Bar Association Review

2017-2018

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The Bar Association Review

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Persons who wish to submit articles, notes, commentaries or reviews on pertinent legal issues to be considered for publication in subsequent issues of the Bar Association Review may do so via:
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Introduction

by Mr. Kamal Ramkarran, President of The Bar Association of Guyana

I thank you for picking up this copy of the Bar Association Review, whether you've just bought it or are browsing through it somewhere and whether you plan to read it from start to finish or whether you just intend to look at one or two articles quickly and put it back on the shelf.

In the 1980s, the Bar Association Review, whose cover design and name we have brought to life again, was a staple feature in the profession. It was published regularly all through that decade up until the early1990s. During those years, the Bar Association was a strong and active body in the country but since then, the Review unfortunately all but disappeared from the scene, with the exception of a few notable cameos, and it last appeared in 2015.

Our publication of this issue of the Bar Association Review fulfils one of the aims of the Bar Council which is, through our members, to see the profession actively working among ourselves and in collaboration with the Judiciary and the various Registries to fix the things that are wrong in our legal system that have crept up over the years.

Discussing issues, as the Bar Association Review does, helps us to recognise problems that can be fixed. In this regard, we must ensure that we are collectively satisfied that the various aspects of the administration of justice in Guyana, which affect our clients, work at the highest standards possible because there is no reason for any of us to accept a state of affairs where litigants can justifiably feel that the justice system, which includes the performance of lawyers, is broken.

The Bar Council hopes that its activities over the period between May 2017 and May 2018, such as social activities and holding discussion sessions which encouraged questions to be asked of senior practitioners at the Bar and members of the Judiciary, will remind the profession, especially its younger practitioners, of the traditions and standards of the Bar and the camaraderie that goes along with being a member of the profession.

The coming into force of the Civil Procedure Rules, which have been in place for more than a year, has meant the end of the list courts like Bail, Chamber, Commercial and Divorce Courts. This improves the delay that was experienced in those Courts and, under the new regime, matters now run quickly from start to finish. But even so, the loss of those Courts has meant the loss of valuable opportunities to meet and discuss issues with other lawyers.

Every week lawyers used to meet in those Courts and, while they waited they discussed everything from their legal arguments just delivered and to be delivered, to the latest decisions of Commonwealth and Guyanese Courts, as well as news and gossip in the profession and out of it. These discussions often led to the building of stronger bonds among lawyers, including between the junior and senior Bar.

The publication of this issue of the Bar Association Review recognises that when we lose opportunities for discussion, we must create new (and revive old) ways of ensuring that the high standards of discussion at the Bar are not lost altogether.

Whether we meet and discuss our issues, as we have done over the course of the year, at one of our panel discussions or social events, or whether we do so at continuing legal education seminars, which we may see in the near future, we must not stop seriously discussion of the problems and issues facing the profession and the system of the administration of justice since it is through discussion that solutions are found.

We hope that the Bar Association Review will help to foster the sort of discussion that adds to the standard of the profession. We also hope that it will continue to be published regularly.

It has been a difficult task to get papers but we are optimistic that this will not always be the case. It is our collective duty to the profession to endeavour to foster discussion by writing and reading articles about our unique legal circumstances so that we can arrive at the right answers to our problems collectively, no doubt after much argument among ourselves.

We hope that this issue of the Bar Association Review and other issues to come, along with more formal and informal discussions and opportunities for fellowship, will lead to a more vibrant and interested Bar working to return our profession to an active and powerful body of people steering the practice of law in Guyana to ever higher standards.

Editorial

The winds of change are always blowing

As the saying goes, the one thing that is constant in life is … change.

Since the last publication of this law journal in December 2014, we have witnessed quite a number of changes.

The first came with a change in Government at the General Elections held in May 2015. For us, the elections delivered a new Attorney General and Minister of Legal Affairs. Later, a new Solicitor General ascended to office.

As expected with any change in Government, there is change in policy. His Excellency, the President of the Co-operative Republic of Guyana announced in December, 2016, after a lapse of some twenty years, the appointment of nine Senior Counsel. This marked the first time in the history of Guyana (or British Guiana) that a woman was bestowed with the honour of silk. And, not just one woman but three! The celebration which ought to have ensued with this achievement was tempered at the Bar since none of three women so appointed were practicing members of the Bar. This ushered in another change, in that, for the first time a sitting judge and retired judge were appointed Senior Counsel. Although this change generated whispers in the corridors of the Court, it did not reach the heights of opposition as seen in Trinidad when their Chief Justice was conferred with silk which he relinquished due to pressure from the Bar. Four more Senior Counsel were again appointed in 2017.

The year 2017 brought us defining changes in our legal landscape. Coincidentally, both the offices of Chancellor and Chief Justice became vacant on the then acting office holders reaching the statutory age of retirement and unfortunately without ever being confirmed. This resulted in the Honourable Justice Yonette Cummings-Edwards being appointed acting Chancellor and the Honourable Justice Roxane George appointed as acting Chief Justice. For the first time in our history, two women are at the head of the Judiciary of Guyana at the same time. The Bar has made no secret of their desire for substantive constitutional appointments of these offices and this is a change we eagerly await.

Notably, the winds of change also brought us all female Registrars of the Registry of the Supreme Court, Deeds Registry, Land Registry and Commercial Registry. These appointments meeting the prior appointment in 2015 of Her Worship Ann Mc Clennan as Chief Magistrate, means that, in essence, for the first time, women sit at the same time at the head of just about each sector of the legal system. Perhaps on reflection, this Editorial should have been titled 'Woman Power'!

Silk returned to the Bar Association in 2017 after about two decades with the election of Mr. Robin Stoby, S.C. as Vice-President. He must be commended for discharging his duty to the profession. We look forward to other Senior Counsel, and particularly with the appointment of recent Senior Counsel, discharging their duty of leadership and guidance to the Bar.

However, the most fundamental and defining change for us in 2017 was the introduction of new Civil Procedure Rules (CPR). The new Rules, instituted with little training to the Bar, completely changed the legal process. New Rules brought new challenges of interpretation and operation. Moreover, drastically increased fees accompanied the new rules. For instance, filing fees were astronomically increased from $10.00 for an originating process to $4,000.00; an upsurge of 4000%. While the new Rules permit a faster track for the hearing of matters

than the old Rules, the Bar still bemoans the absence of improved service at the Registry commensurate with the increased fees. Complaints are constantly received as to the waiting time at the Registry, delay in entering Orders of Court and difficulty in the service of matters. These all affect the efficiency of the legal process.

There have also been physical changes to the Court since our last publication. The commercial sections (trademarks, patents and companies) were separated from the conveyancing and deeds sections of the Deeds Registry and given a new home in 2016 under the banner of the Commercial Registry in the Avenue of the Republic, Georgetown opposite the High Court. The Land Registry has also found a new home having removed from the Lands and Surveys Commission in Hadfield Street, Georgetown. A specialized 'Family Court' accompanied by new Rules and its Registry were put into operation. A new wing of the High Court was opened in 2017 which provided additional Court rooms and now houses the Land Court having removed from Brickdam, Georgetown. The Marshal Section is now housed at the bottom flat of this wing. Court 6 was remodeled and outfitted with equipment to house another specialized court - the Sexual Offences Court, which was formally opened in November, 2017.

Change renews hope of betterment. And we live in this hope and with the earnest expectation of never having to utter the other saying … The more things change the more they stay the same. ⚖

Bar Association News 2017-2018

From the Desk of the Secretary

Ms. Pauline Chase

MORAY HOUSE SERIES

What has been a busy year for the Bar Council elected on May 31, 2017 to serve for a period of one year, commenced with the 'Moray House Series' in June, 2017. It was a series of three interactive sessions held at Moray House. The first, 'A Conversation with Senior Counsel' was held on June 17, 2017 with panelists Mr. Edward Luckhoo, S.C., Mr. Robin Stoby, S.C. and Mr. Ralph Ramkarran, S.C. The second, 'Practice at the Criminal Bar' was held on August 8, 2017 with panelists Mr. Bernard De Santos, S.C., Mr. Nigel Hughes and Mr. Glenn Hanoman. The series concluded with 'The View from the Bench' on October 26, 2017. Their Honours Justice Roxane George, Chief Justice (ag)., Justice of Appeal Dawn Gregory and Justice Brassington Reynolds graciously served as panelists. This series, aimed at the junior Bar was well received.

CRICKET

The lawyer's team (Scales) battled the doctor's team (Steths) in twenty overs for professional cricket superiority on July 22, 2017 at Thirst Park. Our team, led by captain Sanjeev Datadin, on winning the toss elected to bat first. Despite amassing an impressive number of runs, they were unable to defeat the Steths. The Honourable Chancellor (ag). Justice Yonette Cummings-Edwards opened the match by tossing the coin and the Honourable Attorney General, Mr. Basil Williams, S.C. presented the trophy to the winning Steths team. Her Honour Justice Roxane George, Chief Justice (ag). presented the man of the match trophy. The match which gained national attention was well attended and helped the Bar Association raise much needed funds.

LECTURE

On September 12, 2017 the Bar Association hosted a public lecture on the Access to Information Act, 2011 presented by Justice Charles Ramson, S.C., O.R. at the National Library.

BAR DINNER

The Bar Association held their 37th Annual Bar Dinner on November 11, 2017 at Pegasus Hotel. The Right Honourable Sir Dennis Byron delivered the Keynote Address on the Importance of an Independent and Impartial Judiciary. This event was a tremendous success. Additional tickets were reprinted twice to meet demand and a good time seems to have been had by all as the festivities went late into the night.

CHRISTMAS SOCIAL

Members of the Bar Association, at the invitation of the Bar Council, gathered on December 21, 2017 at the Bistro Café to enjoy the Christmas cheer together. We do hope that this event will continue as a tradition.

CONFERENCE

On March 9-10, 2018, the Bar Association in conjunction with the Judiciary held the first ever joint Bench and Bar Conference on Oil & Gas Law. 'The Guyana Oil & Gas Law Training Development Conference' held at the Ramada Georgetown Princess Hotel attracted both local and Trinidadian presenters. The Honourable Raphael Trotman, Minister of State delivered the Feature Address at the Opening Ceremony. Attendance of the Bar exceeded expectations and also drew strong turnout from our colleagues in Berbice.

MEETINGS

The Bar Council met with the Attorney General in July, 2017 to address matters of concern to both parties. A full report was circulated to the Bar via email.

The Bar Council sought to re-establish monthly meetings with the Chief Justice to address matters of concern to the Bar. Although Her Honour was readily amenable, Council has been unable to meet with the Chief Justice monthly mostly due to scheduling conflicts. The Council nevertheless met with Her Honour on no less than three occasions during the last year.

Representation was also made through two meetings with the Registrar of the Supreme Court and one with the Registrar of Commerce and Registrar of Deeds. Reports therefrom have been circulated to Association members. We encourage members to continue to submit their concerns for attention.

President of the Bar Association, Mr. Kamal Ramkarran and Vice President Mr. Robin Stoby, S.C. attended the Council of Legal Education Meeting in Trinidad on September 7-9, 2017 on behalf of the Bar Association. Vice President Stoby, S.C. also represented the Bar Association at the Executive Council of the Council of Legal Education Meeting in Barbados in January, 2018.

The Bar and Bench Committee established by the Honourable Chancellor sometime in or around 2016 to tackle the new Civil Procedure Rules met on about three occasions during the course of the year.

COURT PROCEEDINGS

With the leave of the Court, the Bar Association through the Bar Council intervened *amicus curiae* and made submissions to the Court in the proceedings brought my Marcel Gaskin seeking certain declaratory Orders with regard to the interpretation of Article 161 of the Constitution.

The Bar Council keeps a watching interest in the matter of Nandlall v The Attorney General with regard to the bringing into force of the Judicial Review Act. The bringing into force of this Act was raised by the Bar Council at the aforesaid meeting with the Attorney General in July, 2017 and again later by way of letter.

SOCIAL MEDIA

The Bar Association finally entered the social media space with the creation of a Facebook page, Instagram and Twitter accounts. These provide useful avenues for getting information out to the Bar and public. A website was also launched in April, 2018. We do hope that future Bar Councils will expand this website to include judgments and other useful tools for the Bar.

SENIOR COUNSEL

The Bar welcomed the appointment of four Senior Counsel at a special sitting of the Full Court in Court 1 of the High Court. Mr. Robin Stoby, S.C. delivered remarks on behalf of the Bar Association. We congratulate Mr. K.A. Juman Yasin, S.C., Ms. Joesphine Whitehead, S.C., Mr. Fitz Peters, S.C. and Mr. Andrew Pollard, S.C. on their move to the inner Bar.

APPOINTMENTS

Mr. Timothy Jonas was nominated in 2017 to sit on the University of Guyana Council and has been so appointed.

In November, 2017, in accordance with the Legal Practitioners Act, Chapter 4:01, Mr. Robin Stoby, S.C., Mr. Rafiq Khan, S.C. (as he then was), Mr. Andrew Pollard, S.C., Ms. Emily Dodson, Mr. Teni Housty, Ms. Tracy Gibson, Mr. Moenudin Mc Doom, Mr. Narendra Singh, Mr. Devindra Kissoon, Ms. Dionne Mc Cammon, Ms. Mandisa Breedy and Ms. Faye Barker-Meredith were nominated to sit on the Legal Practitioners Committee and were so appointed by the Honourable Chancellor (ag). in December, 2017 for a period of three (3) years.

The Bar Association discharged its constitutional mandate with the nomination of Justice B.S. Roy to the Judicial Service Commission in April, 2018.

BAR OF SORROW

The Bar mourned the loss of Justice Maurice Churaman who died in England on June 9, 2017. The Honourable Chancellor convened a special sitting of the Full Court at the Court of Appeal on February 11, 2018 to pay tribute to his memory. Vice President of the Bar Association, Mr. Robin Stoby, S.C. spoke on behalf of the Bar.

On August 26, 2017 the Inner Bar lost Mr. Richard Fields, S.C.

The Bar received the sad news on February 17, 2018 of the passing of Mohammed Shahabudeen, former Senior Counsel and Attorney General of Guyana.

Our colleague Keith John was laid to rest on April 25, 2018.

HERE AND THERE

Our colleagues, Messrs. Sanjeev Datadin, Timothy Jonas and Charles Ramson represented the Guyana Bar on the West Indies Lawyers Cricket Team at the Lawyers World Cup in Sri Lanka in August, 2017.

President of the Commonwealth Lawyers Association, Mr. SanthanaKrishnan visited Guyana in September,

2017 and met with Mr. Kamal Ramkarran, President of the Bar Association; Mr. Teni Housty, Vice President of the Bar Association; Ms. Pauline Chase, Secretary of the Bar Association and others at a dinner reception.

In September, 2017 the devastating hurricanes of Irma and Maria hit quite a number of our sister Caricom States. The Bar Association assisted by raising funds in the sum of $204,020.00 (two hundred and four thousand and twenty dollars) which was donated through Rotary.

The Bar Association joined with the University of Guyana to partner in the Law in Society Lecture on "The Life and Jurisprudence of JOF Haynes" on November 7, 2017 at the Herdmanston Lodge. Mr. Kamal Ramkarran joined Justice Courtney Abel to moderate the discussion.

The Formation of The Bar Association of Guyana

by Ms. Pauline Chase, Attorney-at-Law

The Bar Association under which we currently operate is governed by Rules dated and enacted at a General Meeting of April 10, 1980 and can be taken as the date when the Association formally came into being. Its formation however was born out of a defining turning point in Guyana's history.

In 1975, the then Government had set up a Committee to draft a new constitution for Guyana. Flowing therefrom, in 1978, the Constitution (Amendment) Bill was introduced. The Bill was first published in an Extra-ordinary edition of the Official *Gazette* on April 1, 1978 and by April 10, 1978 it had already been taken through all its stages in Parliament and shortly thereafter assented to by the then President, Arthur Chung.

The Bill *inter alia* sought in effect to extend the life of the then Parliament which was due to come to an end in July 1978 and to remove the necessity for a Referendum for the amendment of certain entrenched provisions of the Constitution.

The speed and content of the Bill seemed to have caused great concern, and as a result, a meeting of the legal profession was held on April 24, 1978 at the Law Courts, Georgetown to discuss the said Bill and its effects. At that time, there was not yet the fusion of the profession and legal practitioners operated under the two arms of Barrister or Solicitor. Hence three organisations represented the legal profession, namely, the Guyana Bar Association, the Association of Legal Practitioners and the Law Society. All three organisations through their members attended the meeting which has been described as "the largest gathering of lawyers held in Georgetown, setting aside racial, religious and political differences in the common disquiet about the Act."[1] Unanimous opposition to the Bill was resolved at the meeting and a Memorandum explaining the Bill, its effects and the reason for opposition to it was drafted. Of the 110 then registered lawyers in Georgetown, 91 signed the said Memorandum in agreement.

Similarly, in Berbice, the Berbice Bar Association held a meeting on May 13, 1978 and resolved to adopt the position of the aforesaid Memorandum. Of the 21 registered legal practitioners in Berbice, 16 signed in agreement.

Our colleagues were further roused during this period with the passing of the Bill which brought into force the Administration of Justice Act 1978. This Act was particularly offensive since it removed the right to trial by jury and vested in a Magistrate the power to decide whether trial for certain offences, would be done summarily or indictably. This placed persons who did not find favour with the Government in particular jeopardy.

These circumstances "goaded the members of the profession to discard wigs and gowns and get out in the street in front of the Parliament Building to protest." [2] The protests, which were peaceful in nature, somehow, but yet not surprisingly, nevertheless attracted the attention of the police who on occasion came out with force to quell and disband it. Such was the nature of the environment at the time. Eyewitness accounts recall Mr. B.O. Adams, S.C. racing up the pavement to escape the wrath of the police who were in hot pursuit.

Attention was also being attracted from another source – the Government.

Of the three aforesaid representative organisations, the Guyana Bar Association was the most prominent. Soon, lawyers employed by the State accompanied by the Solicitor General, who up to that time rarely, if at all,

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1 Nanda K. Gopaul, *Ashton Chase, The Bengal Tiger (2012)* p. 40; Memorandum of Meeting

2 Bar Association Review (December, 1982) p. 39

attended Guyana Bar Association meetings, started to attend and vote in favour of positions of the Government. This caused a rift with the private practicing Bar and as a result many legal practitioners in private practice withdrew their membership in the Guyana Bar Association and formed a new organization, The Bar Association of Guyana. With the loss of membership, the Guyana Bar Association became somewhat defunct and ineffective.[3]

It is under the Rules of the new organization, the Bar Association of Guyana, that we still to this day operate. These Rules, made in 1980, have served us up to present time without substantial amendment. The only change over the years has been with regard to membership subscription cost to meet inflation.

It is due to the aforesaid event which led to the formation of the Bar Association of Guyana that the '1980 Rules' reserve voting rights to lawyers in private practice.[4] It is a Rule which guards against a repeat thereof. But more fundamentally, it ensures, insulates and protects the independence of the Bar, which, I respectfully submit, is of equal importance as the independence of the judiciary. It is a pillar on which a true democratic society functions. Accordingly, it is a rule which must be jealously protected, as it has since its inception in 1980, through successive change in governments. It is nonetheless a rule which is to the chagrin of our colleagues employed by the State who feel excluded. It is however not an exclusionary but rather a protectionist rule for the benefit of all Attorneys-at-Law, whether in private practice or employed by the State. It is a rule which not only protects the sanctity of our noble profession from political interference regardless of which foot the shoe is on at the time but also our constitutional right to work. Our survival as a profession and society is dependent on the freedom to practice law without fear or control. It is not a matter of whether we feel comfortable with the government of the day at the particular time but that we are insulated from external political tides.

The Bar Association of Guyana since its formation has, while representing the interests of lawyers, continued to be an important civil society voice speaking out against constitutional abuses and other matters of national importance through changes in government and presidents of the Association. Notably, the Bar Association lent its weight to the struggle for the return of democracy in Guyana through free and fair elections. It was a founding member of the Electoral Assistance Bureau[5] which in conjunction with other local and international groups including the Carter Center secured free and fair general elections in 1992 after in excess of twenty years. In that vein, the Bar Association continued to discharge its civil society duty by acting as a domestic observer in subsequent general elections.

