectation to be furnished with the current voter's list of the BPSU within the 3 months as was the practice and custom for the purposes of the elections;
> (6) A declaration that the use of the BPSU logo as a symbol on the ballot paper is illegal and violates the Parliamentary Elections Act;
> (7) A declaration that the decision to certify an election after being informed about the many irregularities is unreasonable;

(8) An order that all necessary and consequences directions be given.

[…]

(11) An injunction restraining the elected members from receiving remuneration."

[13] There are also claims for consequential directions, damages and costs. I should say at the outset that it is unclear on what basis damages are sought, since it is trite that damages are not normally awarded for administrative breaches, unless such breaches would also found a cause of action at common law (**Knowsley Metropolitan Borough Council, ex p. Maguire** (1992) Times, 26 June). There is nothing on the facts of this case that could conceivably ground a common law claim, and no such claim has been pleaded (as required by O. 53, r.7(2)). The prayer for the injunction (which notably is not even styled as a claim for an *interlocutory* injunction) seems to have been thrown in only for good measure and was never argued. In the urgent circumstances in which this matter came on for hearing, there would appear to have been little utility for injunctive relief in any event. So I need not say anything further on this.

[14] The grounds on which the judicial review application is being presented may be summarized as follows:

(1) That the incumbent Mr. Kimsley Ferguson breached and violated article 21(iii) of the Constitution of the BPSU when he assumed the role of Chairperson of the Electoral Committee and acted as Chairman of that committee on several occasions.

(2) That candidates in New Providence and Grand Bahama were denied the opportunity to review spoilt ballots and representatives of teams were not allowed to verify the marked and spoilt ballots.

(3) That several candidates running on the slate of Mr. Ferguson's team and one independent candidate were retirees and therefore (on the Applicant's interpretation of the Union's Constitution) disqualified from running, which constituted a breach of the Union's rules.

(4) That the ballots violated the electoral rules of the Commonwealth of The Bahamas as they contained the logo of the BPSU instead of symbols of the teams; and that the candidates' names were not listed in alphabetical order and some names spelt incorrectly, which was said to compromise the integrity of the entire electoral process.

(5) That Ms. Janet Russell, the officer in charge of the Department of Labour in Grand Bahama, was not the appointed Designated Officer by the Minister of Labour, Transport and Local Government to supervise the elections and that s. 20 of the IRA was not complied with. Further, that s. 55(i) of the Parliamentary Act was violated, in that Ms. Russell "spent the entire day sitting at the table in the polling station"; and that during the official count of the ballots in Grand Bahama, it emerged that some of the ballots had the stamp on the back but no signature of the Designated Officer.

(6) That with the exception of Grand Bahama, candidates and/or their agents were prohibited from seeing the ballots during the unofficial count.

(7) That it is a "notorious fact" that Mr. Kimsley Ferguson was Vice President during the tenure of the Respondent's presidency of the BPSU, and that the Respondent was conflicted and biased in his dealings with the Applicants.

[15] It seems the applicants were intent on including in their grounds every possible fault or recrimination they could attach to the conduct of the election. The Application was supported by the Affidavit of Arison Wilson, a member of the POWER team, who unsuccessfully contested the position for Executive Vice-President.

[16] On 19 November 2020, the BPSU filed a Notice and Memorandum of Appearance as an "affected party", presumably as a party that would have been entitled to be served with the Notice of Motion if leave were granted as a person "directly affected" under O. 53, rule 5(3)). However, Order 53, r. 9(1) also gives "any person who desires to be heard in opposition to the motion or summons [for judicial review] and appears to the court to be a proper person to be heard" a right to be heard. Undoubtedly, the Union and its leadership team came within the category of a "person directly affected" with the meaning of O. 53, r. 5(3) (see **R v. Liverpool County Council, ex parte Muldoon** [1996] 1 WLR 1103 (per Lord Keith of Kinkel). They were also within the remit of O. 53, r. 9(1) as a proper person to be heard in opposition. I therefore gave leave for them to be heard. But for convenience and to avoid pigeon-holding their standing, I shall refer to them in these proceedings as the interested party ("IP").

[17] On 4 December 2020, the parties appeared before me pursuant to the summons for leave. Somewhat remarkably, counsel for the respondent (Ms. Whyms) *in limine* presented the court with a proposal for dealing with the contested election, which appeared to be a compromise position arrived at between the applicants and respondent. She indicated that they were instructed to ask the court for an order declaring the election held on the 29 September 2020 void, or in the alternative to give directions for the Registrar to set aside his certificate and to conduct new elections pursuant to section 21 of the IRA on the 20 January 2021.

[18] I reminded counsel that unless and until leave was granted for judicial review and the matter heard on the merits, the court had no jurisdiction to make the orders or directions sought, or for that matter to grant any relief in the matter. In essence, this was an attempt by the applicants and respondent to put the cart before the horse. Mr. Parker for the interested party (rightly, it may be thought) strenuously objected to the position expressed by the applicants and respondent, which he described as "collusion", and indicated that he would be opposing the application on the merits if the court granted leave.

[19] I did grant leave for the applicants to commence judicial review on the basis that the matter met the threshold for the grant of leave under O. 53, rule 3(1) and satisfied the test set out by the Privy Council in **Sharma v. Brown Antoine** [2007] 1 WLR 780 of disclosing "*….an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy*." I also gave directions for the expedited hearing of the matter on 18 December 2020, and for the interested party to be served with all the documents.

[20] The Respondent filed the Affidavit of the Registrar (John Pinder) on 11 December 2020 and the interested party filed the affidavit of Kimsley Ferguson on 14 December 2020. The Notice of Originating Motion was filed on 14 December 2020.

THE LAW

[21] The resolution of this matter requires the court to consider legal principles relating to judicial review and the law that governs unions' elections, which is both statutory and contractual (i.e., based on the Union's Constitution).

Judicial Review

[22] As classically formulated by Lord Diplock in the leading case of **Council of Civil Service Union v. Minister for the Civil Service** [1985] AC 374 ("**CCSU case**"), to succeed on a claim for judicial review, an applicant has to establish that the decision under attack is either *illegal*, *irrational* (in the *Wednesbury* sense) or *procedurally improper* (410 C-G, 411 A-B). While the law on judicial review has evolved over the more than three decades since the **CCSU case**, the patina of time has done little to dim Lord Diplock's original formulation of the tripartite heads of judicial review:

> **"By 'illegality' as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**
>
> **By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.**
>
> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

[23] To these heads of judicial review may now be added the frustration of a reasonably held legitimate expectation to certain treatment by a public authority. In **United Policyholders Group and others v. Attorney-General of Trinidad and Tobago** [2016] UKPC 17, after an admirable summary of the authorities on legitimate expectation, Lord Carnwath stated the modern principle as follows [121]:

> **"Where a promise or representation which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it."**

[24] In the **CCSU case** Lord Diplock had also foreshadowed the concept of proportionality emerging as a head of judicial review. While proportionality has entered the lexicon of judicial review, it is most usually invoked as a heuristic tool for assessing the constitutionality of executive action in human rights cases, or as an adjunct to the concept of rationality or reasonableness. There continues to be a debate as to whether it constitutes a distinct head of judicial review (see **Pham v. Secretary of State for the Home Department** [2015] 3 All ER 1015 [114-116, per Lord Sumption].

[25] Another important principle in the exercise of the court's supervisory jurisdiction over public bodies is that the court will not act as an "appeal" body and substitute its decision for that of the authority legally empowered to make the decision (see **Chief Constable of the North Wales Police v Evans** [1982] 1 WLR 1155 [p.1161]).

[26] Judicial review is also said to be a remedy of last resort, which requires a party to exhaust all possible alternative remedies, such as any available statutory appeal, before launching judicial review proceedings (**R v Deputy Governor of Parkhurst Prison, ex parte Leech** [1988] A.C. 553). In their skeleton argument, the applicants suggest that the appeal letter was sent to the Minister out of an abundance of caution to ensure that all possible statutory remedies had been pursued, even though it was conceded that s. 13 does not expressly authorize an appeal against certification by the Registrar.

Law governing union elections

[27] There are two principal sources of law governing unions: the "rules" of the union contained in its Constitution or made thereunder, and the IRA, which contains various provisions regulating the affairs of trade unions. The most important provisions for the purposes of this application are those relating to the conduct of union elections for its executive officers.