The first president of the Bar Association of Guyana was Mr. B.O. Adams, S.C. He served for two years in accordance with the two year consecutive term limit of the rules, when he was succeeded by Mr. Ashton Chase (not yet Senior Counsel) in 1981 who served no less than four (4) two year terms between the 1980s to 1990s. Other past presidents include Mr. Frederick Ramprashad, S.C. Mr. Miles Fitzpatrick, S.C., Mr. Nigel Hughes, Mr. Joseph Harmon, Mr. Khemraj Ramjattan and Ms. Pearlene Roach, the first female president of the Association in 1995 who was murdered while still serving as president in 1997.

There was eventual reconciliation and merger of the two Associations[6]. The Association for some reason however, continued to be known as and called, the Guyana Bar Association. Perhaps because of familiarity with the name. Whatever the reason, it was formed out of a fearless principled unifying stand of our learned seniors and set the standard to emulate.

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3 Nanda K. Gopaul, *Ashton Chase, The Bengal Tiger (2012)* p. 41

4 Rule 3 of the Rules of the Bar Association of Guyana

5 *New Guyana Bar Review* (December 1996) p. 27; The New Guyana Bar Review (May 2008) p. vii

6 Nanda K. Gopaul, Ashton Chase, The Bengal Tiger (2012) p. 41; New Guyana Bar Review (December 1996) p. 27

A Meeting of lawyers representative of the Guyana Bar Association, the Association of Legal Practitioners and the Law Society met at the Law Courts on Monday, 24th April, 1978, to consider the Constitution (Amendment) Bill 1978 (hereinafter referred to as the Bill).

The meeting which was the largest gathering of lawyers held in Georgetown in recent times set aside political, racial, religious and social divisions in common concern about the Bill.

It resolved that -

> "The assembly of lawyers expresses its opposition to the Constitution (Amendment) Bill No. 8 of 1978 which was passed by the National Assembly"

and set up a Committee of ten lawyers to

> "to take steps to give full effect to the aforesaid opposition"

THIS MEMORANDUM seeks to explain the Bill and the legal practitioners' reasons for opposing it.

What the Bill does

The Bill amends Article 73 of the Constitution of Guyana. The relevant portions of Article 73 are set out in Appendix A of this memorandum.

Existing Constitution

Article 73 sets out the manner in which the whole or any part of the Constitution can be amended.

To amend Article 73 itself and to amend Articles in the Constitution dealing, inter alia, with:-

- The Supremacy of the Constitution
- The Presidency
- Establishment and composition of the National Assembly including its tenure and the Electoral System
- The Elections Commission and its functions
- Jurisdiction of the High Court on matters relating to membership or elections to the National Assembly,

a Bill has to be approved by the National Assembly AND there has to be majority support of a referendum to be held not less than two (2) months nor more than six (6) months after passage of the Bill in the National Assembly. On these requirements being satisfied the Bill is submitted to the President for his Assent.

These Articles are therefore very heavily entrenched.

The Amendment

The Bill now seeks to abolish the requirement of a Referendum in respect of the matters listed above.

If the Referendum gets majority support, then Article 73 itself and the matters listed above will be susceptible to alteration by the support of at least two thirds of all the elected members of the National Assembly.

In amending 73 (3) of the Constitution the Bill merges the existing 73 (3) (a) and (b) into one (sub-article) and provides for their alteration in one manner, that is, as stated above and without the requirement of a referendum.

The existing Constitution provides for those Articles listed in 73 (3) (b) (See Appendix "A") to be susceptible to alteration if supported by not less than two-thirds of all the elected members of the Assembly without the necessity

for submission to a Referendum. For the Articles listed in 73 (3) (a) even if a two thirds or higher majority vote were obtained in the National Assembly, .the Constitution demands that it be supported by a majority at a Referendum before the alteration could be made.

The Effect of the Amendment:

The Intention of Bill

Since the present Government has a two-thirds majority in the National Assembly and therefore is empowered to amend certain Articles in the Constitution without the holding of a Referendum, the Act aims at ushering in a change in -

A) The Electoral System;

B) The Composition of the National Assembly and related matters;

Further, as stated by the Government,

C) The Proclamation of a New Constitution;

A) and B) will permit the Government to prolong the life of the present Parliament due to terminate normally in July 1978 and constitutionally not later than 25th October, 1978; and also to increase or vary the membership of the National Assembly.

As to C) the explanatory memorandum to the Constitution (Amendment) Bill stated:-

> "The existing Constitution is too rigidly rooted in the structures of the colonial past to serve as an efficient vehicle for transforming the society into the kind of society it needs to become if it is to survive in the modern world. It is necessary to adopt a new constitution more reflective of the national ethos. This Bill seeks to facilitate the introduction of such a constitution.

A new Constitution more reflective of the national ethos should be subjected to national consensus and national sanction.

Basis of the Opposition

Removal of Democratic Safeguard in a multi-racial Society

(1) The referendum is not asking the electors to approve of a new Constitution.

What the referendum seeks to achieve is to deprive the people of Guyana of their right to approve or disapprove any new Constitution in the future. The people of Guyana are being asked to give up their right altogether in this respect.

If the referendum is successful, the total and absolute power to alter the Constitution will be in the hands of a two-thirds majority of Parliament. A new Constitution that is unacceptable to the people or foreign to their way of thinking can thus be imposed on them. Even if a new Constitution is a reasonable one, it will not be the people's Constitution.

(2) We feel that the requirement of the direct approval of the people to substantial alteration is one of the backbones of a democratic constitution; that our present constitution already leaves much to the discretion of the present 2/3rds Parliamentary majority and that this discretion should not be enlarged. We are convinced that no new constitution should be introduced without the approval of a majority of the electorate directly expressed, more so when the representatives in whose hands such a power is sought to be solely placed have come to the end of their elected period.

(3) We feel that this Bill is in effect an attempt to get the electorate to place a blank cheque on the national future in the hands of a spent Parliament.

Lack of Consultation

Surprise: The Constitution (Amendment) Bill, 1978, was first announced to the public in the Government-owned "Sunday Chronicle" of the 2nd April, 1978. It was first published in an Extraordinary Official Gazette of 1st April, 1978, and introduced in the National Assembly on 3rd April, 1978. It was not at that time in general circulation to the public. It was passed through all its stages in the National Assembly on 10th April, 1978. There was not sufficient opportunity for consulting the public

or informing the public. Such a tremendously important measure should never have been so hastily hurried through Parliament.

Time Factor: Parliament under the Constitution has to prescribe the manner in which the referendum has to be conducted. It has not yet done so.

The Referendum by law has to be held between 10th June, 1978 and 10th October, 1978. Even if it is approved, what time does this leave for consideration of the new Constitution (bearing in mind that the present National Assembly constitutionally ends on 25th October, 1978 i.e. 3 months after the latest date for the dissolution of Parliament (Art 82).

The time between the Referendum (earliest 10th June) and the constitutional dissolution of Parliament - just over 6 weeks from then - is too small a period to introduce a new constitution (which has not been published yet).

Since 1975 the Government set up a Committee to draft a new Constitution. This document was to be presented to the Governing Party's Congress in 1977. It was not. Up to now it has not been published. The deliberations of the Committee have not been made public.

If it takes Government 3 years to write a new Constitution is it fair that the public or Parliament should have a couple months, more or less, to consider such an important document?

Is this Consultative democracy?

Is this the way to involve the people more in the processes of Government?

Even if a draft Constitution is published before the Referendum, there is no guarantee that, once the Referendum is carried, the draft Constitution will not be seriously altered by the Government before its passage through the House.

It would seem, therefore, that either the new Constitution will be passed through the present old Parliament without any real national debate, or that, after the present Bill is passed abolishing the need of any referendum, the life of the present Parliament will be extended and the new Constitution will be introduced within such extended time but still by the use of the present 2/3rds Government majority in Parliament. Either alternative excludes the direct vote of the electorate. Either alternative leaves full power to decide its fate and the fate of our Government and

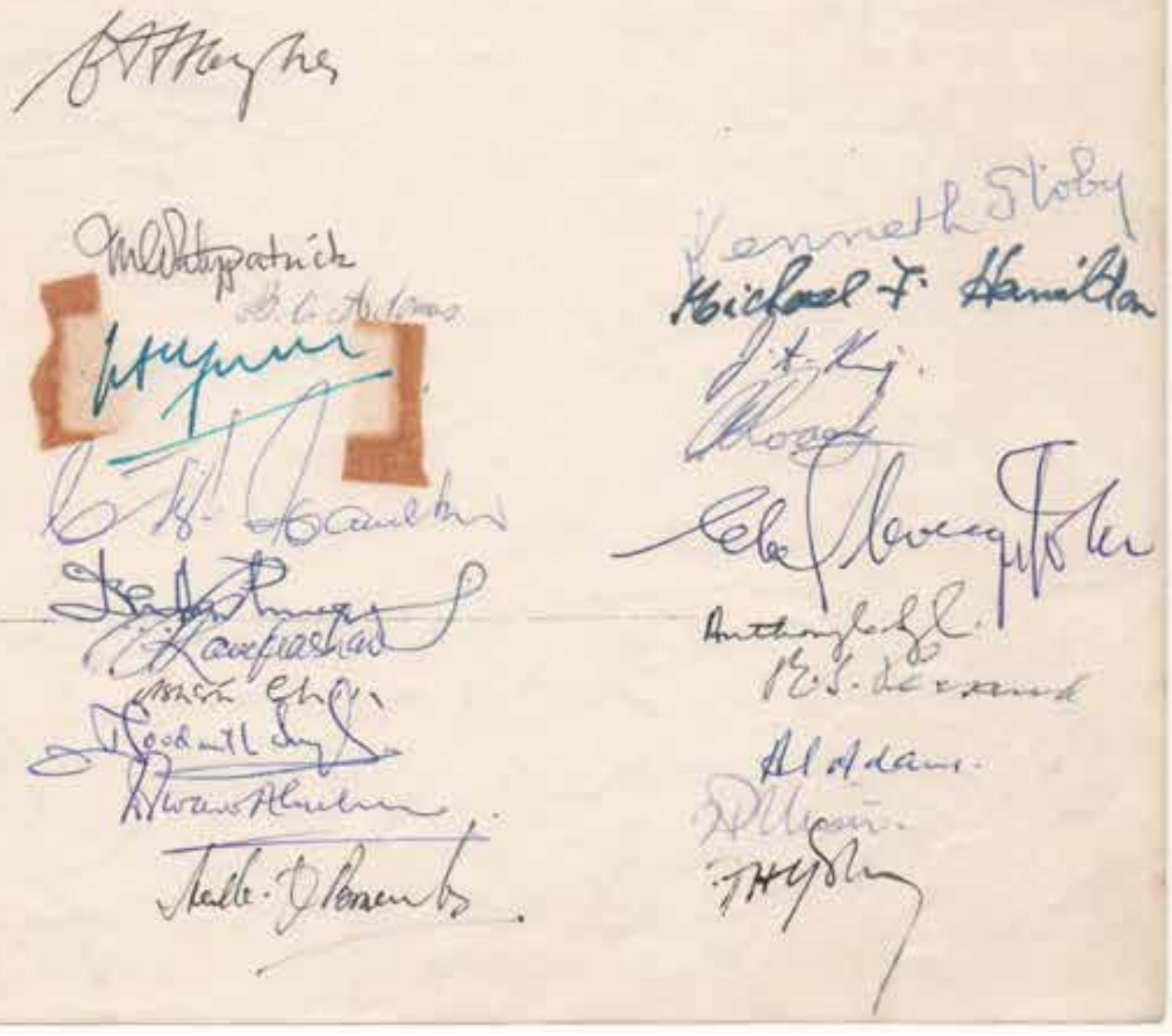
political structure in the hands of a Government parliamentary majority which has nearly run its proper course.

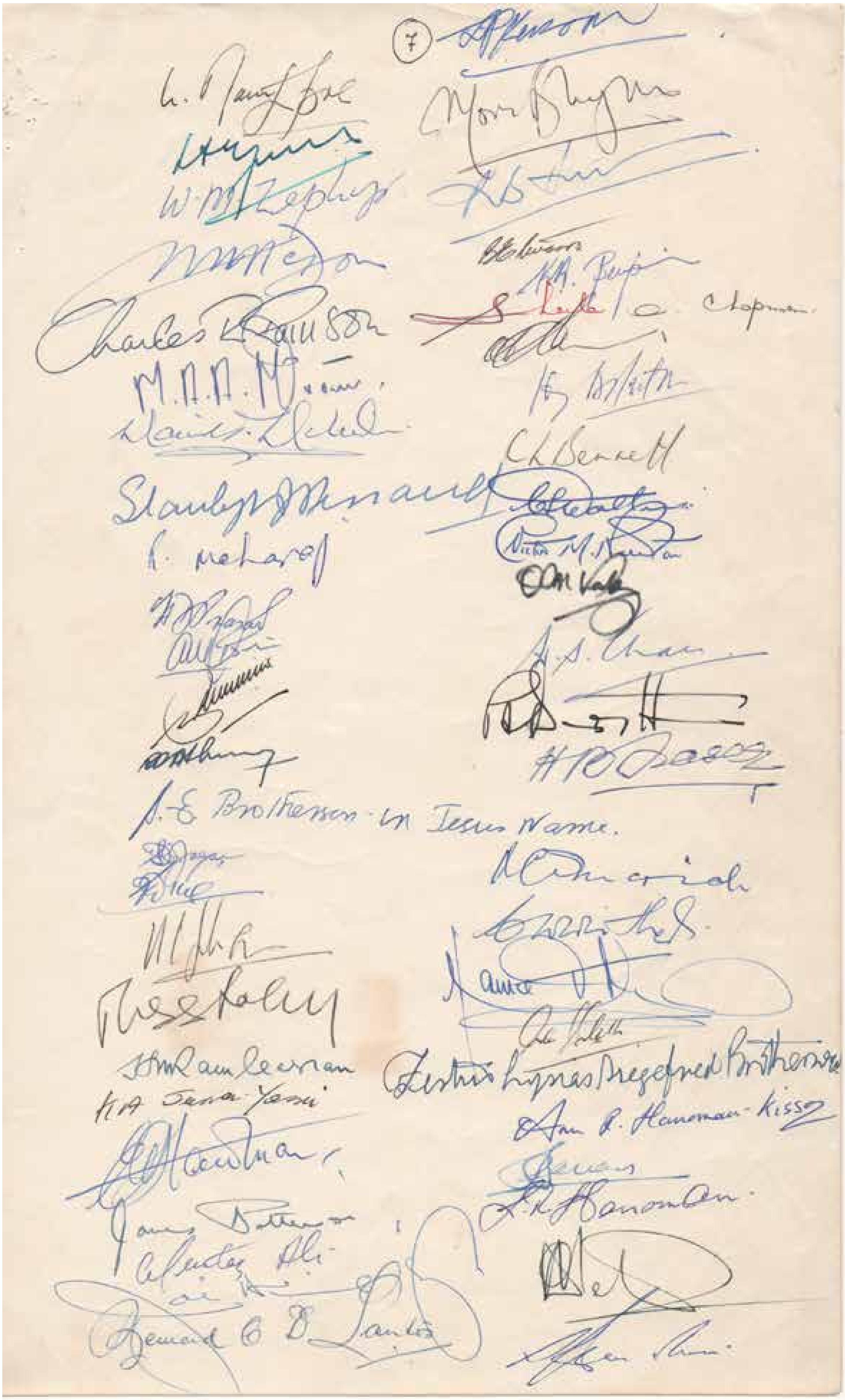
Either alternative we regard as so undesirable in the interest of our democratic constitutional and legal system as to demand the united public opposition of the legal profession.

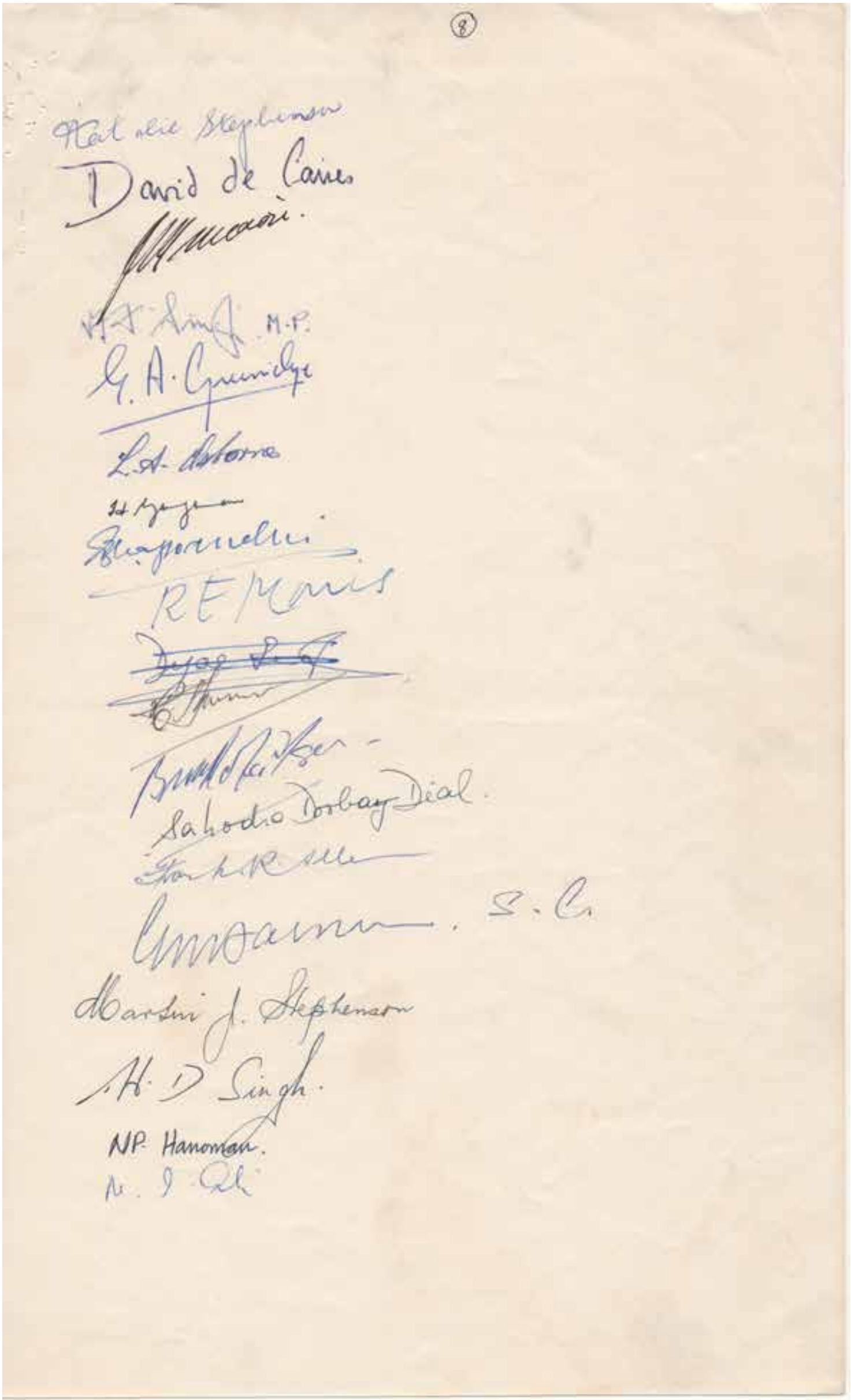
A constitution should be an enduring document, not hastily rushed nor patterned to meet one-sided wishes. The people are the ultimate source of power. Meaningful expression should be given to their views.

Georgetown, Demerara,

Dated this 3rd day of May, 1978.






(8)
Hat'ble Stephenson
David de Caires
M.P.
G. A. Cumming
L.A. Adrome
Bhagwandeen
RE Manes
Dyce Sharma
Sahodra Dorbay Dial.
Martin J. Stephenson
H. D Singh.
NP. Hanoman.

ANNEXURE "A"

The relevant parts of Article 73 of the Constitution of Guyana read as follows:-

"73(1) Subject to the provisions of this article, Parliament may alter this Constitution.

(2) A Bill or an Act of Parliament under this article shall not be passed by the National Assembly unless it is supported at the final voting in the Assembly by the votes of a majority of all the elected members of the Assembly.

(3) A Bill to alter any of the following provisions of this Constitution, that is to say -

(a) this article,
articles 1 (The State and its territory) 2 (The Constitution) 30 (Establishment of office and election of president) 33 (Executive authority of Guyana) 40 (Exercise of president's powers) 57 (Establishment of Parliament) 58 (Composition of National Assembly) 66 (Electoral system) 68 (Elections commission) 69 (Functions of elections commission) 71 (Determination by High Court of questions as to membership of National Assembly and election) 81 (Sessions of parliament) 82 (prorogation and dissolution of parliament) 119 in its application to the Elections Commission and article 125 in its application to any of the provisions mentioned in this sub-paragraph; and

(b) Chapter II (protection of fundamental rights and freedoms) III (Citizenship) article 47 (office and functions of director of public prosecutions) Part 2 of Chapter V (The Ombudsman other than article 53(3) and (5) and the First Schedule)

Articles 59 (Qualifications for election to National Assembly) 60 (Disqualifications for election as members) 65 (Qualifications and disqualifications for electors) Chapter VII (The Judicature) other than article 91 (oath of office) VIII (The Public Service) IX (The Police) articles 115 (Remuneration of holders of certain offices) 116 (Office and functions of Director of Audit) 118 (Removal from office of certain persons) article 119 (powers and procedure of commissions) in its application to any Commission other than the Elections Commission and article 125 in its application to any of the provisions mentioned in this sub-paragraph;

shall not be submitted to the President for his assent unless the Bill, not less than two nor more than six months after its passage through the National Assembly, has, in such manner as Parliament may prescribe, been submitted to the vote of the electors qualified to vote in an election and has been approved by a majority of the electors who vote on the Bill.

Provided that if the Bill does not alter any of the provisions mentioned in subparagraph (a) of this paragraph and is supported at the final voting in the Assembly by the votes of not less than two-thirds of all the elected members of the Assembly it should not be necessary to submit the Bill to the vote to the electors.

LIST OF LAWYERS IN PRIVATE PRACTICE IN GEORGETOWN:

(1) Hardat Singh
(2) Juman Yassin
(3) B. Etwaroo
(4) P. Roach
(5) Elvy Edwards
(6) C.M.L. John
(7) B.E. Gibson
(8) L. Osborne
(9) E.A. Greenidge
(10) V. Newton
(11) K.Z. Ali
(12) C.W. Hamilton
(13) D.A. Robinson
(14) Edgar Cumbermack
(15) H.B. Fraser
(16) Alvin Holder
(17) J.A. Patterson
(18) Frank John
(19) C.J.B. Harris
(20) Eric Clarke
(21) B. Robertson
(22) Duncan Moore
(23) J.T. Clarke
(24) K. Benjamin
(25) N. Bissember
(26) H.A. Bruton
(27) D.P. Bernard
(28) S.A. Chapman
(29) C. Walters
(30) R.E. Moriah
(31) E.A. Hanoman
(32) Debi Dial
(33) Sahodra Dial
(34) S. Hardyal
(35) M.M. Ali
(36) P. Ramprashad
(37) D. Singh
(38) M.M. Mc Doom
(39) M.A.A. Mc Doom
(40) C.L. Luckhoo
(41) L.A. Luckhoo
(42) E.A. Luckhoo
(43) Ena Luckhoo
(44) F.I. Dias
(45) G.S. Gillette
(46) A. Misir
(47) H. Chan
(48) R. Mc Kay
(49) S. Moore
(50) Vish Persaud
(51) S.S.A. Shury
(52) J.T. Kissoon
(53) F.L. Brotherson
(54) S. Sarwan
(55) J.N. Singh
(56) S.E. Brotherson
(57) L. Kissoon
(58) Roberta Kissoon
(59) O.M. Valz
(60) C.A.F. Hughes
(61) E. Stoby
(62) E.E, Fields
(63) F. Allen
(64) K. Bhagwandin
(65) L.L. Doobay
(66) P. Britton
(67) M. Hamilton
(68) E. Bowman
(69) H.D. Eleazar
(70) A. Chase
(71) L. Ramgopaul
(72) W. Zephyr
(73) L.A. Joseph
(74) L. Hanoman
(75) R. Hanoman
(76) E. Dos Santos
(77) D. Peters
(78) Sase Narain
(79) D.C. Jagan
(80) L.T. Persaud
(81) B.O. Adams
(82) R.S. Persaud
(83) S.H.J. Persaud
(84) C. Weithers
(85) C. La Bennett
(86) B. Ramson
(87) A.B.A. Sankar
(88) D. De Caires
(89) M, Fitzpatrick
(90) A.S. Manraj
(91) H. Gangaram
(92) R. Maharaj
(93) M. Bhagwan
(94) H.D. Prasad

.../- 2 -

(95) M.I. Ali

(96) Lea Allen

(97) A. Singh

(98) Lashley Bobb

(99) M.F. Singh

(100) D. Trotman

(101) N.O. Poonai

(102) S. Morris

(103) R. Morris

(104) S.M.R. Nasir

(105) R. Ramkarran

(106) J.A. King

(107) H. De Freitas

(108) M.S.H. Rahaman

(109) Hardat Misir

(110) N. Stephenson

EDWARD BOWMAN
LL.B., (Lond.)
BARRISTER-AT-LAW

7 Charlotte Street,
New Amsterdam,
Berbice.
Republic of Guyana, S.A.
Telephone 03-2296

Our Ref : EB/jm

Your Ref:

13th May, 1978

Mr. Clarence Hughes
Barrister-at-Law
Hadfield Street,
Georgetown.

Dear Clarence,

I enclose herewith resolution passed this morning by the Berbice Bar Association. There are twenty (20) Barristers and one (1) Solicitor in private practice in Berbice, and sixteen (16) persons have signed to indicate their acceptance of the terms of the Resolution.

The persons who did not sign are, Ralph Chandisingh could not be contacted, Milton Persaud needed more time to consider the memorandum and its implications, C.P. Bhairam, he is a public functionary, Bhairo Prasad does not agree with our Stand, and Maurice Haniff is the P.N.C. Mayor of New Amsterdam.

The meeting appointed any two of the following five persons to liaise with your committee:-

Krishna Prasad	:	03-2829	chambers	: 03-3489	Residence
Edward Bowman	:	2296	"	2583	"
Mursaline Bacchus		2357			
Arjoon Shivgoham		2769			
Marcel Crawford					

I hope your meeting with Shahabudeen will not be entirely a waste of time.

Yours faithfully,

Edward Bowman

.....

At a meeting of the Berbice Bar Association held at the High Court of the Supreme Court of Judicature, New Amsterdam, Berbice, on Saturday the 13th. day of May, 1978, the Resolution set out hereunder was unanimously passed as a Resolution of the Association.

Resolved that -

(1) the Berbice Bar Association approve and adopt the Resolution of the Assembly of Lawyers which met in Georgetown, on Monday 24th. April, 1978.

(2) we set up machinery for considering and implementing ways and means of making our objection to Bill No. 8 of 1978 heard.

(3) As members of the Bar we accept an obligation to oppose the Bill in or through our respective Political parties, clubs, churches or other organization.

(4) we appoint five members of the Berbice Bar to liaise and to co-operate with the Georgetown Committee in taking such steps as may be necessary to give telling effect to the aforesaid opposition.

Moved : KRISHNA PRASAD.

Seconded: EDWARD BOWMAN.

Dated this 13th. day of May, 1978.

LIST OF PRACTITIONERS IN BERBICE.

1. Krishna Prasad.
2. Mohendranauth Poonai.
3. Chandradat Pawaroo.
4. C. Molai.
5. H.W. Shah.
6. M.C. Crawford.
7. J. Anamayah.
8. E. Bowman.
9. A. Shivgulam.
10. H. Bacchus.
11. M.H. Parsaud.
12. R. M. Trim.
13. D. Kanowansingh.
14. S. S. Chandra. (Solicitor)
15. R. E. Chandisingh.
16. C.P. Bhairam.
17. Bhairo Prasad, S.C.
18. J. Maurice Hanoiff.
19. M. E. Taharally.
20. T. Ragnauth.
21. W. Rajkumar.

EDITORIAL NOTE
Justice Ramson, S.C., O.R. kindly acceded to the Bar Association's invitation and presented the following Public Lecture on the Access to Information Act No. 21 of 2011 on September 21, 2017 at the National Library.
Justice Ramson is the first Commissioner of Information appointed under the said Act and at the time of delivery of this Lecture he held that office.
Subsequent to the Lecture, a member of the Bar Association expressed a view, by way of letter to the editor of a newspaper, with regard to domicile of companies as raised during the question and answer segment at the Lecture and as carried by a media report. Justice Ramson has added a postscript with regard thereto.

Access To Information Act 2011 And Its Implementation (2013-2017)

by Justice Charles R. Ramson, S.C., O.R.

"To history has been assigned the office of judging the past, of instructing the present for the benefit of future ages. To such high offices this work does not aspire: It wants only to show what actually happened (wie es eigentlich gewesen)." So advised a German Savant, Leopold von Ranke, in Sämtliche Werke Bd. 33/34 Leipzig, 1885, s.7 (See Brexit, Trump and the Media, published in 2017, p. 146 – A German Reaction to Brexit; written by Dianna Zimmerman).

It is with this backdrop and embracing perspective that I propose to facilitate this discourse on the Access to Information Act 2011, the chapeau of which reads thus:

> "An Act to provide for setting out a practical regime of right to information for persons to secure access to information under the control of public authorities in order to promote transparency and accountability in the working of Government and public authorities and for the appointment of the Commissioner of Information."

Without any patina of pedantry one may be excused for identifying the five components of its contemplated panoply of progressive provisions:

1. Appointment of a Commissioner of Information;
2. A practical regime of right to information;
3. Information under the control of Public Authorities;
4. Access by persons to that information;
5. Promotion of transparency and accountability by both Government and Public Authorities.

At the risk of being catechismic it would be necessary to set out two prescriptions of disparate constitutional concepts without which sufficient clarity would not attend this presentation. In this global environment when technology allows ready access to democratic polities with regulatory regimes with dissimilar Supreme laws, a culture of endearment with the minimum resistance can create obfuscation rather than a sense of clarity of informed entitlement. In Guyana, ART 146 of our Constitution is the point of reference for any analysis and understanding of the right however defined and afforded by the 2011 Act. This Article provides:

"146. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom

of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision-

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) that is reasonably required for the purpose of protecting the reputations, rights, and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television, or ensuring fairness and balance in the dissemination of information to the public; or

(c) that imposes restrictions upon public officers or officers of any corporate body established on behalf of the public or owned by or on behalf of the Government of Guyana;

(d) that imposes restrictions upon any person, institution, body, authority or political party from taking any action or advancing, disseminating or supporting any idea, which may result in racial or ethnic divisions among the people of Guyana.

(3) Freedom of expression in this article does not relate to hate speeches or other expressions, in whatever form, capable of exciting hostility or ill-will against any person or class of persons."

In the past, many judicial pronouncements have settled the extent of the rights contemplated therein. From an extrapolation of these decisions, e.g., Hope and AG .v. New Guyana Co. and Vincent Teekah 26 WIR 233; Jagan .v. Burnham 20 WIR 96; Ramson .v. Barker (H.C) 28 WIR 191 and 33 WIR 183 (G.C.A), it may surprise a great many Guyanese that we do not have the freedom of speech enjoyed by our American counterpart. An American can lay claim to the near absoluteness of this right which is guaranteed by the 1st Amendment to their Constitution as originally established by the founding fathers of their Constitution.

The first amendment states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In sum, the legislature of any State of the Union is prohibited from, inter alia, abridging the freedom of speech, and citizens are therefore granted a virtual licence to say or publish their views, opinions, etc. without the constraints attendant on the map of the constitutional provisions in Guyana contained in paragraph 2 of ART 146. The operative differentiating conceptions are contained in the pellucid meanings of "prohibiting" and "abridging". These two terms do not conceive of any lexicographic limitation, thereby creating a virtual topless empyrean of freedom. However, judicial contrivances have supervened to recalibrate and reduce their absoluteness.

Lord Keith of Kinkel in Derbyshire County Council .v. Times Newspapers Ltd (1993) A.C. 534 in addressing the issue of the fundamental right of freedom of speech, cited with approval, the judgment of the Supreme Court of Illinois in the City of Chicago .v. Tribune Co. (1923) 139 N.E. 86 where Thompson CJ said at p. 90:

> "Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished … but all other utterances or publications against the government must be considered absolutely privileged …."

These propositions were endorsed by the Supreme Court of the US in New York Times Co. v. Sullivan (1984) 376 US. 254 at 277.

In the light of ART 13 of our Constitution which provides, in essence, for the establishment of "an inclusionary democracy" as a "principal objective of [our] political system" the Government of the day in 2011 sought to legislate for this novel approach to the rights of its citizens and persons domiciled in Guyana in Section 12 of the Access to Information Act, thereby equipping them to be better informed to contribute to "the management and decision-making processes of the State" as contemplated by the aforementioned Article. Thus the legislative cartography of this ground-breaking regime must be examined, analysed and forensically construed to give meaning to its contextual ramifications.

It was indeed the intention of the framers of this Act to meet the cloud of secrecy, the forest of bureaucratic barriers and the jungle of regulations attendant in the management of the affairs of public business. Specific to its raison d'être was the promotion of transparency and the attainment of accountability in the public sector. With this in mind s.5 of the 2011 Act made provision for the appointment by the President of a Commissioner of Information whose tenure can only be brought to an end by his "removal", not "termination", as contemplated in the law of contract - Laker Airways .v. Dept. of Trade (1977) Q.B. 643 (C.A) [pp. 338-44 – British Govt. and the Constitution, by Colin Turpin 3rd ED]. Section 6 provides for this exclusive exercise:

> "s.6
>
> (1) The President may remove the Commissioner of Information from Office if the Commissioner of Information –
>
> (a) is adjudged an insolvent;
>
> (b) has been convicted of an offence which involves moral turpitude;
>
> (c) is unfit to continue in office by reason of infirmity of mind or body; or
>
> (d) had, or has, acquired such financial or other interest as is likely to affect prejudicially his functions as Commissioner of Information.
>
> (2) Before removing the Commissioner of Information from Office the President shall afford the Commissioner of Information an opportunity of making representations."

Taken in its holistic conception it becomes clear that the tenets and precepts attending his incarnation are not those that characterise a master and servant relationship, hence he is free to pursue his functions "without fear or favour or ill-will", as prescribed in his oath upon his appointment. His is a statutory office, the holder of which is independent of any Governmental influences, superintendence or control. To this end, he is the sentinel qui vive for the promotion of the purposes of the Act. With this foremost in mind, I can do no better than cite the enduring wisdom of Lord Reed, acknowledged by his peers in the Halls of Justice of the Supreme Court of the U.K, for his pre-eminent learning in Constitutional matters:-

> "An official in a government department is in a different constitutional position from the holder of a Statutory Office. The official is a servant of the Crown [President] in a department of State

> established under the prerogative powers of the Crown [President], for which the political head of the department is constitutionally responsible. The holder of a statutory office, on the other hand, is an independent office-holder exercising powers vested in him personally by virtue of his Office. He is himself constitutionally responsible for the manner in which he discharges his office ….”

[See para 50 in R (on the application of Bourgass and another) (Appellants) .v. Secretary of State for Justice (Respondent) (2015) UK.S.C. 54].

It would therefore be ineluctable that this statutory Office holder, unless the contrary is manifest, is the Chief Executive Officer (CEO) of that Office. Closer to home, as far back as 1985 Chancellor Massiah, the éminence-grise of the legal profession, then and no less so in contemporary times, when confronted with a not dissimilar vexed issue in Rhyna .v. T&HD et anor (1985-6) GLR 143, i.e. whether the General Manager of the T&HD was a Crown Servant in 1975 and therefore suable in Tort. The learned Chancellor declared at p.154:-

> “But whether or not he was a Crown Servant depended on whether or not [the T&HD] was a Government Department.”

If it was, he ruled that non-suability followed by way of Writ of Summons.

In spite of the historical underpinnings and the relevance of its application by virtue of more recent statutory intervention, i.e. State Liability and Proceedings Act 1984 CAP 6:05, the profundity of its conceptual inevitability maintains its immanence for the purposes of this discourse. Apart from the purpose and intent of the Act of 2011 as are manifest from its chapeau, there is no express or logically inherent provision for Ministerial intrusion, supervision and/ or superintendence. Once again, solace and shelter are sought from the lucid analysis of this most venerable jurist at p. 153:

> “Nor can there be any judicial statutory modification to promote a seeming depuration of the Statute Book by ridding it of what one may conceive to be superannuated law. Such an approach, pre-emptive in nature, would be tantamount to a judicial usurpation of the parliamentary function …… A statute may not be extended to meet a casus omissus.”

Having regard to these regnant rulings, it can only be concluded that a statutory office-holder is not a public servant in service of a Ministry of the Executive Government and therefore does not have any accountability to a “subject Minister”, as one commentator, untrained or learned in the interpretation and construction of statutes, sought, through the print media, to persuade the reading public. His officially-sanctioned nostrums and versions of the facts should not therefore be adopted by the public as worthy of credence.

In much the same fashion, the recently created State Agencies, SARA, SOCU, FIU, etc. require budgetary allocations appropriated by Parliament for their functioning, the Access to Information Act sought by s.5(2), 5(3) and 5(4), to ensure that adequate provision was made “for the efficient discharge of the functions of the Commissioner of Information”. Not unnaturally, the Minister of Information was identified as the member of the Executive with this mandate (see s.2).

In the interest of clarity and the avoidance of any semblance of dubitation, s.5, so far as it concretises the obligations of the Minister, is set out in full:-

> s.5(3): The Commissioner of Information shall be provided with requisite staffing and budgetary support in order to discharge his functions under this Act.
>
> s.5(4): The Minister shall provide the Commissioner of Information with such officers and employees

> as may be necessary for the efficient discharge of the functions of the Commissioner under this Act.
> s.5(5): The salaries and allowances payable to, and the other terms and conditions of service of, the Commissioner of Information and other officers and employees appointed for the purposes of this Act shall be such as may be determined by the Minister.

Upon this Commissioner's appointment, this portfolio was held by H.E. President D. Ramotar and adequate accommodation, staff and equipment, inter alia, were made available in the Office of the President's complex. This arrangement continued after the change of Executive Government in May 2015. However, for reasons which need not be expiated for the purposes of this discourse, there was a cessation of provision of all resources, apart from payment of the Commissioner's salary and allowances since October 2015 by mutual arrangement for a period of 3 months in accommodation provided by the Commissioner, free of cost to the State. Would it surprise anyone that if you supply a man with lemons you should not complain if he produces only lemonade – not champagne, Whiskey or Rum!

This Office has not received the benefit of any accommodation, including staff, equipment, or basic supplies such as paper, services, not even a pencil or pen, since Oct 2015, notwithstanding a written request to the Minister of Information dated 30th day of June, 2015 to meet his obligations as set out in s.5. To date there has been no reply but with some perseverance, and in a spirit of altruistic commitment to good governance, some services to the Public were maintained with resort to some outsourcing, where necessary. This Ministerial dereliction has resulted in pending litigation and, by virtue of and in deference to, the sub judice rule, no further commentary is permissible. Suffice it to say that it is precisely this kind of bourgeois hegemonic stranglehold on the communication and information space that prompted the enactment of the Access to Information Act as will presently unfold. For the record, in observance of World Press Freedom Day, H.E. Brent Hardt, the quondam American Ambassador to Guyana, had endorsed in May 2014 the findings of a Report by the International Press Institute (IPI) that investigated the media landscape in Guyana in 2013. H.E went on to assert:

> "While the appointment of an Information Commissioner is welcome … to be effective, transparent and independent, this office should be adequately staffed and separated from the Office of the President in keeping with international standards."

It may be apposite to state at this juncture that even though the current holder of that Portfolio is an attorney-at-law, the letter aforementioned was sent to bring to his attention the law that governed the request. Massiah C pointedly observed in McIntosh .v. The State (1985) GLR 119 at p. 123, that "Indeed, there is no presumption that anyone at all knows the law". The learned Chancellor was referring to the trial Judge's presumed knowledge of the law, and went on to say: "This is often confused with the principle of law expressed in the aphorism 'Ignorantia legis non excusat', but they are disparate conceptions".