[28] A trade union must generally comply with the rules of the union concerning the holding of elections (see **Burn v National Amalgamated Labourer's Union of Great Britain and Ireland** [1920] 2 Ch. 364). But the court has a discretion not to declare an election invalid because of minor irregularities, and it is only those deficiencies which go to the root or overall validity of the election that will warrant setting the results aside (**Brown v Amalgamated Union of Engineering Workers** [1976] ICR 147; **Dwayne Woods et al. v John Pinder (as Registrar of Trade Unions) et. al.** 2020/PUB/jrv/21).

[29] The authorities make it clear that the rules of a trade union are not to be construed legalistically, but with an appropriate degree of flexibility. The guiding principles were neatly summarized by Warner J. in **Jacques v. Associated Union of Electrical Workers** [1986] ICR 683 (at p. 692 A-B) after reviewing the leading authorities as follows:

> **"The effect of the authorities may I think be summarized by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court's view they must have been intended to mean, bearing in mind their authorship, their purpose, and the readership to which they are addressed."**

[30] Compliance with statutory conditions is also mandatory. Failure to observe statutory requirements is never trivial and the court cannot ignore the statutory conditions for the conduct of elections (see **Woods et. al.** (*supra*); **Davis v Bahamas (Director of Labour**) [1994] BHS J. No. 85); **Bahamas Hotel Catering & Allied Workers Union et. al. v. Registrar of Trade Unions, Commonwealth of the Bahamas, et. al.** [2010] 1 BHS J. No. 63 (SCCiv Apps. Nos. 012, 105, 109, &B 115 of 2009) ("the BHCAWU case"); **The Airport, Airline and Allied Worker's Union and others v. Harding and others** (No. 00033 of 2007 (BHS J. No. 9). This is especially so when the statute itself contains provisions to the effect that anything done contrary to its provisions shall be null and void (as does s. 20): **Pearse v Morrice** (1834) 2 Ad. & El. 84 at 96.

The rules

[31] The Rules of the BPSU are to be found in its Constitution and are set out in 24 articles providing for the affairs of the Union, which includes the ability to make bye-laws for other purposes (art. 19). I recite only those rules which are relevant to the parties' complaints and which have been referred to in argument by counsel.

<u>Article 3 (Membership)</u>

"(i) All persons who are regularly employed by the Bahamas Government, a Ministry, a Public Board, Public Committee, Public Corporation or by the Union, provided no person shall be eligible for membership unless he is or has been so employed.

(ii) Employees of the Union may maintain membership in the Union Medical Plan, and be eligible for any other benefit as may from time to time be approved by the Executive."

<u>Article 4 (Dues and Subscription)</u>

"(xiii) Members reaching the Mandatory Retirement Age with continuous membership of fifteen or more years and who may wish to continue membership in the Union's Major Medical Plan shall be required to maintain their membership in the Union for that purpose at a rate of 40% of the Membership dues along with the payment of the total Medical Dues."

<u>Article 7 (Meetings)</u>

"(vi) Only financial members on the date of an Annual General Meeting or a Special General Meeting shall be allowed to vote or be eligible for office."

<u>Article 21 (Election for Officers)</u>

"(iii) An election committee comprised of the Secretary General and seven (7) Union members appointed by the Executive Board for that purpose shall be responsible for the conduct of the election. They shall be responsible for the preparation of the ballots, setting up of voting stations and production of the voter's list. They shall liaise with the Registrar of Trade Unions to ensure that the ballot is taken in accordance with the provisions of Section 20 of the Industrial Relations Act.

The statutory framework

[32] The most important provisions of the IRA for the conduct of union elections are sections 20 and 21.

[33] Section 20 provides:

> "20. (1) The constitution of every trade union registered under this Act shall provide for the taking of a secret ballot for all of the following purposes, namely—
>
> (a) the election or removal of any officer or member of its executive committee or other governing body;
> (b) the amendment of its constitution, including any change of name;
> (c) where the union is a union of employees, the taking of strike action,
>
> and the Registrar shall not approve any such constitution unless he is satisfied that every member of the union has thereunder an equal right and a reasonable opportunity of voting, and that the secrecy of the ballot is properly secured thereby.
>
> (2) Whenever any trade union proposes to take any ballot for any of the purposes referred to in paragraph (a) or (b) of subsection (1), not less than seven days' notice in writing shall be given to the Registrar of the intention to take the ballot, and of the time and place at which it will be taken and the ballot shall be taken under the supervision of the Registrar or a designated officer, who shall attend at the time and place; and unless the ballot is so taken and is certified by the Registrar or a designated officer as the case may be to have been properly taken, the ballot shall be void and of no effect and the Registrar or a designated officer shall direct a further ballot to be taken.
> (3) […]
> (4) For the purposes of this section and section 21 "designated officer" means a public officer designated in writing by the Minister for the purpose."

[34] Section 21 provides:

> "21. (1) Where a trade union which is registered under this Act fails to take a secret ballot for the purposes of the election of any officer or member of its executive committee or other governing body at the time set forth in its constitution, the Registrar or a designated officer may direct that a ballot shall be taken under his supervision and cause notice of the ballot to be published in the Gazette in at least one daily newspaper printed and circulated in The Bahamas.

(2) A notice under subsection (1) shall specify the day on which and the time and place at which the ballot is to be taken.

(3) Every officer and member of the executive committee or other governing body of any trade union who fails to comply with a directive of the Registrar or a designated officer issued pursuant to subsection (1) shall be guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars."

[35] Another provision that has some bearing on the matters raised is section 13, which provides as follows:

"13. Any person aggrieved—

(a) by any decision of the Registrar—
(i) not to register a trade union under this Act; or
(ii) to cancel the registration of a union; or
(iii) not to register an amendment of the constitution, or a change of name, of the trade union; or
(b) by the refusal of an officer of the Ministry to certify any ballot as having been properly taken,

may appeal in respect thereof to the Minister, who may, with effect from the date of the determination of the appeal, reverse the decision of the Registrar or officer or confirm it."

DISCUSSION AND ANALYSIS

Alleged irregularities in election

[36] I should say at the outset that the majority of alleged irregularities and breaches of the Union's constitution (which I would call the "collateral challenges") had already been considered and rejected by the Registrar (rightly I would say) prior to his certification. The collateral challenges were not seriously pursued by the applicants at the hearing. Counsel for the applicants indicated that the focus of their attack would be on the alleged lack of compliance with the s. 20 requirements, which was also the basis on which the Registrar was seeking to rescind his certificate. But as the applicants seek remedies in respect of the claims, I must deal with them.

Irregularity in symbols

[37] The Workers Team logo consisted of an upright clenched fist enclosed by a circle, with a miniature of the official BPSU logo inset below the fist. The words "The BPSU Worker's Team" are inscribed at the top of a concentric fringing circle, and at the bottom are the words "Serious about the business of Our Members". The applicants complained that the writing affixed to the image and the inclusion of the Union's official symbol made it something more than a stand-alone electoral symbol. In the appeal letter, it was said that the words on the symbol were a "*clear violation of the Parliamentary Elections guidelines that [does not] allow campaigning and campaign paraphernalia to be displayed within 100 yards of the Polling Station*", and was therefore unfair to the candidates of the other teams.

By contrast, the symbol used by the POWER team was a gavel and sounding block and by the third team ("Team United") a lighthouse. Neither included any form of writing.

[38] The Registrar responded to this complaint in his affidavit as follows:

> **"…[B]y email dated September 25th, 2020, Alexander Burrows, the Presidential Candidate on the "Power Team", raised concerns with the image that another team presented to be used on the ballots for the upcoming election. The email was accompanied by a picture of the ballot. After reviewing the picture of the ballot, I noticed that the images appeared to all be the same size in nature and to my knowledge there was an Election Committee comprising of each of the three vying teams which prepared the ballots. Therefore, what each team presented was used on the ballots. I decided that this did not meet the threshold not to certify the poll as being properly taken as it appeared to be a fair ballot."**

[39] In his affidavit, Kimsley Ferguson addressed the matter of the symbols as follows:

> **"The ballots used in the BPSU's Elections of officers were duly approved by the election committee and in no way contravened the BPSU's Constitution or s. 20 of the IRA. The symbols selected by each team of candidates were used as submitted to the election committee."**

[40] I would be inclined to agree with the analysis and conclusion of both the Registrar and the interested party. This is not to say, however, that there could not legitimately be some objection to the Worker's Team symbol (see **Brodie v Bevan** (1921) 38 TLR 172 (1922) 1 Ch. 276, where the court held that it was objectionable to have words printed on the ballot paper, even if it may not be sufficient to invalidate a ballot).