It is therefore the preferred and logically irrepressible view that the efficient functioning of any Office or Agency requires an adequate supply of resources, financial and human, with complementary accessories, to achieve the results contemplated by its legislative genetical construct. Concomitantly, where the contrary obtains, the level of service provided would be commensurably reduced! In Development Economics I believe there is a concept which postulates that supply is essential to production and productivity. Section 5(2) and (3) are the legislative embodiment of this common-sense charter in our rarefied area of good governance. To conclude otherwise would inevitably lead to a raising of the white flag in abject surrender and no professional worthy of his position, however

titled, should be satisfied with less if his fundamental right to work in ART 149A is to be given the requisite meaning and purport i.e.:

> "No person shall be hindered in the enjoyment of his or her right to work, that is to say, the right to free choice of employment."

I now turn to the functions of the Commissioner. Ex contractu, in the form of the hallowed principle of the consideration necessary to formalise the contractual obligations attaching to his appointment, reference is made to s.7:

> "The Commissioner of Information has the power to
>
> (a) require a public authority to take any steps as may be necessary to secure compliance with the provisions of this Act, including –
>
> (i) by providing access to information, if so requested, in a particular form;
>
> (ii) by publishing certain information or categories of information, that are needed urgently and are not published under any other provision of this Act;
>
> (iii) by making necessary changes to its practices in relation to the maintenance, classification, management, retention and destruction of records;
>
> (iv) by enhancing the provision of training on the right to information for its officials;
>
> (v) by providing the Minister with an annual report;
>
> (b) require a public authority to compensate the complainant for inconvenience suffered;
>
> (c) request and examine any disciplinary action taken against any officer in respect of the administration of this Act;
>
> (d) indicate efforts by the public authorities to administer and implement the spirit and intention of this Act;
>
> (e) make recommendations for reform including recommendations in respect of the particular public authorities, for the development, improvement, modernisation, reform or amendment to this Act or other legislation or the common law; or
>
> (f) address any other matter relevant for operationalising the right to access to information."

Particular attention is drawn to the amplitude of powers conferred upon the Commissioner in s.8, s.9 et sequentes, to be dealt with more fully, presently, and the vexed issue of his purported statutory obligation to prepare an Annual Report for the Minister of Information to present to the National Assembly as erroneously publicised in the media either through misconception, malevolence or mere malcontent. These character traits have found an extraordinary vileness, viciousness and, in contemporary Guyanese society, whereby public officials, in particular, are not infrequently exposed to unnecessary vicissitudes and obloquy in office with little or no evidence to substantiate the allegations. It may not be too late to recommend that trial by media, print or electronic, is only permissible and known to the Common Law where investigative journalists have checked and cross-checked their information. Short of this, without applying the standard scientific method of verification, justice, cloistered by tradition, may be driven from the judgment seat and be replaced by the reckless, arbitrary, bridleless steed of caprice. Cooke, Bracton, and Eldon may be excused for shedding a Kaieteur of tears as they Chronicle their dismay from their respective celestial sepulchres. So too, I apprehend, would E.V. Luckhoo, Bollers, Haynes, Crane, George and Bishop. As a consequence, and if Andy Wigmore and Jack Montgomery are to be taken seriously in

their Essay: "How the Bad Boys of Brexit manipulated the Media", it may be fair to conclude that "most journalists are not the grizzled investigative reporters of yore ….. For the most part, they are lazy creatures on tight deadlines". Small wonder that "churnalism", representing the sum total of the "cut and paste" effort of current media men, has now been added to the lexicon of journalism. It is their contention that journalists and their political anoraks interact so excessively the public is overlooked and is lost in the process. [See Brexit, Trump and the Media, a 2017 Publication p.13]

Before proceeding to particularise the further jurisdictional contours of the COI, it may be convenient to explain that Public Authorities referred to at the commencement of this presentation principally derive their genesis from their operational relationship with the Executive Government, presided over by the President in conjunction with his Ministers (ART 99). For the purposes of the 2011 Act "Minister" is defined in s.2 as the Minister to whom is assigned the Information portfolio but the "responsible Minister" is identified as having responsibility for a Ministry. In this regard, the Minister of Information bears a dichotomous portfolio. This Act is concerned less with the President and his Ministers and more with agencies or departments and declared to be Public Authorities. Included in s.2 is a reference to "Public Authority" and for the sake of completeness this nomenclature, as defined, is spelt out verbatim for ease of comprehension:

"public authority" means –

(a) the National Assembly inclusive of parliamentary committees subject to the Standing Orders;

(b) subject to section 4(2), the Caribbean Court of Justice, the Court of Appeal, the High Court, the Income Tax Board of Review or a Court of summary jurisdiction;

(c) the Cabinet as constituted under the Constitution;

(d) a Ministry or a department or division of a Ministry;

(e) Local Democratic Organs established under the Municipal and District Councils Act, Local Government Act, Local Democratic Organs Act;

(f) a Regional Health Authority established under the Regional Health Authorities Act 2005;

(g) a statutory body, responsibility for which is assigned to a Minister;

(h) a company incorporated under the laws of Guyana which is owned or controlled by the State;

(i) a Constitutional Commission or any other Commission established by law; or

(j) a body corporate or an unincorporated entity –

(i) in relation to any function which it exercises on behalf of the State;

(ii) which is established by or on behalf of the State; or

(iii) which is supported, directly or indirectly, by Government funds and over which Government exercises control;"

Having regard to the wide sweep of the legislative embrace of state, governmental institutions, agencies and others previously regarded as insulated from obligatory disclosures, the Commissioner is invested with that oversight and penultimate decision whether a Public Authority's records, statements, etc., are accessible by citizens or persons domiciled in Guyana upon application (s.16). NGOs are not strictly so authorised but have in the past done so. Invitations to them have invariably been met with a notion of omniscience, aided by enclavic self-delusion and, sometimes, disdainful lack of response. To their credit, the Private Sector Commission, the Forestry Commission, the Credit Bureau found the time to consult with the Commissioner.

Ironically, s.45(1) of the Act makes provision for the development of an educational programme and training and the Ministers responsible for their respective public authorities are tasked with facilitating this exercise depending on "the financial and other resources" available for this purpose. Of greater significance, s.45(2) obliges the Minister of Information to compile a guide containing information for the benefit of a citizen wishing to access information under the Act. To date these obligations have been honoured in the breach. Now that the GBA has stepped up to the plate it is anticipated that the requisite statutory proposals would be initiated incrementally. The Public deserves no less. Without any scintilla of doubt, this innovative legislative schema is bound to languish or may even fall into desuetude if the political unction is not generously applied, in fulfilment of this novel embrace and demonstration of transparency and accountability in governance, so glibly articulated in the electoral season.

At this stage it is apposite to pause and reflect on the purport of s.7 since it speaks to the power of the Commissioner, not his obligations. This crystalline distinction was addressed by Asquith J, later Lord Asquith, nearly 80 years ago in Holloway .v. Poplar Borough Council (1939) 4 ALL E.R. 165, where the Council was invested by an Act of Parliament to disburse commiseratory emoluments "if it sees it fit to grant" (at p.166) i.e. it was given a power by the Statute.

The learned Judge had this to say:-

> "(the clause) imposes no obligation on the defendants (the Borough Council). It merely empowers them to do what they could not otherwise have done – that is, draw on the general rate for a specific purpose".

The injured Council employee could not therefore sue them to compel a variation of the payment schedule ex gratia tendered by the Council. It is therefore unfortunate that our decision-makers in whose hands lay the levers of power have not seized the opportunity to apprise themselves of this rudimentary guide to governance.

In contradistinction with s.7(a)(v), s.44(2), without equivocation, imposes on the Minister of Information the statutory annual obligation to prepare a Report for presentation to the National Assembly. This Section so far as is relevant provides:-

> "44.(1) The Minister shall, as soon as practicable but not later than nine months, after the end of each year, lay a report on the operation of this Act in the National Assembly.
>
> (2) Each responsible Minister shall, in relation to the public authorities responsibility for which has been assigned to him, furnish to the Minister such information as he requires for the purpose of the preparation of any report under this section and shall comply with any prescribed requirements concerning the furnishing of that information and the keeping of records for the purposes of this section.
>
> (3) A report under this section shall include in respect of the year to which the report relates the following-
>
> (a) the number of requests made to the Commissioner of Information;
>
> (b) the number of decisions that an applicant was not entitled to access to a document pursuant to a request, the provisions of this Act under which these decisions were made and the number of times each provision was invoked;
>
> (c) the number of applications for judicial review of decisions under this Act and the outcome of

those applications;

(d) the number of complaints made to the Commissioner of Information with respect to the operation of this Act and the nature of those complaints;

(e) the number of notices served upon the Commissioner of Information under section 11(1) and the number of decisions by the Commissioner of Information which were adverse to the person's claim;

(f) particulars of any disciplinary action taken against any officer in respect of the administration of this Act;

(g) the amount of fees collected by the Commissioner of Information under this Act;

(h) particulars of any reading room or other facility including official websites provided by each public authority for use by applicants or members of the public;

(i) any other facts which indicate an effort by public authorities to administer and implement the spirit and intention of this Act."

The Records ought to reflect that for the year 2014 a report compiled by the Presidential Secretariat on behalf of the then Minister with responsibility for Information was prepared for laying over in the 10th Parliament – a period of constitutional distress and parliamentary turmoil.

In the light of the reluctance of the "responsible Ministers" in 2013 – 2014 to respond to repeated requests of the COI in pursuance of the implementation of the provisions in s.8 and s.9 of the Act, s.7(a)(v) aforementioned was triggered. Consequently, reports consistent therewith were made to H.E. President Ramotar, the holder of the Information portfolio. At his request, the COI was invited to address the Cabinet on two occasions to facilitate a greater awareness of their responsibilities and the ramifications of the 2011 Act. Following these addresses, data satisfactory to meet the requirements of S.8 were received and an appropriate matrix culled therefrom was prepared for the requisite publication in the Official Gazette and Chronicle Newspaper of the 24th May, 2014, respectively, with an addendum published on 8th Feb, 2015. Requests have since been sent out to meet the provisions of S.9 which deals with the categories and classification of documents such as laws, manuals, procedures, statements of policy, records of decisions, practices, etc. used by Officers of the respective Ministries in making decisions, recommendations or in providing advice to persons or agencies with respect their rights, privileges, etc, affecting them. A caveat was attached to the requests that advised against the disclosure of information relating to documents exempted by the Act, which will be dealt with in greater detail shortly.

It must be borne in mind that the disclosures contemplated by this Act relate only to documents or information contained therein, (See S.2 "Information" and "official document"), generated after the commencement of this Act, [See S.14(4)] in connection with its functions as a Public Authority i.e 1st day of July 2013. And by S.13 it is the duty of every such Authority to maintain its records duly catalogued, classified, indexed and computerised. Where possible, this exercise should be connected through a network all over the country to facilitate access by the public to them. However, not all these records may be accessed. Provision is made for the classification of records depending on the "security level" ascribed to them – Top Secret, secret, confidential, restricted or general – and only information in all documents falling in the "general" category shall be accessible by the public, without any need for recourse to the intervention or facilitation of the Commissioner of Information. A Public Authority is required to take such steps as may be necessary to provide as much information in its possession to the public

on "its own volition", [See S.13(3)]; thus, the need for the Commissioner's intervention ought to be seen as a last resort. However, whatever may be the classification attributed to the information/ document in question, it should be noted that this Act does not permit the "inspection or taking of extracts or copies of documents which are governed by any other written law" [See S.14(3)].

For the sake of convenience at this juncture, S10 of the Act deals with certain kinds of information contained in Reports prepared and statements generated by way of advice or recommendations of a body/ entity outside of the Public Authority, under a written law or a Minister or any other Public Authority for the purpose of making those recommendations or advice to the Public Authority or the Minister responsible therefor. These Reports include an environmental impact statement; valuation report; tests for purchasing equipment, scientific, technical or feasibility studies, surveys; tests; final plans or proposals for the re-organisation of its functions; establishment of a new policy, programme or project and statements prepared by the Public Authority with respect to policy directions for the drafting of legislation. In consonance with the thematic purposes of the 2011 Act, S.10 (2) requires the publication in the Official Gazette and a daily Newspaper circulating in Guyana a statement of these Reports/ other documents created after the commencement date of the Act. However, information impinging on the status of exempted information is not required to be so published.

The policy – makers and legal draftsmen contemplated that the Commissioner of Information, akin to a koker attendant, must be diurnally alert to the circadian ebb and flow of the tide of information, documentary and otherwise, which, ex necessitate, comes into the possession of a Public Authority. Properly monitored by a dedicated paladin in accordance with the Act, this function may subserve both the interests of the administration and the innovative development of this legislative mechanism, given the checks and balances therein set out. In this way, it provides the State with an opportunity to develop a theology of information dissemination which can conduce to a credible regime of transparency and accountability to meet the minimum standards for global approbation and, more particularly, the treaty obligations as set out, eg, in the Inter-American Convention against Corruption. Confronted with this dialectic i.e. a creative clash of antithetical interests, a Marxist approach makes for an enduring synthesis. By S.14(4), documents, prior to commencement of this Act, are not accessible and, in this sense, the 2011 Act is prospective. It is worthy of note that a presentation was made on the 10th Oct., 2013 at Cara Lodge to the Review Committee of Experts of the Mechanism on the Implementation of the Inter-American Convention against Corruption, compendiously referred to as MESICIC, as a part of Guyana's contribution to the development of a compliant, complementary, legislative framework globally. For the record, a copy was thereafter lodged with the Presidential Secretariat for archival references.

Notwithstanding the provisions relating to documents exempted from public access as will be articulated presently, the COI may grant access to an aggrieved person where there is reasonable evidence that there is significant:-

(a) abuse of authority or neglect in the performance of official duty;

(b) injustice to him;

(c) danger to his health or safety or of the public;

(d) unauthorised use of public funds;

and access is justified in the public interest. (See S.38). It may be convenient to pose this question for public consumption: Is there some latent reason for the failure, reluctance or refusal of this Administration to provide the

Commissioner with an adequately staffed office?

In short compass, Cabinet documents, or copies, drafts or extracts therefrom are exempted, save where a Cabinet decision was officially published and a Certificate signed by the Cabinet Secretary is conclusive evidence to that effect. A similar classification is given to a document which contains information, the disclosure of which will be likely to prejudice the defence of Guyana or any State allied to Guyana; or maybe injurious to the detection, prevention or suppression of subversive or hostile activities in Guyana; or may prejudice the lawful activities of the disciplined Forces or may be contrary to the public interest. After a period of 20 years from the last day of the year in which the document came into existence, its exempt status expires. (See SS.27 – 31). Not dissimilar considerations relate to documents, disclosure of the contents of which may prejudice the investigations, administration or the enforcement of the law; a fair trial; enable a person to ascertain the identity of a confidential source of information relating to criminal activities; or facilitate the escape of persons from lawful detention, or jeopardise the security of any correctional facilities. In this context, documents classified by a Public Authority as "secret" or "top secret" as defined in s.2, are relevant. That determination is not final since where the issue is sufficiently vexed, judicial review may be apposite. A Court is expected to make a determination of that vexed issue, not by any reliance upon perceptions fuelled by any sensory idiosyncracy but must be guided in the interpretation based upon precedent, rules of laws and canons of construction hallowed by time. The distinction is too manifest to warrant any etymological or philosophical exegesis.

Documents containing trade secrets, or which may expose a business, commercial or financial undertaking to disadvantage or prejudice the competitive, contractual or negotiating position of the Public Authority are equally exempt. In like manner, it is not without some significance that the premature disclosure of information contained in documents which may have substantial adverse effects on the economy of Guyana, eg. the proposed introduction, abolition or variation of any tax, duty, interest rate, exchange rate or other instrument of economic management, is exempted. Similar provisions are made with respect to Public Authorities whose financial interests may be adversely affected in the acquisition or disposal of property or the supply of goods or services, contemplated sale or purchase of securities of foreign or Guyanese currencies which may be materially injurious to the interests of Guyana or its Public Authorities.

In this period of lactation for this seminal piece of legislative intervention a stakeholder could be justified in seeking guidance from judicial pronouncements in other jurisdictions, in particular, where our legislation bears similar provisions. In the Canadian case of Bland v. Canada (National Capital Commission) 1991 F.T.R Lexis 1995 this passage is worthy of repetition if only because it may represent the embodiment of our democratic polity and aspirations:-

> "It is always in the public interest to dispel rumours of corruption or just plain mismanagement of taxpayers' money and property. Naturally, if there has been negligence, somnolence or wrongdoing in the conduct of a government institution's operation it is, by virtual definition, in the public interest to disclose it and not to cover it up in wraps of secrecy."
> (para 27)

Apart from the aforementioned enabling provisions and duties conferred on the COI under the Act, S.50 contains penal provisions where documents or records are destroyed or damaged prior to, during or after, a request for access is made, and penalties range between fines plus a custodial sentence between six (6) months and one (1)

year. Furthermore, altering, defacing, erasing, or obliterating any document or information on any document, is similarly penalised.

Interestingly, in what may be called the "Snowden provision" it is a criminal offence to disclose "any content of exempt documents" or "to publish exempt information" on a website, blog site, any other social networking site, internet, radio or any other media." Penalties range from six (6) months to a year (Subsections.7&8).

It would be remiss of this author not to address a common controversy regarding the expectations of the ordinary citizenry unfamiliar with the complexity of the political and democratic approach to this relatively new phenomenon of transparency and accountability in government and governance which appears to be birthed and configured in the concepts of freedom of information and access to information, respectively.

Given their competing conspectus, this author finds it necessary to address a serpiginous error manifesting itself in recent commentaries relating to jurisdictions which appear to embrace the pursuit of freedom of information in contradistinction to access to information. Conceptually and etymologically spawned in the origins of a legislative framework diametrically conclusive, it would be fair to assert that precepts and principles discretely applicable would ineluctably lead to equally contradistinctive expectations according to established canons of construction. Viewed objectively, it would appear that both statutory regimes encompass a semblance of "a right to information" but, upon closer scrutiny and analysis, they appear to contemplate divergent expectations as may be culled from some of the published judicial decisions and dicta emanating from states with a democratic polity.

In South Africa, there is a Promotion of Access to Information Act 2000, the provisions of which have been construed from, inter alia, the elevated position of a human right embedded in its Constitution. Understandably, this conspectus finds validation in the consequences of an apartheid experience, globally condemned for the enormity of its barbarity. Intrinsic to the grievance giving rise to the extrinsic remedy, a constitutional human right perspective provides the appropriate springboard for its attainment. The Constitutional Court in South Africa in Brummer .v. Minister for Social Development et al (2009) 6 SA 323 (CC) at paras 62-3, declared:

> "And the Constitution demands that transparency must be fostered by providing the public with timely, accessible and accurate information ……. Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights."

In India, the most populous democratic Nation, with its embrace of a liberal jurisprudential approach to all matters touching the human endeavour, it is not surprising to find a comparatively analogous determination, consequent upon the attitudinal iron-fist deprivations and depravities of the British Raj era. One would have to be a student of naivete not to comprehend the historical and colonial proclivity of the British and its loyal Kith and Kin not to exploit and capitalise upon the soporific excesses of the quondam native caste system by which the mores of pre-independent India was generated and became unashamedly normative. The inevitability of division and domination inherent in that pernicious political polity cannot be overstated or underestimated, and its reversal was the only option to provide that equanimity in a modern democracy. Mahatma Gandhi's embrace of the untouchables represents that thaw in this era of equality. Hence, the judicial mindset that has become manifest in its juristic outpourings. While recognising that the right to information cannot be unlimited, even in a Right to Information Act 2005, the Supreme Court in the State of U.P .v. Raj Narain (1975) 4SCC 428 held that ……

> "The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries."

and this appears to have its foundational genesis in what a commentator, JANA, on the Indian Constitution, has explained:

> "Freedom of Information owes its origin in the freedom of speech and expression which is one of the solemn Fundamental Rights under the Constitution of India."

It would be an act of extreme judicial adventure, if not curial abandon, to cast our legislative, architectural net in such a wide arc. The word "Freedom" does not appear in our 2011 Act.