[41] Strictly speaking, the Workers Team symbol would not comply with the generic election symbols prescribed for use in the *Parliamentary Elections (Symbols and Time-off) Regulations* (Ch.5). But it is important to note here (as will be referred to again in this judgment), that the provisions of the *Parliamentary Elections Act* (Ch. 5) ("the Elections Act) do not *de jure* apply to union elections. The IRA sets out the specific statutory requirements which must be complied with by unions in the conduct of their elections, and these may be supplemented by the union's rules. While it stands to reason that the conduct of such elections might be informed by principles and procedures set out in the Elections Act—which perhaps represent the highest legal ideals to achieve free and fair elections for representative democracy—they cannot be automatically imported into the conduct of union elections.

[42] I therefore do not find that the symbol used by the Workers Team, even if objectionable, would have caused any unfairness in the elections. Further, as made clear by article 21 of the BPSU's Constitution, the preparation of the ballots was done by the Election Committee, which included representatives from the applicants' team. It follows that the Registrar's decision to certify the election results notwithstanding this complaint is not a decision which could be impugned on the grounds of irrationality. For reasons explained above, I also cannot make a declaration that the symbol is *ultra vires* the Elections Act.

Ineligibility of certain candidates

[43] The applicants also complain that two of the candidates running on the Workers Team slate (Ernest Tillie Burrows, Philip Greenslade) and one independent candidate (Cindira Bain) were ineligible to contest the elections as they were public service retirees, and not regular members. I accept the submission of both the Registrar and the interested party that this contention is based on a misreading of the Constitution. As set out above, Article 3(i) provides for membership eligibility in the Union as follows: "*All persons who are regularly employed by the Bahamas Government, a Ministry, Public Board, Public Committee, Public Corporation or by the Union, provided that no person shall be eligible for membership unless he is or has been so employed*". Thus, this article expressly provides for former employees in any of the categories listed to continue to be eligible for membership after retirement. It is also consistent with the First Schedule, Part II (Section 9) of the IRA, which sets out the matters to be included in the constitution of a trade union of employees. Paragraph 3(1) of that section provides in part that qualifications for membership should include the stipulation that "no person shall be eligible for membership of the trade union unless he is, or has been, regularly and normally employed in the industry, or as a member of the craft or category of employees, which the union represents."

[44] Article 4 (xiii) provides for members who have reached the mandatory retirement age with continuous membership of fifteen or more years and who wish to maintain their Union's Major Medical Plan to "*maintain their membership in the Union for that purpose at a rate of 40% of the Membership dues along with the payment of total Medicare Dues*." Finally, Article 7(vi) of the Constitution provides that: "*Only financial members on the date of an Annual General Meeting or Special General Meeting shall be allowed to vote or be eligible for office.*"

[45] In his affidavit, Mr. Ferguson states that "*I can confirm that, to the best of my knowledge, information and belief, only financial members participated in the BPSU's Election of Officers and were duly elected to Office*." This was not disputed, and therefore the challenge to the eligibility of the retired members to stand for the elections is misconceived.

Allegations of Mr. Ferguson assuming role of Chairperson of Election Committee

[46] According to Mr. Wilson at paragraph 8 of his affidavit:

> **"[The] incumbent Kimsley Ferguson breached and violated Article 21 (iii) of the BPSU Constitution when he assumed the role of chairperson of the Electoral Committee. He also acted on several occasions as Chairman of that committee. The appointed Secretary General recused herself because she was a candidate in the elections and instead of inviting the Assistant Secretary General to join the Election Committee in her place Mr. Ferguson, acting as Chairman, selected her replacement by himself."**

[47] This is disputed by Mr. Ferguson, who contended:

"Contrary to the false assertion made by Mr. Wilson in his said affidavit, I did not assume the role of Chairperson of the BPSU's election committee. An election committee was duly established by the Executive Board of the BPSU in accordance with article 21 (iii) of the BPSU's Constitution. While Mr. Wilson did not serve on the said election committee, two representatives selected by the purported "P.O.W.E.R. Team" were appointed and did serve on the election committee."

[48] Although there is some conflict in the evidence (which it was not necessary for the court to resolve to do justice in this matter), the applicants acknowledge that the incumbent President only "acted" as Chairperson until a replacement was selected. Also, I note that article 10(iv) provides for the Union's Executive Board to "interpret the rules when necessary" where they are silent between Annual General Meetings. Article 21 provides for the Secretary General to head the Election Committee and is silent as to what is to happen if that person is not available or declines the position. It appears that a person other than the incumbent President was eventually appointed as Chairperson. This is a matter that was best left to the internal affairs of the Union, and the court will not lightly intervene in the union's internal management. As already observed, the court will also allow some flexibility in the interpretation of the union's rules. On the evidence, it also appears that the Election Committee discharged the functions given to it under article 21, although complaint is made of the generation of the voters' list (which is addressed below).

[49] In my judgment, the issues involving the Election Committee did not amount to any breach (or any substantial breach) of the union's rules and did not have any impact on the overall fairness of the elections. In the result, there was nothing irrational about the Registrar's decision to dismiss these complaints and certify the elections.

Allegations of bias by the Registrar

[50] The applicants make a generalized allegation (para. 17 of the affidavit) that the Registrar was "conflicted and bias (*sic*)" in his dealing with the Applicants as opposed to Mr. Ferguson, who served as the Respondent's Vice-President for many years. Mr. Pinder categorically denies this and asserts that "*at all times I acted fairly in my decision making process for this poll*".

[51] The interested party takes this analysis a little further. They contend that far from showing any favoritism to the Workers Team, the actions of the applicants and the respondent post election in fact raise questions as to whether it was not Mr. Ferguson's team that was being treated unfairly and being disadvantaged. This emerges in paragraph 7 of the Ferguson Affidavit:

"I reject any suggestion that the Respondent is in fact biased, or has in any way demonstrated a bias in my favour. Much to the contrary, my fellow candidates and I, as well as the BPSU, are deeply concerned by the Respondent's attempt, made manifest at the hearing in this matter on 4th December 2020, to undermine and vitiate his own Certification of the BPSU's Election of Officers, particularly on the unsubstantiated and tenuous basis proffered by the Applicants, without a hearing or alerting all affected parties. Counsel for the Respondent advised the Court that, in collusion with the

Applicants, they had determined to have the BPSU's duly certified election results set aside and had agreed a new election date, terms, and a new symbol for the Applicants, all without communicating any of this to myself as President of the BPSU or any other candidates in the said certified Election of Officers. My fellow candidates and I are therefore reasonably concerned about the integrity of any new elections, as the Respondent has already clandestinely colluded with one team of candidates, the Applicants, without engaging fully and transparently with all candidates affected, and the Union itself, regarding proposed new elections."

[52] Bias in the exercise of a power by a public authority or some other body may manifest itself in different ways, but mainly where: (i) the decision maker has an interest (pecuniary, proprietary or otherwise) in the outcome of the matter (which would violate the *nemo judex* rule—no one is to be a judge in his own cause); or (ii) where by his conduct, behavior, or comments the decision-maker shows a predisposition to favour or disfavor a party or result (see **Rees et al. v. Crane** [1994] 1 All ER 833).

[53] The allegation of bias is hinged solely on the prior association between Mr. Pinder and Mr. Ferguson as union officers. But the applicants do not point to any specific decision or act taken by Mr. Pinder which would show any lack of impartiality on his behalf, or favoritism to Mr. Ferguson. In fact, the functions of the Registrar (so far as the question of alleged bias arises in relation to the decision being challenged) was only to decide *ex post facto* whether the results of the ballot complied with s. 20. There was no decision taken by him prior to the conduct of the elections which involved the applicants or Mr. Ferguson's team that could have favoured one or the other. In fact, his statutory jurisdiction was not (and could not be) invoked until he was invited to supervise the election (See the **BHCAWU case**, per Newman JA, para. 16). Secondly, in any event, s. 21 of the Union's rules requires the Election Committee to liaise with the Registrar to ensure compliance with s. 20 of the Act, and even though there is some conflicting evidence as to Mr. Ferguson's role on that committee, it has not been disputed that it was a representative committee. Finally, there is force in the contention of the interested party that the Registrar's support of the application to set aside his certification shows an impartial approach, and perhaps this action might be said to be adverse to Mr. Ferguson and his team, considering the allegation of lack of consultation with the Union in this regard.