The media, both written and electronic, ought to play a pivotal role in generating an awareness campaign to ensure that this novel phenomenon of transparency and accountability becomes a household commodity. This civic responsibility inheres in every stakeholder who ought to capitalise on, and maximise the legislative entitlements of citizens and persons domiciled in Guyana. To achieve this, its focus should be to objectivise, not victimise, factualise, not sensationalise. Otherwise, "Name and shame", as is currently practised, will only lead to blame; however, this should not be the endgame! It is recommended that the epigones of those yesteryear media giants, Carl Blackman, Ricky Singh, Rick Mentis, Rev. Harold Wong and Andrew Morrison, et al, seek to raise their vocational standards if the general public is to achieve adequate access to information as contemplated by the 2011 Act.

Contrary to the popular misconceptions reasonably culled from the ill-advised pronouncements in the media, the authority granted to the Commissioner of Information reflects an alignment with his counterparts in the U.K under the Freedom of Information Act 2000 and Canada under the Access to Information Act. Its teleological underpinnings are not dissimilar and the process available to him in dealing with applications for access to information is objective and subject to judicial review, proscribing any tendency by him to infuse his decisions with any overriding subjective, adjectival idiosyncracies. Hence his accountability is preserved by Section II of the Act.

In much the same way that this presentation was commenced it will be concluded by invoking the immortal words of that great legal historian, Frederic William Maitland from the "The History of English Law before the time of Edward I", co-authored by Sir Frederick Pollock:

> "Today we study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow."

You, my colleagues and friends are therefore invited to be vigilant and treat with executive, bureaucratic tactics and frustrations of yesterday in a meaningful way today if the concomitant expectation that society as a whole will benefit generously tomorrow will ensue. For Transparency and accountability to take root the ground has to be tilled by the ploughshares of interested stakeholders with some dedicated diligence if the harvest of economic fruits of governance and government are to be reaped in the immediate future. We must learn from History which offers us the lesson of the Roman Statesman and General, Quintus Fabius Maximus, whose cunctatious manoeuvres in the 2nd Punic War resulted in the defeat of the Carthaginian General, Hannibal.

POST SCRIPT

Following the presentation of the Lecture on the Access to Information Act 2011 an opinion was expressed in one of the local newspapers relative to the issue of the domicilary status of corporate and unincorporated bodies.

For the purposes of informed clarity it is incumbent on the presenter to elucidate the complex concept of domicile (which has been defined as "an idea of Law", per Lord Westbury in Bell .v. Kennedy (1868) L.R 1Sc & Div.

307 at p.320) as it pertains to the implementation of the provisions of this Act. Experience in the interpretation of Statutes and subsidiary legislation is an essential factor in their contextual analyses, if their purport, intent and spirit are to be purposively captured.

The Law

According to J.H.C. Morris D.C.L. F.B.A of Gray's Inn, Fellow of Magdalen College and Reader in the Conflict of Laws, University of Oxford, in his Book "The Conflict of Laws", "the English law of domicile was evolved almost entirely with individuals in mind. It can only be applied to corporations with a certain sense of strain ….. It may be asked if questions concerning the existence, amalgamation or dissolution of a corporation are governed by the law of its place of incorporation, why not say so and dispense altogether with the fiction that it has a domicile? The question is unanswerable …" (see pp. 31-32; 352-354). The learned, eminent Professor Emeritus, with pristine lucidity, re-iterated that a corporation, unlike an individual, cannot change any purported domicile: Gasque .v. IRC (1940) 2 K.B. 80. Therefore it may be fair to conclude that a company does not meet the major qualifying, essential facets of domiciliary capacity. Most importantly, the leitmotif for the "fiction" in English Law, is non-existent for the purposes of the Revenue Law of Guyana. He based his conclusions by reference to taxing statutes which defined persons to include corporations and the Courts were obliged for that purpose to decide where a corporation was domiciled. In other words, that determination was a sine qua non for English Revenue Law which proscribes any attempt at the evasion of taxes. The origins of the modern NGOs, i.e., non-governmental organisations, are not without some vagueness. However, in the last decade of the 20th Century, with the upsurge in calls for transparency in Government, quangos, i.e. quasi non-governmental organisations, were spawned, but not without some patina of political stealth, together with a smattering of unsubtle dissembling. These groupings comprised closeted individuals with ambitions of glory and power but unwilling to risk the vagaries of elective office. Out of these groups of protesters/ civic demonstrators evolved the contemporary NGOs whose primary purposes appear to reflect a courageous pitbull challenge to administrative mismanagement in government and governance. While unincorporated, each of them will be entitled to apply for access to information once he or she meets the definitional structure of s.12 of the 2011 Act.

In the 2011 Act, by virtue of acknowledged canons of construction, its provisions must be considered holistically and not in a piecemeal or individualistic fashion. Of equal salience is the policy intrinsic to its enactment. To address this issue, its interpretation necessitates a consideration of the mischief it was intended to cure or remedy. Bennion on Statutory Interpretation – 6th Ed, provides an authoritative confirmation of this juridical methodology. Section 295 of the Code affirms the judicially approved approach to the mischief rule: Jude .v. H.M. Advocate (2011) UKSC. 55 at para 19:

> "In using the mischief for the purpose of interpretation it may be important to determine, so far as necessary for settling the point in issue, the precise scope or ambit of the mischief Parliament intended to remedy."

Thus, where the occasion warrants, common sense may indicate that the ambit of the mischief is narrower than the literal meaning. The Text was firm in its recommendation that in arriving at a determination it was necessary to seek out and concentrate on "the defect for which in the end Parliament actually legislated."

Section 12(1) allows for an application for the right of access and construed, in vacuo, may contemplate any person identified in law, to make such an application. Hence, a company or unincorporated body can be considered

a potential applicant. However, bearing in mind its contextual, inevitable postulation, s.3(1), which specifically establishes the "Object of the Act", provides that the "objective of this Act is to extend the right of members of the public to access information in the possession of public authorities …." The cardinal question which needs to be integrated in this discourse therefore, must be, Is a company or unincorporated body a "member of the public"? Herein lies the dilemma since subsection 2 reinforces this objective by its insistence that "the provisions of this Act shall be interpreted so as to further the objective set out in subsection (1)…" For these empirical reasons and other self-evident inferences this presentation arrived at the conclusions adumbrated herein.

This commendable approach is captured without equivocation in the most recent unanimous decision of the Caribbean Court of Justice in Katrina Smith vs. Albert Anthony Peter Selby (2017) CCJ 13 (AJ). Sir Dennis Byron, in delivering the Judgment, ruled that Lord Bingham's approach to legislative interpretation in R (Quintavalle) v. Secretary of State for Health (2003) 2 WLR 692 (HL) must be adopted and applied (para 8). At para 8 of the latter judgment Lord Bingham ruled:

> "Every Statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So, the controversial provisions should be read in the context of the entire statute, and the statute should be read in the historical context of the situation which led to its enactment."

The contention subsumed in the opinion expressed in the newspaper that "it is a matter of elementary law, not requiring the citing of any case authorities …" makes its reference to Sherlock Holmes' famous assertion to Watson clearly inapposite and is, perhaps, an officious knee-jerk clamour for narcissistic attention. It would be helpful to remind ourselves that opinions generated by rote present a danger greater than a surfeit of blissful, selective disinterest. ⚖

All underscorings are intended for emphasis.

A commentary on 12 years of Guyanese contribution to the Appellate Jurisdiction of the Caribbean Court of Justice

by Mr. Richard Layne, Attorney-at-Law

INTRODUCTION

The Caribbean Court of Justice (CCJ) was established on 14th February 2001 by the Agreement Establishing the Caribbean Court of Justice. The Agreement came into force on 23rd July 2003 and the CCJ was subsequently inaugurated on 16th April 2005 in Port-of-Spain, Trinidad and Tobago, which is also the Seat of the Court. The inauguration of the Court was as a significant milestone for the region which had been working towards establishing a regional court for a number of decades. With the passage of the Caribbean Court of Justice Act, Act. No. 16 of 2004 and its coming into operation on 1st April 2005, Guyana became one of the first territories in the region to accede to the appellate jurisdiction of the CCJ. Guyana's accession to the Court was particularly significant because it was the first time since formally delinking from the Privy Council in the 1970s that the country had an external final court of appeal.

Although twelve years is a relatively brief period for a regional appellate court, particularly one that boasts dual jurisdictions, the CCJ has nonetheless managed to lay the foundation for a strong and diverse regional jurisprudence. Jurisprudence emanating from Guyana has featured prominently in the decisions of both the Court's original and appellate jurisdictions. These cases have covered a wide range of legal areas and have established, in certain instances, landmark legal precedents and clarified ambiguities in the law which have existed for years. This paper seeks to extrapolate notable cases from the past twelve years which have emanated from Guyana in the appellate jurisdiction of the CCJ and assess how they have contributed to the development of the law in Guyana, as well as to illustrate how they have contributed to the development of a broader regional jurisprudence. The following section briefly recounts the historical context of the establishment of the CCJ as the region's apex appellate court. Section III provides an overview of the dual jurisdictions of the CCJ. Section IV critically examines notable from Guyana that have featured in the CCJ's appellate jurisdiction in the areas of special leave applications, criminal law, property law and civil litigation. Section V offers brief concluding thoughts on the past twelve years of jurisprudence in the appellate jurisdiction emanating from Guyana.

I. THE ROAD TO THE CCJ

The territories of the British Caribbean have flirted with the concept of a regional court for several years, as illustrated by the Federal Supreme Court of 1950's, the British Caribbean Court of Appeal of 1960's and the present Eastern Caribbean Supreme Court[7]. The British Caribbean Federation Act of 1956 laid the legal foundation for

7 The Eastern Caribbean Supreme Court (ECSC) was established in 1967 by the West Indies Associated States Supreme Court Order No. 223 of

the short-lived West Indies Federation and came into being on 3rd January 1958. This legislation also provided for the establishment of a Federal Supreme Court with the exclusive jurisdiction to pronounce upon any issue arising out of the interpretation of the Constitution of the Federation; as well as an original jurisdiction to resolve disputes involving Member States of the Federation. While the Federation was operational for only four years after collapsing with the independence of Jamaica and Trinidad & Tobago in 1962, the court laid the framework for a regional judicial institution of a similar nature.

Following the collapse of the Federation, two critical events in the 1970's re-ignited discussions of a regional court. The Treaty of Chaguaramas was signed on 4th July 1973 by Barbados, Guyana, Jamaica, and Trinidad and Tobago. This treaty also established the Caribbean Community and Common Market, replacing the Caribbean Free Trade Association which ceased to exist on 1st May 1974. The second critical event occurred a year earlier when the decision was made at the Representative Committee of the Organisation of Commonwealth Caribbean Bar Associations (OCCBA) to interrogate the prospects of establishing a Caribbean Court of Appeal to replace the Privy Council. In 1972, the OCCBA issued a report recommending the establishment of a regional court based on the following reasons:

a. *The removal of this vestigial colonial link is an essential part of the development of an independent Caribbean region;*
b. *The high cost of pursuing litigation in London inhibited access by the vast majority of citizens to the highest court of their respective countries;*
c. *While the technical legal expertise of the Privy Council was of the highest calibre, the unfamiliarity of the judges with the Caribbean life and culture was a factor that would militate against the development of a relevant body of Caribbean jurisprudence; and*
d. *The experience of the West Indian Court of Appeal justified confidence in the ability of the region to produce jurists of the highest quality.*[8]

Plans finally began to concretise at the Eighth Meeting of the Conference in 1989 where the Heads of Government of CARICOM agreed in principle to establish a Caribbean Court of Appeal. This decision was endorsed by the West Indian Commission in 1992 in their Report entitled "*Time for Action*".[9] The objectives of the original Treaty of Chaguaramas initially proved to be slow to actualise. Subsequent efforts to address this as well as to expand the scope of the treaty commenced around the late nineties and eventually culminated in the adoption of the Revised Treaty of Chaguaramas (RTC) establishing the Caribbean Community Including the CARICOM Single Market and Economy in 2001.[10] In adopting the RTC, regional leaders were acutely aware of the vulnerabilities faced by the small island economies of the Caribbean and the importance of establishing a larger single economic space for competition on the external market. Concomitant with this was the need to have an effective legislative framework to police the enforcement of the rules of the RTC and to facilitate legal and

1967. The court has both original and appellate jurisdictions comprising six independent states (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines) and three British Overseas Territories (Anguilla, British Virgin Islands, and Montserrat).

8 Cheryl Thompson-Barrow, Bringing Justice Home: The Road to Final Appellate and Regional Court Establishment (Commonwealth Secretariat December 8, 2008) 25.

9 West Indian Commission (1992), Time for Action: Report of the West Indian Commission, Bridgetown, Barbados. This was an independent body which was tasked with reporting to the CARICOM Heads of Government on proposals for advancing the goals of the Treaty of Chaguaramas.

10 Revised Treaty of Chaguaramas Establishing the Caribean Community (CARICOM) Single Market and Economy, 5 July 2001, 2259 UNTS 303 (entered into force 4 February 2002) [CARICOM 2001].

economic certainty in its application. It is against this backdrop that the Agreement Establishing the Caribbean Court of Justice was adopted.

It should be noted that the process of acceding to each of the original and appellate jurisdictions of the CCJ is different. In the original jurisdiction, the prevailing view is that since all CARICOM Member States are signatory to the Agreement Establishing the CCJ, they are by virtue of their CARICOM membership a party to the RTC, Article 216 of which makes the CCJ's original jurisdiction compulsory. Consequently, except for Montserrat and the Bahamas, all CARICOM Member States are subject to the CCJ's original jurisdiction. However, the situation becomes slightly complicated in relation to accession to the appellate jurisdiction. Article XXV (1) of the Agreement Establishing the CCJ provides that the CCJ is a "superior Court of record with such jurisdiction and powers as conferred by [the CCJ] Agreement or by the Constitution or any other law of a Contracting Party." Accession to this jurisdiction is therefore contingent not only on CARICOM Member States signing the Agreement Establishing the CCJ, but also, where necessary, completing all internal processes, including constitutional or other legislative amendments.

Guyana, for its part, got a "head start" on the process of delinking from the Privy Council when, by virtue of section 8 of the Republic Act, 1970, it abolished the right of appeal to the Privy Council in ordinary civil matters which did not involve questions of constitutionality. This legislation was then followed by the Judicial Committee of the Privy Council (Termination of Appeals) Act, 1970, which removed the right of appeal to the Privy Council by special leave. Completing the legal process of delinking was the enactment of the Constitutional (Amendment) Act No. 19 of 1973, which abolished the right of appeal in constitutional matters. Consequently, the municipal Court of Appeal then became the final appellate court in Guyana. The passage of these pieces of legislation in the 1970s made Guyana's accession to the appellate jurisdiction of the CCJ a relatively uncomplicated process and so the Caribbean Court of Justice Act, Act. No. 16 of 2004 was enacted and came into effect on 1st April 2005. Guyana and Barbados were the first countries to accede to the appellate jurisdiction of the CCJ in 2005. The constitutional arrangements in Barbados required only a simple majority in Parliament. This was achieved by the passage of the Constitution Amendment Act 2003; the Caribbean Court of Justice Act (Amendment) Act 2005; the Constitution (Amendment) Act 2005; and the Caribbean Community (Amendment) Act 2005.

The delinking process has not been as smooth for other territories where it has been controversial and, in some instances, politically-charged. In Jamaica, three bills were laid before its Parliament in 2003 to abolish appeals to the Privy Council and make the CCJ that country's final appellate court, one of which sought to amend the Constitution. These Bills were passed by a simple majority in Parliament since they sought to amend a non-entrenched provision of the Constitution. This was subsequently challenged by the then Leader of the Opposition and others, culminating in a finding by, ironically enough, the Privy Council itself in the case of *Independent Jamaica Council for Human Rights Ltd v S Marshall-Burnett and the Attorney General of Jamaica*[11] that the procedure adopted by the Government of Jamaica was unconstitutional. The three Bills were thus deemed non-severable and struck down; while the original jurisdiction Bill was revived and legislation eventually enacted to facilitate Jamaica's participation in the original jurisdiction of the CCJ. The issue of acceding to the appellate jurisdiction of the CCJ remains a controversial issue today in Jamaica which is usually a topic of much contention.

For most of the states of the Organisation of Eastern Caribbean States (OECS), it appears that referenda are

11 (2005) PC 3; 65 WIR 268.

required, in addition to a qualified majority vote in Parliament, to formally delink from the Privy Council. Grenada held such a referendum on 24th November 2016 which resulted in seven Bills aiming to amend the Constitution being rejected, one of which included a Bill to abolish appeals to the Privy Council and have the CCJ be its final appellate court. A similar rejection occurred in 2010 when St. Vincent and the Grenadines held a referendum on that island acceding to the appellate jurisdiction of the CCJ. Belize and Dominica signed on to the CCJ in 2010 and 2015, respectively. To date, Barbados, Guyana, Belize and Dominica are the only four countries to have acceded to the appellate jurisdiction of the CCJ.

II. OVERVIEW OF THE JURISDICTIONS OF THE CCJ

The CCJ has an original and appellate jurisdiction. In its original jurisdiction, the Court functions as an international tribunal with the compulsory and exclusive jurisdiction to apply rules of international law in interpreting and applying the provisions of the RTC. In its original jurisdiction, the Court is tasked with ensuring adherence to and compliance with the provisions of the RTC, thereby ensuring uniform application of its rules and promoting certainty in the operation of the CSME. The original jurisdiction of the CCJ has also produced a number of important decisions that featured the State of Guyana as a defendant party, including *Trinidad Cement Limited and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana*[12] where the Court addressed complaints from a cement manufacturer in Trinidad to compel the Guyana government to impose the agreed tariffs on extra-regional cement imports from the Dominican Republic; and *Rudisa Beverages & Juices N.V. and Caribbean International Distributors Inc. v. Guyana*[13] where the Court determined that the imposition of an environmental tax by Guyana on all imported non-returnable beverage containers imported into the country was discriminatory.

In the appellate jurisdiction, the CCJ functions as a final appellate court for both civil and criminal matters for Barbados, Guyana, Belize and Dominica. It has often been observed that in its appellate jurisdiction the Court has the best ability to contribute to the development of a robust Caribbean jurisprudence.[14] Proponents of this view usually point out the fact that the Court comprises judges and nationals of the Caribbean who actually reside within the region. At the CCJ, with a current compliment of seven judges, there sit nationals of Trinidad and Tobago, Jamaica, St. Vincent and the Grenadines, St. Kitts and Nevis, the United Kingdom, the Netherlands, and, most recently, Belize. Two Guyanese judges have also sat on the CCJ bench in prior years, the Hon. Mme Justice Desiree Bernard, who has the distinction of being the Court's first female judge and the Hon. Mr. Justice Duke Pollard. Both judges demitted office in March 2014 and June 2010, respectively.

III. APPELLATE JURISDICTION JURISPRUDENCE FROM GUYANA

Special Leave Applications

The very first appeal from Guyana before the CCJ was the case of *Griffith v Guyana Revenue Authority*.[15] This case provided the Court with one of its earliest opportunities to explore the circumstances under which it would exercise its inherent jurisdiction to grant special leave and also provide guidance on the issue of "as of

12 (2005) PC 3; 65 WIR 268.
13 [2014] CCJ 1 (OJ).
14 *AG and Others v Joseph and Boyce* [2006] CCJ 3 (AJ) [18] ; (2006) 69 WIR 104 [18].
15 [2006] CCJ 2 (AJ); (2006) 69 WIR 320.

right" appeals under section 6 of the Guyana Caribbean Court of Justice Act. The applicant in this case was a customs official who alleged that, as a public office holder, he was dismissed in breach of his constitutional right to property in the form of his superannuation benefits. In 1996 the Customs Department was transformed into a new corporate body - the Guyana Revenue Authority - by the Revenue Authority Act, No. 13 of 1996. The applicant agreed to be transferred to the Revenue Authority and commenced employment on 28th January 2000 when the Act came into force. He was absent from work for the period 23rd August 2000 until 23rd September 2000. His submitted medical certificates to the Authority were rejected due to his apparent failure to tender them in the time period prescribed by the Authority's Code of Conduct. He was subsequently dismissed from the Authority.

He initiated constitutional proceedings to declare his removal null and void in the High Court but his motion was dismissed and his subsequent appeal to the Court of Appeal was also dismissed. He then filed for special leave to appeal with the CCJ. The CCJ was Guyana's final court of appeal as of the 8th December 2005 Court of Appeal judgment and, according to the CCJ's rules, the applicant had 30 days from the date of judgment to apply for leave to appeal. This stipulation was not complied with and he instead filed for special leave on 16th January 2005, blaming his untimeliness on his attorneys' unfamiliarity with the newly established CCJ's procedures.

The Court observed that appeals to the CCJ are available: (i) as of right; (ii) with the leave of the Court of Appeal or; (iii) with special leave granted by the CCJ in accordance with sections 6, 7 and 8 of the Guyana CCJ Act. While conceding that special leave is not defined in the Guyana legislation, the Court noted that section 8 of the Act provides that special leave may be granted in civil and criminal cases. The Court explained that special leave was intended by that section to apply to cases where an appeal did not lie as of right and leave to appeal could not be obtained from the Court of Appeal. It further explained that it also had discretion, in the exercise of its inherent jurisdiction, to grant special leave when the Court of Appeal wrongly refused leave, or granted leave subject to conditions which were outside its powers, and when no application for leave has been made to the Court of Appeal, as long as in each instance the CCJ finds the appeal has a realistic chance of success.

The CCJ ultimately decided to treat the application as of right despite no such application being made in the court below. However, the Court refused to grant special leave as it did not view the proposed appeal to have a likelihood of success. This was because the applicant was of the misconceived view that his dismissal amounted to a constitutional deprivation of his "property" which consisted of the public office he held. While he may have fit the constitutional definition of a public officer while holding the office of Customs Officer and was governed by the Public Service Commission Rules, the Revenue Authority was not synonymous with the government nor were its employees' public officers, or even public servants. The Revenue Authority was a new distinct corporate entity whose employees were not holders of any public office nor were they employed in the service of the government in a civil capacity, despite the Revenue Authority being a public authority.

The Court also observed that the applicant failed to do anything other than claim he had a right to superannuation benefits. While agreeing that his dismissal negated the opportunity to qualify for such benefits, the Court stated that the loss of opportunity did not qualify as deprivation of property. It further noted that the applicant could not rely on a constitutional right to natural justice because that claim was also tied to a misconceived reliance on public office status. This decision was one of the earliest illustrations of the scope of the CCJ's inherent jurisdiction to grant special leave and exhibited its willingness to be somewhat flexible to litigants who were still becoming acclimatised to the Court's procedures.

Another case seeking special leave - *Ross v Sinclair*[16] - provides an interesting illustration of the inherent mechanisms within the structure of the CCJ to ensure widespread access to justice to litigants. This case focused on a dispute surrounding ownership of a condominium in which the applicant, a poor, blind and elderly woman, had resided for several years as a tenant of a deceased resident. The condominium was owned by the Central Housing and Planning Authority. The respondent, who was the administratix of the deceased resident, was herself poor and elderly. The Court ultimately viewed the case to be meritorious since it granted the application for special leave. In the Court of Appeal, the applicant was refused leave to appeal as a poor person and she was ordered to lodge security for costs in the sum of GY$100,000 within 90 days failing which the appeal would be dismissed. Consequently, the applicant sought leave to appeal from the CCJ as a poor person. Article 10.17(3) of the CCJ's Appellate Jurisdiction Rules provide a mechanism for facilitating access to the Court to low-income groups and states: "A party to whom leave has been granted to appeal or to defend an appeal as a poor person, shall not be required to provide security for costs or to pay any Court fees." Leave to appeal as a poor person is granted if the worth of the applicant's assets are below an amount stated in the Court Rules,[17] or if the court is satisfied that the applicant is unable to provide the security required by the Court Rules.

At the hearing of the special leave application, the CCJ had to consider whether it could grant leave to appeal as a poor person when such leave had been refused by the Court of Appeal which under the Appellate Jurisdiction Rules was the court empowered to grant such leave. After hearing arguments from counsel for the parties who appeared *pro bono*,[18] the Court granted leave to the applicant to appeal as a poor person by utilising Rule 1.3 of the CCJ Rules which defines the overriding objective as being "to enable the Court to deal with cases fairly and expeditiously so as to ensure a just result." The reasoning was that the fact that the Rules conferred on the Court of Appeal the power to grant leave to appeal as a poor person, does not mean that a refusal of such leave disables the CCJ, if it considers that the interest of justice so requires, from making an order of its own granting such leave, particularly where the appeal is deemed to be meritorious.

Criminal Appeals

The first criminal appeal from Guyana before the CCJ was the case of *Thomas v The State*.[19] The appellant in this case had been convicted of buggery committed on a 14-year old and sentenced to 10 years' imprisonment. After his appeal was dismissed, he sought and obtained special leave to appeal his conviction from the CCJ. The virtual complainant (VC), almost 15 years old at the time, was proceeding along the western side of the East Bank Demerara Airport main road at around 7pm on 27th March 1999. A police officer in a police vehicle pulled alongside him, conducted a search on him and ordered him into the car. The VC was driven to a deserted spot near Land of Canaan and was forcibly sodomized by the officer. After recounting his ordeal to his mother, a report was made to the Ruimveldt Police Station where he was interviewed by an Assistant Superintendent (ASP) Lawrence who then proceeded to Grove Police Station where the appellant was stationed to confront him about the allegation. A subsequent medical examination confirmed the VC had been forcibly sexually assaulted. On an identification parade held on the 29th March 1999, the VC identified the appellant as the person who had buggered him.

16 [2008] CCJ 4 (AJ); (2008) 72 WIR 282.

17 Schedule 4 of the Appellate Jurisdiction Rules, as amended on 21 April 2017, provides that the maximum net worth qualification for leave to appeal as a poor person from Guyana is GY$250,000.00.

18 Mr Stephen Fraser appeared for the applicant and Mr Timothy Jonas for the respondent.

19 [2007] CCJ 2 (AJ).

The State's case had rested on three elements: (i) circumstantial evidence; (ii) identification parade; and (iii) oral confession. In relation to the circumstantial evidence, it was brought out in evidence that the appellant, after dropping another officer home in Land of Canaan, would have passed the VC upon his return. Additionally, the VC had given evidence that the policeman who raped him had sprayed the car with "a blue perfume bottle" retrieved between the two front seats. Another police officer had testified to finding a bottle containing a blue liquid that smelled like perfume at about 9 a.m. on the 28th March 1999 in the same car driven by the appellant on the night in question. Further, the appellant's physical appearance corresponded with the rudimentary description given by the VC. The second limb of the prosecution's case was the identification of the appellant by the VC at the identification parade. The Court severely criticised the conduct of the parade and viewed that it was vitiated by the appellant being told in advance that the suspect would be in the line-up; and because the appellant would have stood out from the others who were all shabbily dressed prisoners. The third limb of the evidence against the appellant was an oral confession which ASP Lawrence testified the appellant made to him. Lawrence died before the trial and accordingly the deposition which he gave at the preliminary enquiry was put into evidence at the trial.

The Court ultimately viewed that the ground of appeal which had the most merit was that the trial judge misdirected the jury in dealing with the issue of whether the appellant had in fact made the self-inculpatory statement alleged by ASP Lawrence, by suggesting to them that ASP Lawrence's action in arresting the appellant before he had been identified by the VC, was consistent only with the appellant having made the contested admission. The Court in its judgment identified four passages in the course of the summing-up in which the trial judge strongly suggested to the jury that they could infer from ASP Lawrence's action in arresting the appellant prior to his identification by the VC, that the appellant must have made the admission of guilt. The Court was of the view that such an inference was not one which could be legitimately drawn as it was unsupported by the facts; and there were also other inferences more favourable to the accused which were equally consistent with his being arrested when he was. The Court declined to order a re-trial based on seven years elapsing since the appellant's arrest, the opportunity a re-trial would give to correct mistakes by the prosecution and the ordeal of another trial to both the appellant and VC. The conviction and sentence were ultimately quashed and the appellant discharged.

In the case of *Lashley v Singh*,[20] the appellants sought to challenge their conviction and sentence for the offences of breaking and entering and larceny on the grounds of incompetence of their counsel and the severity of their 14-year sentence, which was the maximum permissible sentence under the statute. In relation to the first ground of appeal, the Court observed that an allegation of incompetence is assessed by the touchstones of fairness and due process and an appellate court will overturn a conviction only in circumstances where the counsel's management of the case results in a denial of due process or an unfair trial. The Court, by majority judgement, held that the decision not to cross-examine the investigating officers as to the voluntariness of the confession statements as well as the decision not to lead any sworn evidence to support the allegation that the statements were obtained by coercion and the use of force were part of counsel's litigation strategy. These matters did not rise to a level so as to render their convictions unsafe because, even if the confessions were improperly admitted, there was still real evidence which pointed to the appellants' involvement in the break-in.

20 [2014] CCJ 11 (AJ).

On the issue of sentencing, again by majority judgment, the Court held that an appellate court will not interfere with a sentence unless it is manifestly excessive or wrong in principle. The reference in the magistrate's reasons to the 14-year maximum sentence underscored the recognition of the seriousness of the offences. Further, the magistrate's reasons indicated that due consideration was given to good character by reference to the sporting and religious activities of the appellants. The Court dismissed the appeal against conviction and affirmed the sentence.

The case of *Singh v Harrychan*[21] involved largely procedural issues concerning the interpretation of section 8(2) of the Summary Jurisdiction (Appeals) Act. This provision provides that upon receipt of the magistrate's memorandum of reasons for decision, the clerk shall forthwith, and at latest within 21 days of the receipt thereof, prepare a copy of the proceedings including the reasons for the decision, and when the copy is ready he shall notify the appellant in writing and, on payment of the proper fees, deliver the copy to him. The respondent had been sentenced to three years' imprisonment and filed an appeal. No grounds of appeal were filed but he applied for an extension of time to submit grounds of appeal arguing that the clerk's notice was not sent within the 21 days required by statute. The CCJ was confronted with two issues: (1) whether there is a statutory obligation on the clerk to prepare and serve the notice of proceedings within 21 days of receipt of the magistrate's memorandum and the consequence for non-compliance with such a requirement; and (2) whether service of the notice on the attorney was valid.

The Court observed that section 35 of the Summary Jurisdiction (Procedure) Act relates to the period between hearing and delivering the decision in a summary matter, not to the lodging of the reasons. Nonetheless, where the magistrate does not furnish the reasons within a reasonable period of the pronouncement of judgment, any person prejudiced thereby may bring proceedings under section 37 of the Act to compel the magistrate to produce those reasons. The Court agreed with the finding of the majority in the Court of Appeal that section 8 (2) imposed a requirement on the clerk to prepare the record of proceedings and notify the respondent within 21 days of receiving the statement of reasons from the magistrate. Non-compliance constituted a breach of that statutory obligation.

In addressing the consequences of the breach, the Court believed non-compliance did not deprive the clerk of jurisdiction to serve the notice outside the prescribed period. However, an appellant who was not served within the prescribed period had the right to compel the clerk's performance by way of seeking an order of mandamus under section 37 of the Act. The Court further determined that service of the notice on the respondent's attorney was valid. The attorney on record for the respondent had filed the notice of appeal in the proceedings. He was the agent of the party with the authority to accept service. The Court did not, however, decide as a general proposition that service in this manner is always permissible or in conformity with the Act. The Court allowed the appeal and remitted the matter to the Court of Appeal for hearing on its merits. Leave was granted to the respondent for an extension of time for filing the grounds of appeal to the time they were in fact filed. The Court also directed the Court of Appeal in hearing the appeal to consider the extensive delay in the processing of the matter and its impact on the conviction and sentence.

21 [2016] CCJ 12 (AJ).

Property Law

It is well-known that Guyana, as a result of its colonial past, has a hybrid land law system consisting of a unique and complex mixture of Roman-Dutch law and English common law. This hybrid system has proved to be jurisprudentially challenging over the years, even resulting in several inconsistent judicial authorities. The CCJ in its jurisprudence has been able to provide some much-needed clarity on several land related issues. One critical area concerns equitable interests in immovable property. For a number of years it had been unclear whether such interests are recognised in the Roman Dutch system. In the case of *Ramdass v Jairam and Others*,[22] the CCJ confirmed that equitable interests in immovable property are not recognised and cannot be acquired in Guyana. The Court explained that where a purchaser acquired no equitable interest in the land which he bought, he merely had a right to sue for specific performance before title was conveyed to a third party for value. It was further cautioned that where such a purchaser did not sue, the third-party purchaser would obtain an indefeasible title which could only be declared void by a court upon proof of fraud.

These principles were further developed in *Ramkishun v Fung-Kee-Fung and Others*,[23] where a vendor agreed to sell to a purchaser a parcel of land but died without having conveyed the property to the purchaser. Subsequently, the vendor's wife was appointed administratrix and transferred the land to the deceased vendor's heirs. The transport to the heirs was duly registered and the issue arose as to whether an order of specific performance to transfer the land to the purchaser could be made against the heirs on the basis that they were volunteers, given that they had not provided any consideration for the land. This was a particularly thorny issue since although the Civil Law Act provided that specific performance is available as a remedy in cases involving the sale of land, the purchaser in this case could not claim any such interest in light of the CCJ's earlier decision in *Ramdass*. The Court applied a Roman Dutch doctrine at paragraph [59] that "volunteers who acquire a real right, in whatever form, are bound by an undertaking of their predecessor with regard to the thing to which the real right adheres whether they have knowledge of that undertaking or not" and affirmed that in Guyana a purchaser for value of land can obtain an order for specific performance against a volunteer who is not a party to a contract.

In an earlier case - *Toolsie Persaud Ltd v Andrew James Investments Ltd and Others*[24] - the Court clarified the concept of adverse possession in Guyanese land law. The appellant company in this case sought a declaration that it had acquired prescriptive title to a tract of land by undisturbed adverse possession for over 12 years by the company and its predecessor in title - the State of Guyana. The appellant had purchased from the State, who had previously attempted to compulsorily acquire the land, by a process which was subsequently declared invalid. This sale to the appellant had taken place before the compulsory acquisition was challenged. The CCJ clarified the criteria for establishing a claim of adverse possession. A claimant had to show that for the requisite period he (and any necessary predecessor) had a sufficient degree of physical custody and control of the claimed land in the light of the land's circumstances; and an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land. The Court specifically noted that what is required in a claim of adverse possession is the intention to make full use of the land in the way in which an owner would, whether he knew he was not the owner or mistakenly

22 (2008) CCJ 6 (AJ); (2008) 72 WIR 270.
23 [2010] CCJ 2 (AJ); (2010) 76 WIR 328
24 [2008] CCJ 5 (AJ); (2008) 72 WIR 292.

believed himself to be the owner. If a dispossessed landowner wishes to stop time running in favour of the person in undisturbed possession of the land, he must bring proceedings against that person who is in possession of the property. The case also clarified that it is indeed possible for the State to acquire land by adverse possession.

Civil Litigation

Several civil litigation cases from Guyana have featured prominently in the CCJ's appellate jurisdiction. Two cases are notable. The first is *Guyana Sugar Corporation Inc v Dhanessar* [25] which was an employment law case that revolved around the application of the Termination of Employment and Severance Pay Act, 1997. The Guyana Sugar Corporation (Guysuco) summarily dismissed the respondent from his cane worker job in November 2006 after a physical altercation with his supervisor. Guysuco challenged the decision of the Court of Appeal of Guyana which held that the respondent's conduct did not amount to serious misconduct as to justify summary dismissal under section 10 of the Act. The Court of Appeal had also found that the respondent ought to be paid wages in lieu of notice, as well as severance benefits. On the issue of summary dismissal, the CCJ determined that because Guysuco did not present evidence that Mr Dhanessar's conduct related to the employment relationship or caused detriment to their business, it could not rely on section 10 of the Act. The Court agreed that there was good and sufficient cause to dismiss Mr Dhanessar for his inappropriate conduct under section 7 of the Act but noted that in such circumstances, the payment of severance benefits is excluded by the Act. The Court therefore set aside the award of the severance benefits but left intact the award of one month's salary in lieu of notice.

The second case is *Samuels v Guyana Telephone & Telegraph Co Ltd*.[26] This appeal arose after the appellant was sued by the Guyana Telephone and Telegraph Company (GT&T) for breach of contract after his Digital Subscriber Line (DSL) internet service was cut off because of his use of Voice over Internet Protocol (VoIP) technology provided by US company Vonage. GT&T defended the disconnection by arguing that Samuels' use of VoIP was a violation of the terms of his service agreement which prevented international telephone activity and international telephonic traffic bypass, as well as the provisions of the Telecommunications Act which forbid the operation of an unlicensed telecommunication system. In the High Court, the trial judge had found that GT&T had breached their contract to provide DSL internet service to the appellant and that GT&T had not given him sufficient notice of any restrictive terms when he signed up for DSL internet service, and he did not sign a written contract. The trial judge had also found that GT&T's exclusive licence was void under the Civil Law Act which prohibits illegal monopolies. The Court of Appeal overturned this decision and held that there was an implied term in the contract that the appellant would not employ his DSL internet service for international telephone activity and international telephonic traffic bypass. The Court of Appeal also determined that the issue of the breach of the Telecommunications Act was a public law issue which had no bearing on the breach of contract claim. Importantly, the Court of Appeal did not disturb any factual findings made by the trial judge.

Both parties appealed to the CCJ. The appellant argued that GT&T's exclusive licence was void because it perpetuated an illegal monopoly and facilitated a breach of the right to freedom of expression under section 146 (1) of the Constitution. Counsel for GT&T also cited section 21 of the Civil Law Act which addresses monopolies. On this point, the Court stated at paragraph [57]:

"From inception, Mr Samuels' claim was couched in the language of contract law. There is simply no

25 [2015] CCJ 4 AJ.
26 [2015] CCJ 8 (AJ).

> indication on his pleadings that his was a mixed claim. As such the main issues between the parties centred on whether there was an oral or written contract and what the terms of their agreement were. To allow Mr Samuels to challenge the validity of GT&T's licence in these proceedings would be manifestly unfair to GT&T. This is simply not the pleaded case that GT&T was called upon to answer. Mr Samuels gave no notice to GT&T that wider public interest issues, such as the legality of monopolies and the infringement of constitutional rights, were at stake. It goes without saying that the principles of fairness and justice must be considered from the standpoint of all the parties to litigation."

The CCJ also pointed out that neither the State nor the Director of Telecommunications, both of whom would have an interest in the resolution of this question, was a party to the appeal. The CCJ posited that there are some instances where claims of public and private law can be furthered in one action but that this would only be in exceptional circumstances. While finding that no such circumstances existed in this case, the Court pointed out that the groundwork could have been laid by joining the relevant parties or framing the pleadings in such a way to notify both GT&T and the courts below as to the public law issues now being ventilated. The Court dismissed this aspect of the appellant's appeal and also disallowed a cross-appeal by GT&T that the appellant's use of his DSL line for internet calls was a breach of the Telecommunications Act.

The CCJ found no basis for interfering with the findings of fact made by the trial judge who heard the viva voce evidence. The Court held that the trial judge properly believed Mr Samuels' claim that he did not sign a DSL service agreement and was not aware of any restrictive terms. As a general rule, an appellate court should be slow to reverse a trial judge's findings of fact, which are not disputed by the Court of Appeal. The CCJ also ruled that the Court of Appeal erred in implying a term into the contract between the appellant and GT&T. The issue of implied terms was not raised by the parties and there was no evidence that demonstrated how the appellant's use of Vonage would threaten GT&T's business interests. The appellant's appeal was thus partly allowed. The Court declared that GT&T was in breach of its contract with the appellant for the provision of DSL internet at his premises; restored the order for damages made by the trial judge and ordered GT&T to pay the costs of the appellant's appeal and its cross appeal, as well as the appellant's costs in the Court of Appeal. Although the CCJ declined to pronounce upon the legality of GT&T's monopoly over the telecommunications sector in Guyana, the decision was nonetheless significant as it has implications on the future use of advanced communication technologies and their relationship with older telecommunications legislation. There is growing reliance in Guyana and around the region on VoIP technology, both video and voice, which will force telecommunications companies to evolve and be more innovative in responding to these challenges.