[54] I therefore do not find any substance in the allegations of bias and conclude that the Registrar's decision in rejecting it cannot be impugned on judicial review grounds. I hasten to add that it is improper and irresponsible for parties to level allegations of bias against public authorities performing their statutory functions in the absence of any supporting evidence (**Rees et. al. v. Crane**, *supra*).

Voters' list

[55] As to the complaint that the voter's list was received by the candidates later than customary (less than a week before the elections as compared to the usual three months) and therefore breached a legitimate expectation held by the applicants, I find this to be a seriously misconceived claim. It is undoubtedly correct that a union's rules might be supplemented by custom and practice (see **Heatons Transport v TGWU** [1972] IRLR 25,

[28-29], per Lord Wilberforce). However, the doctrine of legitimate expectation operates in a public law context to ensure that *public* authorities do not resile from specific promises made to identified persons or groups on which they have acted to their detriment. Other than those cases in which statute has intervened to regulate the conduct of unions and protect the rights of members (mainly in the governance of the union and in industrial action), the rights of union members vis-à-vis the union in terms of their internal rules or practices sounds in contract, not in public law.

[56] In any event, it is clear that judicial review is a remedy directed to a particular decision made by a public authority (see **Bahamas Hotel Maintenance & Allied Workers Union v. Bahamas Hotel Catering & Allied Workers Union, et. al**. [2011] UKPC 4 (per Lord Walker, para. 35). The decision being challenged is the Registrar's certification of the poll, and it is therefore difficult to see how a claim of legitimate expectation can be maintained in respect of an alleged breach of the union's rules or practices by candidates against the union. In any event, the duty to produce the voters' list pursuant to s. 21 of the Rules was imposed on the Election Committee, which included representatives from the POWER Team, and whatever reason there was for the delay must be imputed to the Committee. Again, it cannot be said that the decision of the Registrar to certify in light of this claim was unreasonable in the *Wednesbury* sense.

Spoilt ballots

[57] There is very little by way of evidence to substantiate this claim, other than the bare averments. This was also one of the allegations which had been complained of to the Registrar and investigated prior to his certification and rejected. I can find no basis for saying that the conclusion at which he arrived was unreasonable.

The main challenge

[58] In essence, the surviving and central challenge of the applicants comes down to compliance with section 20 of the IRA. It is formulated at paragraphs 13 and 14 of the Wilson affidavit as follows.

> **"13. That the BPSU failed to comply with Section 20 of the Industrial Relations Act (IRA) by not insuring that secret ballots were used in the electoral process.**
>
> **14. That Ms. Janet Russell who is the Officer in Charge of the Department of Labour in Grand Bahama was not appointed Designated Officer by the Minister of Labour, Transport and Local Government nor was she appointed to work as an Election Agent. She spent the entire day sitting at the table in the polling station which contravened Section 55(i) of the Parliamentary Elections Act Statute Laws of The Bahamas. Further, during the unofficial count of Grand Bahama when candidates were allowed to scrutinize the ballots it was observed that some of the ballots had the stamp on the back but no signature of the Designated Officer."**

[59] The chronology of the events and the issues with the actual conduct of the election are more fulsomely set out in the affidavit of the Registrar, and it is useful to quote the relevant passages in some detail to properly have the context and the Registrar's view on the issues:

> **"9. On November 13th, 2020, I was advised of this matter before this Honourable Court by the Attorney General's Office and was sent the documents filed for review. Upon reading the Affidavit of Mr. Arison Wilson, at exhibit labeled "A.W.-3", Judy Hamilton wrote an appeal letter to the Minister of Labour, the Honourable Senator Dion A. Foulke dated October 1 2th 2020. This was the first time I had seen the letter and the contents therein. While I know that there was no route of appealing my certification under section 13 of the Industrial Relations Act, Ch. 321, to the Minister, the new concerns presented still warranted my attention and investigation. I decided to investigate what may or may not have transpired at the Grand Bahama polling station.**
>
> **10. I spoke with the officers of the Department of Labour that supervised the Grand Bahama Polling station. My investigation confirmed the complaint contained within the above-mentioned letter to the Minister. There were ballots that members voted on that were only stamped with the Department of Labour's stamp but not also signed by the Designated Officer as per the Department's procedure to ensure the integrity of the vote. When a member presents themselves to vote, they are given a ballot that contains the Department of Labour's Stamp and Designated Officer's signature on the back of the ballot. After they proceed to the voting booth and vote, the member is asked to fold the ballot and show the Designated Officer the fold, that would reveal the stamp and signature, before they drop the ballot into the locked box. A ballot will only be considered valid it if has both the Department of Labour's Stamp and the Designated Officer's signature on the back of it.**
>
> **11. Ms. Janet Russell, Assistant Director of Labour, was designated with supervision powers by the Minister of Labour by execution of a Designated Certificate in accordance with section 20(4) of the Industrial Relations Act. However, Mr. Vaughan Bullard another officer with the Department of Labour, purported to supervise the election and signed the ballots as if he was in fact the Designated Officer. Mr. Bullard was not designated by the Minister with supervisory powers. A copy of the Designation Certificate is herein marked and exhibited "JP-5".**
>
> **12. Therefore, had the Applicants presented the complaints regarding the Grand Bahama Polling Station, my decision to certify would have been different. As the complaints of the ballots images and the nominees made prior to certification, in my opinion, did not meet the threshold that prevented certification of the poll. However, the missteps revealed by the Department's officers in Grand Bahama, while regrettably (*sic*), does meet the threshold. The provisions of section 20(4) of the Act is (*sic*) mandatory and non-compliance with the provisions means that any officer who attempts to exercise powers that were not properly appointed or designated to them is not deemed valid and the ballot cannot be certified.**

13. In light of the findings, I also appreciate that in my capacity as Registrar of Trade Unions, I am unaware of any legal avenue whereby I can recalling or rescinding my own certification (*sic*), even if there was consideration given to a time frame for recall, for example, within thirty days from certification. I pray an avenue can now be confirmed in case law that I can do so, within a reasonable time-frame, through the endowment of section 36 of the Interpretation and General Clauses Act (Ch. 2), with powers intended to facilitate my functioning as the Registrar.

14. In accordance with section 20 of the Act, if a ballot is not certified as being properly taken, the union would be directed to take a further ballot. However, Article 7 of the union's constitution states that the election must be held in the month of June but no later than September 30th. As the Union is now outside of their constitutional time-frame to direct another ballot, I am restricted from directing them to do so, as I am unable to certify an election outside of the constitutionally stipulated timeframe.

15. Therefore, in order to regularize and rectify the tenure of the Executive Council of the Union, I ask this Honourable Court to allow me as Registrar of Trade Unions, under Section 21 of the Industrial Relations Act to take carriage of and supervise the election of officer's poll. A section 21 Poll and Certificate is designed to regularize the tenure of the executive council of a union when they fail to do so, this failure can be due to an unwillingness to call for an election or simply a failure to be able to. This Section 21 Certificate will place the tenure of the union where it ought to have been. Hence even though the proposed date of the election will be January 20th, 2021, the Section 21 Certificate will include a tenure of the Executive Council from September 29th 2020 to September 29th 2023.

16. In these premises, I humbly ask that this Honourable Court to (sic) declare the elections held on September 29, 2020 null and void, as the poll was not properly taken in accordance with Section 20 (4) of the Industrial Relations Act and secondly, there be an Election of Officers Poll of the Union on January 20, 2021 in accordance with Section 21 of the Industrial Relations Act. I will accept the nominations as presented in the Election Poll of September 29th, 2020. All teams can provide the Department of Labour with the image of their choice to be used on the ballot. The ballots will be prepared and disseminated by the Department of Labour under under a Section 21 Election of Officers Poll."

[60] The gravamen of the complaint in which the Registrar finds merit may be distilled to this: the ballots used in Grand Bahama (or some of them) had the stamp of the Department of Labour but were not signed by the Designated Officer. Instead they were signed by another officer from the Department of Labour who worked the poll. Before turning to examine whether or not there was compliance with section 20, I should say something about the general law with respect to setting aside election results.

Setting aside Union elections

[61] All of the cases speak with one voice that the general principle with respect to disputed election results is that they should not be nullified for irregularities or minor breaches which do not materially affect the results.