IV. CONCLUSION

Before issuing its first judgment in a Guyanese case in 2006, the expectations for the CCJ as Guyana's premiere appellate court were high, particularly by members of the legal fraternity, since it was the country's first external appellate court in over three decades. In the twelve years since its inauguration, the CCJ, with each ruling handed down from a Guyanese appeal, has diligently crafted an impressive jurisprudence which covers a diverse and often complex range of legal issues in Guyana. Many of these earlier decisions were very instrumental to the CCJ's jurisprudence as they provided the Court with the first opportunity to give insight into

its jurisprudential philosophy and its judicial approach in adjudicating upon certain topical issues. In addition to providing legal clarity in various areas of the law, the Court has on several occasions been forced to bemoan instances of judicial delay in several cases from Guyana, many of which have been prolonged and consistent so as to indicate evidence of a systemic culture of judicial delay. These illustrations of delay have serious implications for the overall administration of justice in Guyana and the public perception of the court system. Moreover, it can negatively impact the ability of the CCJ as Guyana's premiere appellate court to adjudicate on cases in a fair and efficient manner. For its part, the Guyana judiciary has been expending efforts to address this issue, including collaborating with various institutions for technical and other support. In this regard, the Guyana judiciary has been in collaboration with the CCJ, primarily under the stewardship of its President, the Rt. Hon. Sir Dennis Byron, in developing programmes and strategies aimed at promoting case management techniques to address chronic case backlogs and pre-trial detention issues throughout all levels of the courts in Guyana. Such activities are proof that both Guyana and the CCJ have forged an incredibly productive relationship which has furthered the development of Guyanese and Caribbean jurisprudence. ⚖⚖

Single Forever?
Deconstructing Selby v Smith [2017] CCJ 13(AJ)

by Ms. Ria Mohammed-Davidson, LLM (Harvard), Attorney-at-Law - Trinidad & Tobago

INTRODUCTION

In his breakout hit of 2012 "Single Forever" Chutney singer KI Persad, vows to remain single forever thereby escaping the strictures of married life such as the curtailment of social exploits coupled with the concomitant increase in accountability and responsibility. The appeal of the song lies not only in its rhyming couplets, infectious beat and hook line but also in its vivid encapsulation of the joie d'vivre associated with the life of a single man. The feminist perspective was provided in Calypso Rose's 2017 offering of "Leave Me Alone". Much like KI, Rose's female protagonist also yearns for the careless abandon of singledom, thus opting to throw off the perceived albatross of partnership in order to maximize her enjoyment of the Carnival festivities. The concept of the single life is one which has occupied the attention not just of artistes and musicians but also of regional legislatures and courts. The issue came to the fore in the recent decision of the Caribbean Court of Justice (CCJ) in *Selby v Smith*; a case triggered by the sudden death of Albert Michael Selby in April 2008. The CCJ was called upon to resolve the question of whether a married man, living with someone other than his wife, was a single man.

When ah dead bury me clothes

Caribbean people are keenly aware of the battles waged upon the death of a family member, particularly one who dies intestate. Not uncommonly, previously unknown and unacknowledged family members, mostly in the form of intimate partners and children, come out of the woodwork in the quest to secure their rightful inheritance. Death, like sunlight, it seems is the best disinfectant, offering a glimpse into the complexities of intimate relationships in the Commonwealth Caribbean. Single, married, common-law, 'live-wid', 'live home', 'keep miss', 'jabal', 'horner man/woman' are all terms in the regional lexicon describing various relationship statuses, several of which can subsist at the same time. This uniquely Caribbean social phenomenon, which could be traced to the failure of the legal system to grant formal recognition to unions between slaves and later, East Indian immigrants, has prompted regional legislatures to make provision for persons in relationships other than traditional marriage to inherit under succession laws in certain circumstances.

Barbados led the charge in this regard via the Succession Act 1975; the historic impact of which was assessed by regional academics such as Norma Forde[1] and, more tangentially, Sampson Owusu.[2] Forde correctly surmised that the Act was intended to grant legislative imprimatur to the "illegitimate family"[3] and thus "align legislative development with social reality."[4] By its expansive definition of the term 'spouse' the Act was a "first step towards giving legal recognition to common law unions … intended to secure inheritance rights for persons involved in a reasonably stable relationship."[5]

The Selby Case

The Barbadian case of *Selby* arose against the backdrop of precisely such a union between Alfred Selby and Katrina Smith who began living together in 2002. At that point he was still married, eventually finalising his divorce

in 2004. His relationship with Katrina continued until his untimely demise in 2008. Alfred having died intestate, both Katrina and Anthony Selby, Alfred's brother, applied to the court for a grant of letters of administration to deal with Alfred's estate. This precipitated a round of litigation which lead all the way to the CCJ. The central question was whether Katrina could be regarded as Alfred's spouse, which turned on the question of whether Alfred was a 'single man' owing to section 2(3) of the Succession Act of Barbados ("the Act") which provides that:

> For the purposes of this Act, reference to a 'spouse' includes:
> (a) a single woman who was living together with a single man as his wife for a period of not less than 5 years immediately preceding the date of his death.

Taken at face value the section imposes two conditions for recognition as a spouse: (1) a cohabitational relationship of 5 years duration and (2) that the parties to the relationship are single persons. However, Alfred's divorce was obtained in 2004 and he died in 2008. As such, and in the immortal words of Tom Hanks in the film Apollo 13, "Houston, we have a problem!" At first blush, it appeared that Katrina failed to come within the remit of section 2(3)(a), falling short by a margin of a little over one year. As *Selby* shows in life and in the law, things are rarely ever that simple.

One section, three meanings

The three *Selby* judgments taken collectively demonstrate that section 2(3) is capable of different meanings depending on the jurisprudential philosophy of statutory interpretation adopted by the court, whether the requirements are to be construed conjunctively or disjunctively and whether the term 'single' is a term of art.

(1) <u>The Trial Judge</u>

Alleyne J, the trial judge, deconstructed the "spousal question"[6] central to the case into three issues:

> (1) can the term 'spouse' cover relationships other than marriage and those between single persons,
> (2) does the term 'single' include a married man who separated from his wife and
> (3) to qualify as a 'spouse' should the parties be single for the entire 5-year cohabitation period?

In answering each issue, the trial judge adopted the purposive approach to statutory interpretation as his guiding touchstone. In his view, the Act served a social purpose by granting rights to persons previously excluded from inheriting such as common law partners, dependents and illegitimate children. This historic background favoured "as liberal and beneficial an interpretation as it allows linguistically."[7] In relation to the first issue, Alleyne J held that the construction of section 2(3) evinced an intention to preserve the natural and ordinary meaning of the word 'spouse', i.e. a married man or woman and extend it to include single persons and no further. That alone was the "extent of the statutory enlargement."[8]

On the second question, Alleyne J concluded that the term 'single' can include married persons who were separated from their spouse. His reasoning was bolstered by English jurisprudence[9] as well as the scheme of the Act, particularly sections 2(4) and 102(5). Whilst acknowledging the use of the 'settle all doubts' device in s. 2(4) which states that 'single' includes widows, widowers and divorcees, the judge placed much store on the word 'includes'. He used this phraseology to bolster his assertion that the s. 2(4) is not to be taken as providing an exhaustive definition of the word 'spouse'. He further noted that s. 102(5) provides that married persons who have separated from each other and lived apart for more than five years are not entitled to inherit, notwithstanding the absence of any formal dissolution of the marriage. All of the foregoing is marshalled in support of his conclusion

that the term 'single' must be construed broadly to include married, estranged persons. Alleyne J explained that the "social reality is that some married persons who separate choose, for whatever reason, not to get divorced but go on to establish new relationships of some permanence. The law must have regard to this reality."[10]

Thus, in the court's view Katrina was Alfred's spouse despite the fact that from 2002 – 2004 Alfred was married. The trial judge distinguished the Barbadian authorities of *Dorothy Hudson v Julius Polius*[11] and *Kinch v Clarke*[12]; both of which hold that common law relationships cannot subsist where one of the parties is married, on the basis that they deal with separate legislation, namely the Family Law Act ("the FLA") which does not require the parties to be single. In a similar fashion, the case of *Murray v Neita*[13] which held that 'single' cannot include married persons, was dismissed because it dealt with a Jamaican statute and ought not to be transplanted into Barbadian law.

Despite admitting that the third question was not raised by counsel for either party, Alleyne J still deemed it "an issue worthy of examination."[14] He reasoned that the requirements of section 2(3) are to be viewed disjunctively and therefore the status of the parties as single persons need not coincide with the cohabitational period. in his view, the guiding consideration was whether the deceased party was single at the time of death, as opposed to during the pendency of the cohabitational relationship. This generous construction was motivated by "social purpose of the legislation"[15] which militated against a restrictive interpretation of the categories of person entitled to inherit from the deceased estate.

Based on Alleyne J's finding that Katrina was Alfred's spouse within the meaning of the Act, she became entitled to inherit 2/3 of his estate as per the provisions of s 49(2) of the Act. Anthony and the other siblings were left to share equally in the remaining 1/3 portion as Alfred's next-of-kin.[16]

Somewhat predictably Anthony appealed to the Court of Appeal, arguing that the trial judge erred in law in ascribing such breadth to section 2(3) and in concluding that the term 'single' referred to the parties' status at the time of death only.

(2) <u>The Court of Appeal</u>

The Court of Appeal allowed Anthony's appeal with its decision being delivered by Mason JA.[17]

Whilst acknowledging the utility of the purposive approach, Mason JA emphasised that the "first rule of statutory interpretation is that where the legal meaning of a word is plain, it must be followed."[18] The court failed to find any ambiguity or hidden meaning in the term 'single' as appears in section 2(3) or any gap in the legislative definition provided. Thus, the natural and ordinary meaning of the word prevailed that 'single' referred to persons who were not married.

In this regard, the court held that the decisions of *Kinch* and *Murray* were to be preferred to that of the trial judge. Mason JA conceded that the cases dealt with different legislation but she felt that the commonalities in the statutory language coupled with the factual substratum merited a similar outcome. Mason JA agreed with the irrefutable logic of Sykes J in *Murray* that if Parliament intended that a married man who was estranged from his wife be considered single, it would have so provided by clear words.

The Court of Appeal took issue with the trial judge's use of section 102(4) to justify an expanded reading of the term 'single'. In their view, this section fell to be construed in its proper context and served the limited purpose of setting out those situations where spouses are not entitled to inherit. This specific provision could not be taken as to govern the meaning to be ascribed to the more general terms used in the Act. The interpretation placed on

section 2(4) by the trial judge also came in for criticism. Mason JA held that the section is specific and exhaustive in its description of those persons who are to be regarded as single, which clearly did not include married separated persons. Furthermore, the historical backdrop to the Act indicated that Parliament intended to grant legitimacy to common law or "live wid" relationships but not to "disregard the sanctity of marriage."[19] In sum, the court could find no basis for holding that the term 'single' could include married estranged persons.

Mason JA also concluded that the requirements of section 2(3) were cumulative and conjunctive. The section required not just that Katrina and Alfred must have had a cohabitational relationship for at least 5 years immediately preceding Alfred's death but also that both parties must have been single for that entire 5-year time period. Beginning her calculation on 30 April 2004, Mason JA calculated that Katrina and Alfred's relationship fell one year and 19 days short of 5 years, thereby failing to satisfy the time prescribed by the Act. As such, Katrina could not be regarded as Alfred's spouse for the purposes of inheritance. Mason JA noted that:

> "The language of s. 2(3) is specific. It is specific as to who is a spouse: a single man/woman living with a single woman/man as husband and wife. It is specific as to the period of this condition of living together: a period of not less than 5 years immediately preceding the date of death."[20]

In Mason JA's view to stretch the meaning of the Act in the manner contended by the trial judge would be "a feat of statutory constructive imagination."[21] Dissatisfied with the ruling, Katrina filed an application for special leave to appeal to the CCJ. By consent, the hearing of the application was treated as the hearing of the substantive appeal. In its judgment handed down on September 1, 2017 by Byron P,[22] the CCJ ruled in favour of Katrina based on a unique interpretation of s. 2(3).

(3) The Caribbean Court of Justice

The CCJ's analysis began with an overview of the relevant principles of statutory interpretation. Byron P emphasised that the literal and purposive approaches ought not to be viewed as mutually exclusive. Citing with approval the decision of Lord Bingham in *R (Quintavalle) v Secretary of State for Health*,[23] the CCJ noted that ultimately the court's role is to discern and give effect to Parliament's intention as gleaned both from the words of the statute as well as the social and historic context of the legislation. In any interpretative exercise, judges must also guard against the risk of usurping the role of the Parliament by "imposing changes to conform with the judge's view of what is just and expedient."[24]

Having thus set the stage, the CCJ then proceeded to consider the mischief which the Act aimed to address, namely the failure of the colonial legal and juridical regime to provide a right of inheritance for persons living together as man and wife who were not married. The Act aimed to fill this void by providing inheritance rights not based on marriage but rather on a cohabitational relationship of 5 years duration which was determined as a "credible indicator of a commitment to a true union comparable to formal marriage."[25]

In relation to s. 2(3)(a) the court found no ambiguity but rather a clear legislative intent that a woman who was living with a man who remained married at the date of death could not qualify as a spouse. Byron P surmised that this could be attributed to Parliament's desire to "make a social statement about the importance and sanctity of marriage."[26] The court criticized the trial judge's "finessing"[27] of the term 'single' to include married estranged persons, agreeing with Mason JA and *Murray* that the term must be given its natural and ordinary meaning, i.e. an unmarried person. It further noted that if Parliament had intended the interpretation contended for by the trial judge then the required delineation would have been made in s. 2(4). It followed then during the first two years of

their cohabitational relationship, Alfred was not a single man.

However, the CCJ upheld the trial judge's disjunctive reading of s. 2(3) based on its natural and ordinary meaning combined with its historic context. Thus, the court held that Mason JA's conclusion to the contrary coupled with her reliance on *Kinch* which dealt with the FLA were misplaced. Byron P noted that while the term 'single' in s. 2(3)(a) operates as a barrier as to who can be considered a spouse, it does not apply where the deceased is single at the time of death. Much like Alleyne J, he referred to s 102(4) which excludes married partners from inheriting where they have been separated for 5 years immediately preceding death. He reasoned that cohabitation for the requisite 5-year statutory period preceding death, not marital status, is the primary determinant to the right of inheritance granted to a spouse by the Act. Therefore, once the deceased is single at the time of death, the surviving partner will come within the scope of s. 2(3) because:

> "The law clearly prescribes that cohabitation for five years is the statutory period which gives inheritance rights. It also prescribes that the court cannot declare a single woman to be the spouse of a married man. We have concluded that the assessment of marital status for the purpose of rights under the Act is made immediately preceding the death of the deceased."[28]

In conclusion, the CCJ held that Katrina was Alfred's spouse given that their cohabitational relationship subsisted for the minimum 5-year period before his death at which point he was a single man having divorced his wife in 2004.

Measuring Selby's impact

In partly upholding both the decisions of the trial judge and the Court of Appeal, the CCJ attempted to have the best of both worlds. *Selby* suffers from fractured reasoning leading to a flawed conclusion which ultimately runs counter to the plain meaning of the Act, the legislative intent, existing Caribbean jurisprudence and the separation of powers doctrine. The case also has implications for similarly worded legislative provisions in other Caribbean territories such as Guyana.

The attempt by the Court to marshal the relevant approaches to statutory interpretation into a coherent body of legal principles is commendable, motivated no doubt by the perceived ideological clash in the decisions of the lower courts. The court distills four major rules which ought to guide the process, namely the need to pay respect to:

1. the language of Parliament;
2. the context of the legislation;
3. the overriding obligation to give effect to Parliament's intention as discerned from the objective of the legislation and the words used and
4. the doctrine of judicial restraint to avoid imposing changes to the statute based on the judge's personal view.

Whilst the validity of each of these principles is unassailable, the supporting authorities referenced by the CCJ are curious choices. Byron P bolstered his analysis by reference to a raft of English cases, ranging from the 1584 *locus classicus* of *Heydon's Case*[29] to the 2003 decision of the House of Lords in *R (Quintavalle) v Secretary of State for Health*. In fact, the very first passage quoted in *Selby* comes from *Oliver Ashoworth (Holdings) Ltd v Ballard (Kent) Ltd*[30] which sets out the "conventional English approach"[31] to statutory interpretation. In this part

of the judgment, no fewer than seven English cases are used[32] compared with the three Caribbean cases, of which two are only mentioned in the footnote[33] and only one (which is used in the body of the judgment) is a decision of the CCJ itself.[34] For a court which is supposed to sit at the pinnacle of the regional judicial system and whose quest is the development of indigenous jurisprudence, more is expected.

Leaving that aside, the interpretation placed on s. 2(3) by the CCJ merits close scrutiny. No criticism can be levelled against the finding that the term 'single' refers to unmarried persons. Not only is this the natural and ordinary meaning of the word but there is nothing to suggest that the legislature intended to give the term a special meaning or elevate it to a term of art. The CCJ's censure of the trial judge's flawed interpretation of s. 2(3) owing to his personal views as to the aim of the Act is well placed. However, the court's further conclusion that the word 'single' is a mere description of the status of the deceased party at the time of death, rather than a qualifying requirement to be attached to the statutorily prescribed cohabitational period, is troubling on several fronts.

First, the CCJ acknowledged that this issue was raised tangentially by the trial judge of his own volition. In his decision, Alleyne J conceded that both parties proceeded on the assumption that the requirements of s. 2(3)(a), namely the status of single and the required cohabitational period were conjunctive and must coincide. Nonetheless the trial judge felt obliged to weigh in on the issue though acknowledging that "it is unnecessary for me to do so and, despite having not had the benefit of submissions from counsel in this regard."[35] As such, the trial judge's observations on this point were *obiter* as he himself acknowledged by noting that his answer to the other two components of his "spousal question" were dispositive of the dispute. For the CCJ to elevate the trial judge's dicta on a point that was not raised by either party to the ratio of their decision is quite remarkable.

The second problem is that the CCJ's disjunctive interpretation of s. 2(3) is difficult to reconcile with the actual wording of the provision, the legislative intent and relevant Caribbean case law.

The CCJ's conclusion that the term 'single' refers to status of the parties at the death of the deceased and that the 5-year cohabitation can include periods where the parties were married manifests a strained interpretation for which no authority was cited. The court provided no rationale for its endorsement of the trial judge's disjunctive reading other than a nebulous reference to the natural and ordinary meaning of the section coupled with the statutory and historic context.[36]

They then went on to reason that 'single' must refer to the status of the deceased at the date of death not only because of the clear meaning of s. 2(3) but also because s. 102(4) provides that a married person who was not cohabited with their partner for 5 years immediately preceding death could not inherit.

The better view is that s. 2(3) must be read as setting out conjunctive requirements for a surviving partner of a common law relationship to be considered a spouse in order to inherit on an intestacy. This cumulative reading is supported by the grammatical structure and natural meaning of the section, legislative intent of the Act, the wider statutory regime governing common law unions in Barbados and comparative case law both within Barbados and the wider Caribbean.

The plain meaning of s. 2(3) suggests that the legislature intended that to be considered a spouse, both parties must be single persons and have lived together in that status (i.e. as single persons) for the statutorily prescribed cohabitational period as man and wife. In the section, the phrase 'immediately preceding the date of his death' comes right after the reference to the 5-year minimum period of cohabitation. The cohabitational relationship is in turn described by reference to a single woman living together with a single man as his wife. Taken

together two conclusions follow naturally. First, the reference to the period immediately preceding the death of the deceased

sets out the period of time from which the court must begin its calculation in reconciling the actual cohabitational period of the parties with the 5-year minimum threshold. Second, the court must be further satisfied that for the entirety of this 5-year period, the relationship bore certain features, namely that (1) it involved two single parties (2) who lived together (3) as man and wife. This conjunctive reading is the inevitable outcome of the grammatical construction and syntax of the section. The structure of section 2(3) reveals a clear intention on the part of the legislature that only single persons could enter into cohabitational relationships.

The outcome in *Selby* flies in the face of the spirit of the Act which seeks to preserve the sanctity of marriage; a point which the CCJ itself recognised.[37] Yet the court has in effect condoned adultery by allowing married persons to enter common law relationships whilst their marriage subsists. All that matters, in their view, is that at the time of death the parties were single. The problem *Selby* creates is not ameliorated by the court's determination that the term 'single' cannot include married persons. *Selby* opens the door for the years spent in an extra-marital union to count towards the 5-year cohabitational period required to inherit as a spouse.