[62] In **Woods** [para. 31], Winder J. quoted with approval the dicta of Langrin J. in the Jamaican case of *The Representation of the People Act v. The Election Petitions Act*, eta SUIT No. MOO1/98 (albeit a parliamentary election matter), where he stated:

> **"The irregularity to achieve the effect of voidance must be one that would lead to a substantial distortion of subversion of the process of free and fair elections. To establish this ground the evidence need not affect the majority obtained by the winner. It would be sufficient to show that the process of free and fair elections would be substantially distorted or subverted by the irregularity. An election is not to be upset for an informality or for a triviality. The irregularity must be something substantial which is calculated to affect the result of the election even though it may not actually affect it. The court must look to the substance of the case and ascertain whether the irregularity is of such a nature as to be fairly calculated to produce a substantial effect upon the election.**
> **However, a failure to observe statutory requirements for the conduct of the poll must be met by stiffer penalties. No matter how trivial an irregularity may be, it must never be condoned as a mere irregularity. The punishment provided in the Act must be sufficient to act as a deterrent."**

[63] In **Brown v. AUEW** (*supra*), Walton J. refused to declare a trade union's election conducted by postal ballot invalid on the basis of various irregularities in the conduct of the election, which included the fact that a considerable number of members either received their ballots late or did not receive them at all. This is what he said (beginning at 157 F-H and continuing to 158 A-E, quoting elliptically):

> **"The first question which arises, and which has given me considerable difficulty, is whether the October 1972 election was not so utterly chaotic as to be completely void as an election. …It appears to me, however, that (save perhaps in relation to wholly exceptional facts) the crucial question which falls to be asked in this regard is whether the election was conducted substantially in accordance with the procedure laid down in the rules and otherwise in accordance with the directions of the executive council, and is not simply to be answered by pointing to the fact that a considerable number of members did not receive ballot papers, or did not receive their ballot papers in time. ….The fact that that mistake was made had nothing to do with the conduct of the election and hence its overall validity. …[I] think that this was a mere irregularity, highly regrettable, but not going, as it were, to the root of the election."**

[64] The principle that an election result will only be set aside if there is substantial irregularity calculated to affect the result also has deep roots in Canadian jurisprudence (see **Anderson v Stewart** (1921) 62 D.L.R. 98 (AC). In the more recent case of **Laboucan et. al. v. Looksin et al.** [2008] FC 193 (CanLII), O'Reilly J. said:

> “**The cases cited by the applicants deal with a general principle that arises in election disputes that I find is equally applicable here—that is, those who contest elections should have to prove that something seriously went wrong. Election results should not be lightly disturbed. The applicants concede that no election is perfect and that there will always be irregularities. In order to meet their burden, therefore, they must show substantial problems with the election.”**

[65] Then, as expressed by the learned editors of *Harvey on Industrial Relations and Employment Law Issue 285* (Published December 2020), speaking about the right of cancelling the election results for a union once declared:

> **“The interest of good governance demands that there should be an end to petty bickering and recrimination, and in that sense, the declaration of the result is final; the matter is closed and cannot be re-opened in the absence of evidence of some fundamental flaw, such as the ‘election’ of an unqualified candidate, or wholesale ‘voting’ by persons not entitled to vote, or ballot rigging. To oversimplify: once the result has been declared, an imperfect election is nevertheless a valid election, but a dud election is a non-event (*Wise v USDAW*; *Brown v. AUEW*, above, *Douglas v Graphical, Paper and Media Union* [1995] IRLR 426, Morrison J.; *AB v CD* [2001] IRLR 808, Morritt V-C, at para. 34).**

[66] It is very important, however, not to lose sight of the point that the principles on which the court may set aside parliamentary or local government elections do not *stricto sensu* apply to a challenge on judicial review (see, for example, **Tanzanite International Ltd. v. AG of St. Lucia** [2008]. ECSC J1010-2 (CLAIM NO. 2008/0644) per Cottle J.). When dealing with a claim in judicial review challenging the Registrar’s decision to certify election results (or the Minister’s decision on appeal under s. 13 to approve his non-certification), the court is exercising a very different function than when hearing an election petition from parliamentary or local government elections. In the latter case, the court is concerned with whether the irregularities or breaches would have materially affected the results (which is necessarily a merits-based review); in judicial review, the court is concerned with whether the decision of the Registrar to certify was irrational or procedurally improper, having regard to the conduct of the elections, or whether there was compliance with the Union’s rules or statutory requirements. But it is clear that some of the principles overlap, as the scale and gravity of the alleged irregularities and their impact on the overall fairness of the elections are factors which the court will have regard to in determining issues such as reasonableness and procedural propriety for the purposes of judicial review.

Bahamian cases

[67] I have before me several examples of cases in which this court has quashed union election results for serious irregularity and failure to comply with statutory conditions. In **Davis**, Osadebay J. set aside the BPSU elections held 16 March 1994 for failure to comply with the requirements in its Constitution as to the time period for the holding of elections and, more importantly, for failure to comply with the provisions of s. 20, which he found were mandatory:

> **"…the provisions of Sections 20(4) and 20 (2) of the Industrial Relations Act are mandatory and non-compliance with the provisions of Section 20(4) means that the officer appointed or designated cannot properly exercise the powers conferred on him...and since Mr. Bert Edgecombe who purportedly exercised those powers was not properly appointed or designated under the provisions of Section 20(4) his purported exercise of such powers of supervision and certification was not valid and therefore the ballot purportedly taken by him could not be certified as required by Section 20(2) of the Act."**

[68] In the more recent case of **Woods** (judgment delivered 16 September 2020), Winder J. did not disturb the decision of the Registrar to refuse to certify the results of the election for officers of the Bahamas Utilities Services & Allied Workers Union held on 30 June 2002 on the ground that "the overall fairness of the election" was called into question because of the totality of the alleged irregularities. These included the fact that the poll in Exuma was conducted at the Administrator's Office in Exuma under the supervision of the Administrator, and not the officer from the Department of Labour who was designated by the Minister to supervise the elections, and that the applicants marked the ballots with their team's stamp. Winder J. refused the application for judicial review, *inter alia*, on the ground that the applicants had not exhausted the statutory mechanism for appeal under s. 13, and held that as the poll conducted was "void and of no effect" the Registrar was free to set a date for the conduct of new elections under s. 21 of the Act.

[69] In the **Airport, Airline and Allied Worker's Union case**, Isaacs J. quashed the Registrar's certification of a secret poll to remove certain officers of the union for failure to comply with the seven days' notice of an intention to conduct a poll required by section 20(2).

[70] In the **BHCAWU case,** Newman, JA made the observation that [13]:

> **"[A] legally flawed nomination process will render the election unlawful and of no effect, and certification of a ballot where there has been a legally flawed nomination process will not cure the defect. The election will, notwithstanding certification, be unlawful. The certification in such a case will have no meaning and effect, for the election will be declared unlawful. The certification will be vacated or quashed."**

The statutory conditions set out at s. 20 of the Act

[71] In that same case, the Justice of Appeal identified what he termed the "*two cardinal principles secured by the Act [Industrial Relations Act] in connection with elections*": the first being that the Union constitution "*must secure for members of a trade union an equal right to vote and a reasonable opportunity of voting*"; and the second being that "*when voting, members are protected by the privacy of the balloting process.*"

[72] In my view, the statutory conditions for the conduct of a valid election under s. 20, including the matters identified by Newman JA, are as follows:

(i) The electoral process must afford members an equal right to vote and a reasonable opportunity of voting;
(ii) The vote must be conducted by a process which protects the secrecy of the ballot;
(iii) The union must give at least 7 days' notice to the Registrar of the intention to take the ballot and the place and time at which it will be taken;
(iv) The Registrar or a designated officer [i.e., an officer designated by the Minister in writing pursuant to s. 20(4)] must attend at the stipulated time and place and the ballot must be taken under their supervision; and
(v) The Registrar or a designated officer must certify that the ballot was properly taken.

Has there been compliance with these conditions?

[73] As seen from the applicants' complaints, and the material submitted by the respondent, the main challenges are to (ii), (iv) and (v).

Secrecy of the balloting process

[74] On this point, I have before me only the bare assertion in the affidavit of Mr. Wilson at para. 13 that "*the BPSU failed to comply with Section 20 of the Industrial Relations Act (IRA) by not insuring that secret ballots were used in the electoral process*." There is not one scintilla of evidence that any member cast their ballots elsewhere than in a concealed polling booth or voted in a manner that allowed his or her vote to be observed and therefore violated the principle of secrecy. In fact, the procedure outlined in paragraph 10 of the Registrar's affidavit (which it has not been suggested was not followed) is that "*after they [voting members] proceed to the voting booth and vote, the member is asked to fold the ballot and show the Designated Officer the fold, that would reveal the stamp and signature, before they drop the ballot into the locked ballot box*."

[75] In **Ingraham and Others v McEwan** [2002] 65 WIR 1, the Court of Appeal rejected a contention that the marking of a counterfoil of the ballot paper with the voter's number could potentially reveal the identity of a voter, if the votes had to be scrutinized later for the purposes of an election challenge. The facts of that case are not relevant to the case at bar. But I bear in mind the admonition of the Sawyer, P., in giving the reasons of the Court, in which she said: "*The respondent asked the court to find, in effect, that it is possible that a voter's identity as well as how that voter voted could be revealed because of the marking of the counterfoil. It has been said that anything is possible: courts however, do not make decisions in civil cases on the basis of possibilities; courts make decisions either on a preponderance of probabilities, or because there is no reasonable doubt about the existence of relevant facts*."

[76] There are no relevant facts before me to substantiate the allegation that voter secrecy was in anyway compromised, and I find no merit in this ground.

The alleged failure of the Designated Officer to supervise the election

[77] The gravamen of the complaint really boils down to an alleged violation of [iv], that is, that the poll was not supervised (or properly supervised) by a designated officer. I must point

out immediately that, apart from being incorrect in a material way, the applicants' evidence in support of these allegations is opaque. As will be noted from the portions of the respective affidavits cited above, the applicants state that Ms. Janet Russell "… *was not the appointed Designated Officer by the Minister of Labour, Transport and Local Government, nor was she appointed to work as an Election Agent*."

[78] The evidence of the Registrar establishes very clearly that Ms. Russell was in fact designated with supervision powers by the Minister of Labour, by execution of a Designation Certificate, made under the hand of the Minister, which said certificate was exhibited and dated 22 September 2020. It read, in material part:

> **"In accordance with the provisions of Section 20, Subsection 4, of the Industrial Relations Act, Chapter 321, Statute Law of The Bahamas: I hereby appoint, Janet Russell, Assistant Director, Designated Officer, to Supervise an Election of Officers Poll for the Bahamas Public Services Union to be held on Tuesday 29 September 2020, between the hours of 8:00 a.m. to 6:00 p.m. at the Bahamas Union of Teachers Hall, Grand Bahama, The Bahamas."**

[79] When his attention was drawn to this, Mr. Ferguson was forced to concede that the averment as to Ms. Janet Russell not being designated was incorrect. But he maintained the claim that she did not supervise the election. It was said that "*she spent the entire day seated at the table in the Polling Station*" which is said to have contravened s. 55 of the Parliamentary Elections Act.

[80] The omissions in the applicants' bare allegations were somewhat filled in by the affidavit of the Registrar, in which it is indicated that the real issue was that notwithstanding Ms. Russell's certification as the Designated Officer, it was in fact Mr. Vaughn Bullard, another officer with the Department of Labour, who "purported" to supervise the election and signed the ballots, as if he were in fact the Designated Officer.

[81] These allegations call for careful study. Firstly, as already pointed out, the provisions of the Elections Act do not apply to union elections, and it is unclear in any event what provision of s. 55 was being invoked by the applicants and/or its relevance. Presumably, it was being invoked on the misapprehension that Ms. Russell was not the designated officer. (That section directs that the "presiding officer" should not permit more persons into the polling place than the corresponding number of booths, and to exclude all but the necessary persons (i.e., returning officers and polling clerks, candidates, elections agents, police on duty, and aides to incapacitated voters).)

[82] Secondly, during the course of argument, both the applicants and the Registrar contended that the functions assumed by Mr. Bullard would have violated the *delegatus non potest delegare* principle (improper delegation of power). I am not able to accept this proposition, as there is no evidence that Ms. Russell in anyway attempted to sub-delegate her authority as designated officer to Mr. Bullard to supervise the elections. The evidence of the applicants and the Registrar is that she attended at the polling place and remained there "all day", presumably for the duration of the elections. It is also clear that Mr. Bullard did not certify the election results, which if he had done, would have been a clear violation of s. 20.

What constitutes supervision?

[83] This issue also arose in **Woods**, where Winder J. observed that "*supervision is not a defined term in the Act*". But it is an accepted canon of statutory construction that in construing the meaning of words "an appropriate starting point is that the language is taken to bear its ordinary meaning in the general context of the statute:" **R v Secretary of State for the Environment, Transport and the Regions, ex P. Spath Holme Ltd**. [2001] 2 AC 349. The *Oxford Compact English Dictionary* (2nd Ed.) defines supervise as to "*observe and direct the performance of a duty (a task or activity) or the work of (a person)*". In a U.S. case (which I refer to only for analogical purposes) it was observed, in the context of the phrase "to supervise the assessment of [taxes] of their respective counties", that "*To supervise does not mean to do the work in detail, but to see that it is done. It means to oversee, with power of direction*" [**Von Rosenberg v. Lovett, Tex. Cit. App.,** 173 S.W. 508).

[84] Considering the functions of the Registrar (or the Designated Officer) vis-à-vis the conduct of union elections in the context of the IRA, Newman JA said in the **BHCAWU Case**:

> **"17. […] The Registrar has a duty to decide whether, as a matter of fact, the ballot has been properly taken. The meaning of "proper" must be derived from the context; namely whether the statutory purpose of secrecy has been achieved.**
>
> **18. The decision for the Registrar involves an assessment of the facts and the circumstances attending the ballot and an assessment of their impact on the propriety of the ballot; namely whether a secret ballot has been taken."**

[85] On the foregoing facts and analysis, I am not prepared to find that Ms. Russell did not supervise the elections. I have come to this conclusion for the following reasons. Firstly, it emerges, even on the applicants' own evidence, that Ms. Russell did in fact embark upon her duties as the Designated Officer. This is what was indicated in the appeal letter to the Minister: "*I wish to draw to your attention the fact that on the morning of the Election the Ballots for the BPSU elections in Grand Bahama, which were sent to the Administrator the day before, were turned over, counted and signed for by the Officer in Charge of The Department of Labour, Janet Russell at the designated Polling Station*." The letter goes on to say, as did the affidavit, that Ms. Russell was not appointed as the Designated Officer, but we now know this to have been mistaken.

[86] Secondly, I do not find that there is anything inherently inconsistent with a Designated Officer being assisted in the performance of supervising the elections by a subordinate officer of the Department, as long as the Designated Officer attends the polls and retains legal supervisory authority over the process. This case is completely unlike the situation in **Davis**, where an improperly designated officer purported to supervise and certify election results, or **Woods** where a non-designated person and therefore someone lacking statutory authority presided over a particular poll. Here, the properly designated

Officer attended the election and oversaw its conduct (even if it is contended that she could have taken a more active role).

[87] Thirdly, at paragraph 10 of his affidavit, the Registrar asserts bluntly "*A ballot will only be considered valid if it has both the Department of Labour's Stamp and the Designated Officer signature on the back of it*." Mr. Ferguson's riposte to this is that: "*…there is nothing in the BPSU's Constitution or s. 20 of the IRA that speaks to the ballots requiring a stamp and/or signature of the Designated Officer to be valid, and the mere allegation that "some" of the ballots had one and not the other does not rise to the requisite level so as to void the entire Election of Officers*."

[88] While the procedure indicated by the Registrar may undoubtedly be a prescribed electoral requirement for parliamentary elections (see, for example, s. 60(2)(a) of the PEA, which requires the signature of the presiding officer for a vote to be counted), I would venture to say that the Registrar's statement goes too far in respect of union elections. In this regard, the interested party is right to point out that there is no statutory requirement for the ballot to be stamped and signed by the Designated Officer, neither in the Act nor in the Union's rule. As to the latter, it has been observed by Isaacs J. (as he then was) in the **Airport, Airline and Allied Workers Union case** that in assessing whether there has been compliance with s. 20 the Registrar is in any event "not required to have regard to the Union's constitution to determine if the preconditions set out in it for the purpose for which the meeting has been called have been met." I agree that s. 20 only speaks to the statutory requirements for the conduct of an election. But in the instant case, regard to the Union's rules would not have produced any different result, as they themselves only require compliance with s. 20 (art. 21).

[89] In the absence of a statutory or rule-based requirement, the failure of the Designated Officer to sign the ballots, taken at its highest, would amount to an omission to follow her own departmental guidelines or practice for the conduct of union elections, even if the practice was informed by parliamentary election requirements. There is no allegation in this case that the ballots used were not the official ballots; they bore the stamp of the Department to show that they were properly issued, and the signature of an officer of the Department of Labour to boot (even if not that of the Designated Officer). Should members who legitimately cast their votes for the candidates of their choice, in elections which were otherwise free and fair, be disenfranchised because the Designated Officer made an administrative omission in not signing the ballots? I think not.

[90] By way of comparison, it may be noted that in the United Kingdom (and no doubt in many other jurisdictions), trade union elections are conducted by postal (mail-in) ballots. There is no in-person voting which requires the signature of a presiding officer or poll clerk to contemporaneously verify the ballots. In fact, even in parliamentary or local government elections in the UK conducted under the Representation of the Peoples Act, the ballot is only required to be marked with an official stamp (and not signed) to indicate that it was properly issued (see **Morgan and Others v Simpson and Another** [1975] Q.B. 151).

Conclusion on compliance with s. 20 of the Act

[91] Section 20 is not a model of drafting clarity. But when it refers to the requirement for a ballot to be "so taken" and to be certified by the Registrar or a designated officer "to have been properly taken" it can only be referring to compliance with the statutory conditions laid down in that section. In my judgment, based on the facts before me, all of the statutory conditions and objectives of s. 20 were satisfied in the conduct of the elections. Firstly, there has not been any complaint that any member was not afforded an ample or equal opportunity to vote. Secondly, the generic complaint that voter secrecy had not been secured is wholly unsubstantiated and rejected out of hand. Thirdly, the Union gave the requisite 7 days' notice to the Registrar of the intention to take the ballot (the letter to the Registrar was dated 14 September 2020 for elections set for 29 September 2020). Fourthly, in the absence of a statutory requirement, I am unpersuaded that the failure of the Designated Officer to sign the ballots amounts to a failure to supervise within the context of s. 20. Fifthly, the election results were certified by the Registrar, who is statutorily empowered to do so.

[92] I must indicate that this particular aspect of the case has caused me considerable difficulty, not only because it involves the construction of a problematic bit of legislation, but because in coming to my decision I have had to reject the position contended for by the Registrar. I do not do so lightly, and I have paid the highest regard to the views expressed by the Registrar. But I bear in mind that although the Registrar is not to be reduced to "a cipher" with respect to the performance of his statutory functions vis-à-vis unions (as has been said in one case), neither does s. 20 constitute him a mini-Parliamentary commissioner or presiding officer armed with coercive powers to conduct union elections pursuant to the statutory code for parliamentary elections, or according to rules imposed at his whim.

[93] I would therefore refuse to quash the Registrar's certification of the ballot on the grounds of irrationality. I also do not find that the conduct of the elections was *ultra vires* s. 20, based on the new information which came to the Registrar's attention post his certification.

Discretionary nature of relief in judicial review

[94] I also remind myself that this is an application for judicial review, and all relief is discretionary: see the **Bahamas Hotel Maintenance & Allied Workers Union case** (per Lord Walker, para. 40.). In particular, the court will take account of the interests of good public administration in exercising its discretion whether or not to grant relief. As I did not find any non-compliance with the statutory conditions, I would therefore have exercised my discretion to refuse the reliefs sought in spite of the alleged irregularities, in the interests of avoiding any detriment to the public interest.

[95] In this regard, the members of the Union are entitled to know without any undue delay who the officers and executive body of the Union are, and they are entitled to rely on the certificate of the Registrar unless and until set aside by the court. The Registrar certified the elections fully aware of the complaints of the applicants. In any event, his duty to ensure that the conduct of the elections complied with s. 20 is a statutory duty which is independent of and does not depend on the receipt and investigation of any complaints.

Moreover, the Government is entitled to know the persons who may legitimately represent the interests of the Union and its members at the negotiating table. Finally, the conduct of elections are costly, time-consuming and can cause considerable inconvenience, as the Employer (the Government) has to release employees from work to allow them an opportunity to vote if fresh elections were ordered.

Additional Issues

[96] These conclusions are sufficient in law to decide the judicial review motion. But as the parties have canvassed a range of other issues before me, and the Registrar has also sought clarification on issues going to the performance of his statutory functions (even going so far as to ask for relief, which the interested party rightly contends he is not entitled to ask for on this application), it would be discourteous of me to not address them. I also bear in mind the observation by Newman JA in the **BHCAWU case** (stay application, 4 January 2010, pg. 13), that it is conceivable that the Registrar could approach the court for directions, even though this is not such an application. Thus, what I have say below may provide some guidance on certain aspects of the Act if this matter goes no further, and if it does, it will be grist to the mill for the consideration of the appellate courts.

Whether Registrar can voluntarily set aside his certification

[97] Both the Respondent and the applicants contend that, aside from the quashing powers of the court under a judicial review application, the Registrar has power to set aside his certification of the poll and Order a new poll pursuant to s. 21. They concede that there is no express power to do so in the Act but contend that the doctrine of ancillary or implied powers apply, as codified at s. 36 of the Interpretation and General Clauses Act (Ch. 2), ("IGCA" or "Interpretation Act"), may be prayed in aid. That section provides in material part as follows:

> **"36(1): Where any written law confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of an act or thing.**
> **(2) Without prejudice to the generality of subsection (1), where any written law confers power—**
> **[…]**
> **(c) to approve any person or thing, such power shall include power to withdraw approval thereof."**

[98] The applicants rely on dicta from the **Airport, Airline and Allied Workers Union case,** where, discussing the functions of the Registrar, Isaacs J. said (para.19):

> **"…I am cognizant of the statutory obligations of the Registrar, but I hold the view that there are actions that may be taken lawfully by the Registrar although not expressly mentioned in the Act that enhance and assist his functions as the Registrar. …Indeed he is endowed by section 36 of the Interpretation and General Clauses (Ch.2) with powers intended to facilitate his functioning as the Registrar."**

[99] Mr. Parker for the interested party argued forcefully that once the Registrar certifies a poll he is "*functus officio*" and has no ability to recall it. As appears in his written submissions:

> **"When the Respondent exercises his statutory discretion to certify the results of a Trade Union's election, all parties affected thereby are reasonably and lawfully entitled to rely on the same as being his final decision. The powers advocated for by the Respondent would deprive certificates issued by the Registrar under the Industrial Relations Act of the essential element of certainty intended by Parliament and required by Trade Unions. To allow the Respondent to unilaterally rescind or recall a duly issued certificate would undermine the entire scheme of the Act and expose Trade Unions to unnecessary uncertainty. Furthermore, it would in no way reduce the potential for litigation, as a decision to rescind or recall a certificate would likewise be amenable to judicial review."**

[100] The issue of ancillary powers has been considered by this court in a number of cases. But I will only refer to a few. In **Arawak Homes v. Bahamas (Minister of Public Works)** (No. 567 of 1997) [1998] BHS J. No. 42, Strachan J. considered the issue of whether the Minister of Works was empowered by virtue of (36(2)(c) of the Interpretation Act to cancel development approval granted under the Private Roads and Subdivision Act, where that Act was silent on the point. Although he did not definitively decide the point, Strachan J. indicated that he was not prepared to hold that the context of the Act ousted the application of s. 36(2)(c) (as had been argued by opposing counsel), mainly because the Act provided an avenue for an aggrieved person to appeal any decision by the Minister to the Supreme Court, and therefore the doctrine of implied powers would not introduce any unfairness.

[101] In **Bahamas Industrial Manufacturers and Allied Workers Union v. The Industrial Tribunal and others** (2004/PUB/jrv/00019) [BHS J. No. 68] Hepburn J. was also equivocal about the application of a similar section in the Interpretation Act (s. 42 (c)) to the powers of the Registrar under s. 17 of the IRA to withdraw the registration of an industrial agreement. Section 42 of the Interpretation Act provides for a person who is authorized under law to "*make, issue or approve any proclamation, order, notice, declaration, instrument, notification, licence permit, register or list*" to also have power to withdraw such approvals. Hepburn J. accepted that the common law doctrine of implied powers might be applicable, but the Judge based this on her construction of provisions of the IRA itself: "*…I am satisfied that it is not necessary to look to any implied power on the part of the Tribunal to withdraw the registration of the Industrial Agreement. It is clear from the provision of sections 55(b) of the Act that the Tribunal has jurisdiction not only to register the industrial agreements but also to hear and determine matters relating to the registration of such agreements. …Therefore, if Morton had a concern about whether the Industrial Agreement registered by the Tribunal was its document, it could have sought a determination by the Tribunal on the question.*"

[102] What both cases show is that the court has been reluctant to embrace the doctrine of ancillary powers as codified in the Interpretation Act to amplify express powers granted under statute. In other words, there can be no blanket importation of those powers to fill what is thought to be any lacunae in statutory powers to achieve a result that does not

align with what Parliament has specifically provided for, or which ill suits the statutory context.

[103] As indicated, any views expressed on this point are *obiter*, but in my considered opinion I would agree that the Registrar has no power *ex propri motu* to recall or rescind his certificate, and neither is he enabled by the provisions of s. 36 of the Interpretation Act. The doctrine of ancillary powers only operates to the extent that there is no contrary intention in the Interpretation Act itself or the "written law or instrument" which is being construed (see section 2 of the Interpretation Act). A contextual reading of the Act does not support the contention that Parliament intended for the Registrar to have the power to recall his certificate once issued. I am disposed to put this construction on the statute for the following reasons:

(i) Parliament (deliberately it may be surmised) did not provide for an appeal from the Registrar's certification of an election poll (as it did, for example, at section 13 from his refusal to certify) and it is an irresistible conclusion that recourse from the Registrar's certification is by way of an application for judicial review.

(ii) Where Parliament intended to empower the Registrar to recall a certificate (as it did with respect to a recognition certificate at s. 15), it made specific provisions for this to be done and prescribed a procedure to ensure fairness to the affected party. In the case of a proposed cancellation of registration, the Union is to be given two months' notice to be heard and afforded an opportunity to remedy the defect before cancellation.

(iii) To imply such a power without more would deprive persons affected of the right to natural justice and breach the *audi alteram partem* rule, which would always result in a successful application for judicial review (even if it turned out that there were proper grounds to revoke the certificate).

(iv) Finally, this would also constitute the Registrar acting as a review panel from his own decision to certify, which is eminently an issue for the court. As said by Lord Diplock in the **CCSU case**, whether or not a decision maker has properly appreciated the statutory remit of his powers in the event of a dispute is "…*par excellence* a justiciable question" to be decided by judges.

The s. 21 issue

[104] The applicants, and the respondent in particular, also contend that were the court to quash the certification of the Registrar, it should give directions for the Registrar to proceed under s. 21 to "regularize and rectify the tenure of the Executive Council", since any new election would be outside the Union's constitutionally mandated time period for conducting its election. Section 21 provides that where a union "*fails to take a secret ballot for the purpose of the election or any officer or member of its executive committee or any other governing body set forth in its constitution*" the Registrar or a designated officer may direct that a secret ballot shall be taken by a Union on a date and time and place to be specified in a notice published in the Gazette.

[105] Like my brother Winder J. in **Woods**, I agree that the period specified in a union's constitution for the conduct of elections does not impose any fetter on the statutory power

of the Registrar (and certainly not on the court) to direct new elections outside of the constitutionally prescribed period. The union's rules must yield to the mandatory requirement in the Act for the union to conduct elections by secret ballots to elect its executives, and for the union to have a democratically elected body to conduct its affairs. Common law principles exist to determine the continuity of leadership and validity of the acts of the Executive Body if it turns out that their election was invalid.

[106] I also agree that while s. 21 is specifically said to be applicable where the union *fails* to take a vote, its application must govern situations wider than a mere omission to conduct an election within the constitutionally stipulated time.

[107] It seems to me that s. 20 and 21 were intended to deal with union elections in different scenarios. Section 20 was intended to deal with elections which take place according to the regular constitutional process of the union, where the Registrar is invited to supervise, and the Union determines the date, place and time of the elections. If a Union conducts an election within the valid constitutional time which is not certified or found to be invalid for non-compliance with s. 20, there is nothing to prevent the Union (on the direction of the Registrar or the Court) having a re-run of that election pursuant to s. 20 if the election can still be carried out within the time frame allocated by the Union's constitution.

[108] Section 21, however, is primarily aimed at the situation where the election is not conducted within the regular period, or done within the period but invalidated, and by effluxion of time cannot be held within the union's constitutional framework. This is only logical, as the Union would have no constitutional authority to call an election outside of the constitutionally mandated time, nor could it give valid notice of such an election, and neither could such results be certified by the Registrar. Thus, s. 21 allows for the Registrar to cure the union's constitutional infirmity by the intervention of statutory powers enabling him to direct the ballot to be taken, and the Registrar is then empowered to set the date, place and time of the elections and give notice in the Gazette. These factors are no longer under the control of the Union, as they would be under s. 20 when the election is called by the Union and notified to the Registrar. In fact, in contradistinction to s. 20, s. 21 gives the Registrar coercive powers to direct elections and makes it an offence for members of a union to fail to comply with his directions given thereunder.

CONCLUSION & DISPOSITION

[109] In the circumstances, I dismiss the application for judicial review and refuse the declarations and orders sought by the applicants. As this application was successfully resisted by an interested party, who did not seek to be formally joined, I will direct the parties to submit written submissions on costs within 14 days of the delivery of this Ruling.

[110] I also thank counsel for their assistance in this matter, which was argued spiritedly but with charm on all sides, notwithstanding the polarization of the positions. I have also not thought it fit to burden this Ruling with a recitation of counsel's arguments, but I hope that they are sufficiently illuminated in the court's treatment of the issues and evidence canvassed.

Postscript

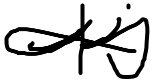
[111] It is also fitting, in the circumstances of the frequent challenges to union elections which besiege the courts, to append to this judgment a few observations which may have a bearing on these matters.

[112] The first is that the provisions of the IRA have clearly not kept pace with the developments in international law dealing with the rights of unions and their members, nor has it evolved to keep pace with the burgeoning governance requirements of unions in the active labour and industrial law context of The Bahamas. As illustrated by this case, and the referenced authorities, it seems that union elections are conducted according to an eclectic mix of rules derived from the unions' constitutions, principles interposed from the Parliamentary Elections Act, common law principles, and sometimes the edicts of the Registrar. Much litigation and dissension might be averted if the unions developed rules for the conduct of these elections (as they are entitled to do), which not only adopts the mandatory provisions of s. 20 of the Act, but set out specific procedures to be followed with respect to the nomination, balloting and voting processes. These could be benchmarked against other progressive jurisdictions, such as the trade union law of the UK (Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA") (as amended). For example, TULRA provides for union elections to be conducted by independent scrutineers (a "qualified independent person" (QIP)), under rules developed by the Unions themselves and in accordance with the general guidelines contained in TULRA.

[113] Alternatively, reforms could be modelled on international best practices and model rules provided under the international conventions. In fact, this would bring the Act closer in line to complying with article 3 of Convention No. 87 (which The Bahamas ratified in 2001). This, *inter alia*, establishes the fundamental principle that the regulation of procedures and methods for the election of trade union officials is primarily to be governed by the trade union rules themselves, and that the public authorities are to restrain from undue interference. This is not to suggest for a moment that these international conventions have the force of law without statutory transformation. But there is a presumption that Parliament intended to legislate in compliance with its international obligations and legislation should be interpreted so far as possible to comply with international law (**R v. Secretary of State for the Home Department, ex parte Brind** [1991] AC 696).

[114] The second observation is this: judicial review is a rather blunt instrument for testing the validity of election results. The reason for this, as already mentioned, is that judicial review is not a merits-based scrutiny. On an application for judicial review, it is not the business of the court to scrutinize votes to determine whether the irregularities would have affected the result of the election. It is only to test the reasonableness or propriety of the Registrar's decision to certify the results, or interrogate whether or not there was compliance with the Union's rules or the governing statute. This has the possible effect of distorting minor irregularities or breaches, with the result that an election could be declared void *in toto* because of irregularities or non-compliance that in fact *do not* affect

the results of the elections (e.g., where less than 7 days' notice is given to the Registrar, or where irregularities are localized to a small constituency which could not possibly affect the outcome of the elections). By comparison, the statutory position under TULRA in the UK provides for a member of a union or a candidate to challenge the conduct of an election by applying to a Certification Officer or a court for a declaration of invalidity, which allows for a review of the merits of the election results. It might therefore be appropriate for Parliament to give consideration to providing for a more direct method of challenging union elections, which allows the court to uphold the results unless the irregularities or omissions would affect the outcome or overall fairness of the election, and not be straitjacketed into nullifying elections for procedural errors which do not have this effect.



Klein, J.

15 January 2021.