An examination of the Parliamentary debate on the Act reveals that prior to being laid in the House it provoked debate in the Press and religious circles, even being condemned by the Dean of the Cathedral for its recognition of illegitimate children and common law unions.[38] This being the political and societal climate of the time, it is unsurprising that the Act is devoid of any intention to allow married persons to enter into 'live-wid' relationships. This conclusion is strengthened when one considers the Barbadian legislature's treatment of common law relationships in the round. As noted earlier, the Act was passed in 1975. The social issue of cohabitational relationships was again legislatively considered in the FLA which was passed a mere six years later in 1981. The FLA recognises cohabitational relationships and makes provision for the grant of maintenance orders and property division. It has been described as "revolutionary in nature and unique in content."[39] The difference between the two legislative schemes was explained by Owusu:

> "the Succession Act, which accords marital succession rights to a party to a de facto conjugal union. The Family Law Act, on the other hand, extends marital support and property rights to a party to a union other than marriage on termination of such union by separation and not by death."[40]

Section 39 of the FLA defines a union other than marriage as the "relationship that is established when a man and a woman who, not being married to each other, have cohabited continuously for a period of five years." Notably absent is any mention of the word 'single'. As such, Owusu notes that the FLA envisions that parties to a 'union other than marriage' can be engaged in adultery while the Act does not. He theorises that this anomaly can be resolved by a restrictive interpretation of s 39 which focuses on the phrase 'not being married to each other', reasoning that it would be difficult to meet where either cohabitee "was married before their union started."[41] However the conclusion in *Hutson v Polean*[42] proves just the opposite. In that case Williams J held that s. 39 can apply where the cohabiting partners are married persons. Tesheira also endorses this interpretation of the FLA.[43]

For better or worse, the Barbadian legislature has deliberately decided to treat common law relationships differently *inter vivos* than upon death. It is important to note that the Act was the subject of legislative amendment in 1979[44] in order "to bring about changes based on practical experience in adjudication." [45] The most pertinent change for present purposes was effected to the very s. 2(3) in the form of a reduction of the prescribed cohabitation

period from 7 years to 5 years. This change was effected in response to a recommendation by the National Commission on the Status of Women, chaired by Norma Forde.[46]

However, the term 'single' remained untouched and so subsists to the present day. This is not to say that there is no Caribbean precedent for moving away from the requirement that only single persons can enter into a cohabitational relationships. In 2000 Trinidad and Tobago passed the Distribution of Estates Act ("the DEA") which, *inter alia*, amended the definition of 'cohabitant' in the 1981 Succession Act to remove the word 'single', thereby bringing the statute into conformity with the Cohabitational Relationship Act.[47] In fact, section 25(2) of the DEA sets out the distribution formula to be applied where a person dies intestate leaving a spouse and a cohabitant; a clear indication that both types of relationships can subsist and overlap. As Jamadar JA explained in *Narine v Chune*[48] this broadening of the categories of cohabitants was the "clear and unequivocal legislative intention … an overt public policy change introduced and made by the legislature."[49] By parity of reasoning, it can be argued that the failure of the Barbadian legislature to make a similar amendment evinces a contrary intention, i.e. to keep the category of cohabitants for the purpose of inheritance restricted to single persons; and for the purposes of maintenance or property division only to include married persons.

In *Selby*, counsel for the respondent made specific reference to the Trinidad and Tobago legislative change and *Narine* in order to demonstrate that s. 2(3) would have to be amended to allow for periods of cohabitation where the parties are married to count towards the 5-year prescription.[50]

The CCJ blithely dismissed the point noting that such "legislative amendment would only be required where at the time of death the deceased was still married to another person."[51] However it provided little to no rationale for its own disjunctive interpretation of the Act which allowed Katrina to source the extra year required to fall within s. 2(3) by adding on from the period 2002 – 2004 when Alfred was still married. In so doing, they seem to have subconsciously endorsed the appellant's submission to adopt an interpretation of the Act which harmonises "spousal rights in life and in death."[52]

The conclusion is *Selby* is also at variance with previous Barbadian jurisprudence such as *Douglas* and *Kinch* as well as other Caribbean cases such as *Murray*. In *Kinch*, the applicant shared a longstanding relationship with the deceased, Alfred Seymour Clarke, with whom she lived from 1967 – 1982. Upon his death, she claimed to be entitled to a half share of his estate and applied for an order to this effect under the FLA. Her claim was dismissed by the trial judge, Williams J on that basis that the FLA does not cover property which forms part of the estate of deceased persons. Upon death, the estate of the deceased and the related remedies became governed by the provisions of the Succession Act. Williams J went on to cast doubt on the possibility of a successful claim under the Act. Mr. Clarke obtained a divorce in September 5, 1978 and died on August 27, 1982. Therefore, the trial judge observed that Ms. Kinch "could not qualify as a spouse under the Succession Act because she had not been living together with a single man as his wife for a period of not less than five years immediately preceding the date of his death."[53]

Despite noting the obvious, namely that *Kinch* is not binding precedent and Williams J's interpretation of the Act is dicta (points which the Court of Appeal concede in any event), the CCJ provides no substantial analysis of the case. Instead they state that it "should be clear from our assessment of the purpose of the relevant sections that we have come to a different conclusion."[54]

Interestingly Ms. Kinch fell a mere 9 days short of the 5-year threshold compared to the 1 year and 19 days

shortfall which characterized Katrina and Alfred's relationship.

Another pertinent authority is *Murray,* which the CCJ quoted with unqualified approval. *Murray* arose after a stroke of luck befell Mr. Nieta who won the Jamaican lottery. What was lucky for him turned out to be unlucky for his partner of some 20 years, Ms. Murray, who was jilted in favour of a younger companion. Ms. Murray sought reprieve under the Property (Right of Spouses) Act 2004 (PROSA) claiming 50% of Mr. Nieta's property including a half portion of his lottery winnings. Her action was dismissed on the basis that she failed to meet the requirements to be considered a spouse under s 2(1)(a) of PROSA because he remained a married man throughout their relationship. Section 2(1)(a) is substantially similar to s. 2(3)(a) of the Act and contains the same requirement of a cohabitational relationship between a single man and a single woman which must endure for at least 5 years. Sykes J concluded that the word 'single' fell to be given its ordinary meaning and could not include married separated persons. He also noted that only single persons can live together throughout the required cohabitation period and be considered spouses. Both conclusions are evident from the following passage, which itself is reproduced in *Selby*:

> "Single is an ordinary word which usually means unmarried. The word single restricts the class of men and women who can live together and be regarded as spouses under the Act. Had it been intended that spouse includes any man and woman living together then single would not have been included in the definition."[55]

In *Selby,* it appears that the CCJ has cherry picked from the *Murray* judgment. On the one hand, Byron P used the case to support his argument that the term 'single' must be given its natural and ordinary meaning. On the other hand, the learned President failed to apply Sykes J's conclusion that the parties to a cohabitational relationship must have been single during the pendency of the statutorily prescribed 5-year period. No explanation is provided by the CCJ to explain this apparent judicial volte-face.

The third area of concern is that the CCJ's decision in *Selby* falls afoul of the separation of powers doctrine. It is trite law that the Caribbean constitutional structure endows the legislature with law making power and the judiciary is cast in an interpretative role. However, by concluding that the right to inherit as a spouse is based on the marital status of the parties at the date of the death of the deceased, the CCJ has effectively re-written s. 2(3) to read thus:

> For the purposes of this Act, reference to a 'spouse' includes:
> (a) a <u>woman</u> who lives with a <u>man</u> as his wife for a period of not less than five years immediately preceding the date of his death <u>provided that the deceased is single at the</u> <u>date of death.</u>

In adopting this perplexing interpretation, the CCJ falls prey to the same error which it ascribed to the trial judge, that of distorting the natural meaning of the Act because of its perception as to the purpose of the Act. Their conclusion is difficult to reconcile with their own sage advice that courts must exercise judicial restraint in interpreting legislation. Their disjunctive reading of s. 2(3) violated their own observation that "the judiciary should not usurp the parliamentary power by giving words a meaning that Parliament does not intend."[56]

Even more troubling is that this is not the first occasion on which the CCJ has trespassed on the province of the legislature under the guise of statutory interpretation. In *Rambarran v R*[57] the court adopted a tortured interpretation of the Criminal Appeal Act holding that the time for appealing a criminal conviction begins to run from the date of sentence, prompting a robust and compelling joint dissent from Justices Nelson (as he then

was) and Rajnauth-Lee. Interestingly *Rambarran* also involved a situation where the appellants were substantially outside the statutory regime, namely 21-day limit for filing an appeal. It may be surmised that the CCJ has a penchant for law making where litigants fall afoul of statutory time frames.

Considering the entire scheme of the Act, there was no need for the CCJ to adopt such a contrived interpretation of s. 2(3). The Act already makes provision for persons who do not qualify as spouses to receive financial assistance from the estate of their deceased partners using the route of dependency. Section 57 defines a dependent to include, *inter alia*, "any woman (other than his spouse) living together with a man as his wife immediately preceding the date of his death and wholly or mainly maintained by him at that time." (my emphasis). Section 58 goes on to provide that dependents can apply for an order of maintenance to be made from the intestate's estate and the court is given wide discretion to make such order as it considers fit. The CCJ explicitly recognised that if Katrina could not qualify as a spouse, she could seek financial relief via this route.[58] However they expressed no view on the matter because it was not raised by the parties, seemingly forgetting that neither was the question of the disjunctive reading of the Act.

Fourthly, as a practical matter, the *Selby* decision is likely to have further implications for several Caribbean territories which grant inheritance rights to the surviving partner of a common law relationship. Although by a strict application of the doctrine of judicial precedent *Selby* is binding only on Barbados, the reality is that the CCJ sits as the apex court for two jurisdictions with comparable legislation -Belize and Guyana.

At the regional level, succession legislation of several Caribbean territories such as Belize,[59] Guyana,[60] Jamaica[61] and Trinidad and Tobago[62] has broadened the categories of persons who are entitled to inherit on an intestacy to include persons in relationships other than a traditional marriage to take into account the social realities of intimate relationships in the region. The nonclementure given to these relationships varies from common law union in Belize and Guyana to cohabitant in Trinidad and Tobago and spouse in Jamaica and Barbados. These relationships are collectively termed "statutory spouses" by Tesheira,[63] who further observes that they all share key marks of commonality namely, a cohabitational relationship, a statutorily prescribed period of cohabitation and that the parties are single persons of the opposite sex. The term 'single' appears in almost all the provisions defining statutory spouses, with Belize and Trinidad and Tobago being notable exceptions. The plain meaning and legislative intent of these provisions (barring the noted exceptions) is that statutory spouses must be single persons for the duration of their cohabitational relationship which are all calculated by reference to a 5-year period preceding death.

By way of example, in Guyana, the Rights of Persons in Common Law Union (Amendment) Act 2012 provides that a single woman living with a single man in a common law union for 5 years has the same rights of inheritance regarding intestate succession as a widow, widower or surviving spouse. In piloting this Act in the National Assembly, then Attorney General Mr. Mohabir Nandlall was at pains to explain that the legislature was seeking to extend legal recognition for common law unions for the purpose of inheritance on intestacy. However, they were not prepared to undermine the marital union by allowing both common law and traditional marriage to subsist at the same time owing to the potential deleterious effect on the fabric of society. Thus, Minister Nandlall assured that:

> "Clause 2(2) recognises only one such union. The reason being is that we could not and cannot take the position of recognising more than two unions. If we do so, we would be taking common-law

> unions to the other extreme, to the extent that we would be lending our imprimatur to adulterous unions. I do not think as a society we would want to go that route … To recognise that spouse who is the new cohabite will again put us in the position where we are condoning adultery. One may argue or condoning bigamy, obliterating or professed allegiance to polygamy. I do not think that we want to go that route either."[64]

In the case of Belize, there is no mention of the term 'single' but it is still evident that common law unions cannot be entered into by married persons. In 2001 the Supreme Court of Judicature Act was amended to provide that a "common law union or union means the relationship that is established when a man and a woman who are not legally married to each other and to any other person cohabit together continuously as husband and wife for a period of at least five years."[65] (my emphasis). This definition also applies to common law spouses who seek to inherit under the Administration of Estates Act, s. 54. As referenced earlier Trinidad and Tobago is the only jurisdiction to date to dispense with the requirement of singledom in relation to the parties to a cohabitational relationship.

Despite the tenets of judicial precedent, as a practical matter it is reasonable to assume that the CCJ will interpret the law in Belize and Guyana in line with the reasoning in *Selby*. There is little in the language of the sections which provides for any point of distinction. Therefore, not only has the CCJ taken a red pen to Barbadian law but it has also opened the door to similarly strained interpretations to be placed upon Guyanese and Belizean legislation. This despite the clear intention in both jurisdictions to preclude married persons from entering into cohabitational relationships.

CONCLUSION

The decision in *Selby* is a historic one but its reasoning is highly questionable. In an effort to help one woman come within s. 2(3) by making up the shortfall of 1 year and 19 days the CCJ has upended the natural meaning of the Act, the legislative intent and the existing jurisprudence on the issue. They have seen it fit to expand the boundaries of common law relationships to include not just single persons but married ones too. This extension comes with little clinical analysis making the court's rationale difficult to follow and/or accept. The CCJ appears ready and willing to throw off their judicial robes in favour of legislative hats, particularly when dealing with legislation which sets out prescribed time limits. In the meantime, Caribbean people concerned about guarding their finances and securing an estate for their heirs are perhaps best advised to heed the advice of Beyoncé, i.e. if you like it then you better put a ring on it!

1. Norma Monica Forde, Family Inheritance, Provisions in the Barbados Succession Act: Redefining the Family, 9 U. Miami Inter-Am. L. Rev. 115 (1977).
2. Sampson Owusu, Union other than Marriage under the Barbados Family Law Act 1981, 22(4) Anglo-Amer. LR (1992).
3. Forde, supra note 1.
4. Id. at 122.
5. Id. at 117.
6. BB 2010 HC 13 at [35].
7. Id. at [55].
8. Id. at [68].

9. Jones v Evans [1944] K.B. 582, R v Collingwood 116 E.R. 1025, Taylor v The Supplementary Benefit Officer [1986] 1 F.L.R. 16.
10. Selby, supra note 6, at [105].
11. High Court Suit No. 93 of 1982.
12. BB 1985 HC 17, [1986] 21 Barb. L.R. 50.
13. JM 2006 SC 82.
14. Selby, supra note 6, at [61].
15. Id. at [113].
16. Section 53(1) of the Act which defines next-of-kin to include blood relatives of the deceased.
17. BB 2017 CA 2.
18. Id. at [33].
19. Id. at [61].
20. Id. at [62].
21. Id. at [67].
22. [2017] CCJ 13 (AJ).
23. [2003] 2 W.L.R. 692, HL.
24. Selby, supra note 22, at [9].
25. Id. at [22].
26. Id. at [24].
27. Id.
28. Id. at [30].
29. 3 Co. Rep. 7a.
30. [1999] 2 All E.R. 791, CA.
31. Id. at 805, See also: Selby, supra note 22 at [7].
32. Oliver Ashoworth, supra note 30, Quintavalle, supra note 23, Heydon's Case, supra note 29, Williams & Glyn's Bank Ltd v Boland [1981] AC 487, R (on the application of West Minster City Council) v National Asylum Support Service [2002] 1 WLR 2956, Lumsden v IRC [1914] AC 877, Fothergill v Monarch Airlines [1981] A.C. 251 HL.
33. Court of Appeal of Jamaica In Independent Commissions of Investigations v Digicel Jamaica Limited JM 2015 CA 57 and James Ifill v The Attorney General and the Chief Personnel Officer Civil Appeal No. 3 of 2013.
34. Rambarran v The Queen [2016] CCJ 2 (AJ).
35. Selby, supra note 6, at [108].
36. Selby, supra note 22, at [29].
37. Id. at [24].
38. Official Report of the House of Assembly Debates, Second Session 1971- 76, 15 July 1975, 5216 – 5242.
39. Owusu, supra note 2, at 449.
40. Id. at 474.
41. Id. at 474-75.
42. BB 1983 HC 16.
43. TESHEIRA, COMMONWEALTH CARIBBEAN FAMILY LAW: HUSBAND, WIFE and COHABITANT 65 - 68 (2012).
44. Succession (Amendment) Act 1979.
45. Official Report of the House of Assembly Debates, Second Session 1979 –81, Speech of the Hon. H. de B. Forde, November 1979, 2997 – 3000, 2997.
46. Id. at 2998.
47. Chap 45:55.
48. TT 2012 CA 19
49. Id. at [14].
50. Amended Written Submissions of the Respondent, filed on 07/05/2017, at [23] – [28].
51. Selby supra note 22, at [25].
52. Written Submissions of the Appellant, filed on 06/20/2017, at [29].
53. Kinch, supra note 12 at 2 – 3.

54. Selby, supra note 22, at [29].
55. Selby, supra note 6, at [24].
56. Selby, supra note 22, at [24].
57. Rambarran, supra note 34.
58. Selby, supra note 22, at [19] – [21].
59. Act No. 6 of 2001.
60. Rights of Persons in Common Law Unions (Amendment) Act 2012 which amended that Family and Dependents Provision Act Cap 12:24.
61. Intestates Estates and Property Charges Act, s. 2.
62. Administration of Estates Act Chap 9:01, s. 2.
63. TESHEIRA, supra note 43.
64. Common Law Union the Right to Access Benefits, Speech delivered at 24th Sitting of the Tenth Parliament (Jun. 12,2012)http://parliament.gov.gy/media-centre/speeches/common-law-union-the-right-to-access-benefits/#.WbP6lIWcFjo.
65. Cap 91, Laws of Belize, s. 148:04.

EDITORIAL NOTE

Nine Senior Counsel were appointed by His Excellency, the President of Guyana in December 2016 after an absence of appointments for twenty years. His Excellency further indicated at that time that appointments would be made annually and was so done again in 2017 with four additional appointments.

The appointment of Senior Counsel has since independence caused disquiet at the Bar who have consistently called for transparency in the appointments by repeatedly, without success, seeking to have the criteria for appointment defined. There is no defined, prescribed and/or mandated criteria or procedure for appointment and hence seem to have varied over time depending on the officer holder. This causes uncertainty and unfairly opens members of the Bar so elevated to criticisms of political appointees particularly when there is the belief that other deserving persons have been overlooked.

Address on behalf of The Bar Association Of Guyana: at the full court sitting on March 16, 2018 on the admission of four senior counsel to the inner bar

by Mr. Robin M.S. Stoby, S.C., Vice President of The Bar Association of Guyana

OPENING

I have been asked to make this welcome presentation to the four new members of the inner bar on behalf of the Bar Association of Guyana. It is my pleasure and honour to do so, and to observe that this ceremony is an ongoing one that regenerates the senior echelon of the legal profession at a time when the profession is grappling with the new culture in civil proceedings brought about by the adoption of new Rules of Civil Procedure that by their nature force us to relook at our practice of law and our relationship with our clients and the Court. This is a time when leadership is required, and young lawyers seek to gain guidance from the knowledge, experience and acumen of the upper Bar. For example, there is a famous quotation from Lord Denning – *"What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both."*

SHORT HISTORY

The title "Senior Counsel" (which is a plural noun) has its history in the ancient and revered body of senior legal practitioners in the United Kingdom appointed by the Queen and known as 'Queen's Counsel'. It was a title referring to an eminent lawyer (usually a barrister in pre 1994 UK) who is appointed by the Queen to be one of "Her Majesty's Counsel learned in the law." In some members of the Commonwealth the term was determined to be inappropriate after the cessation of monarchial connections and the adoption of Republic Constitutions, where the Queen is no longer head of State. Examples of such countries apart from our own, include Mauritius, Zambia, India, Hong Kong, the Republic of Ireland, South Africa, Kenya, Malawi, Singapore and Trinidad and Tobago [Source in this reference is taken from 'Wikipedia']. Just as a **junior counsel** is "called to the [Outer] Bar", a Senior

Counsel is said to be "**called to the Inner Bar**", and Senior Counsel may informally style themselves as *silks*, which is the new court gown they adopt, and the ceremony described as 'taking silk', like their British counterparts.

Wikipedia notes interestingly enough, that "the earliest English law list, published in 1775, lists 165 members of the Bar, of whom 14 were King's Counsel, a proportion of about 8.5%. As of 2010 roughly the same proportion existed, though the number of barristers had increased to about 12,250 in independent practice". In Guyana I hazard a guess that the law list must be in excess of 450 lawyers of which with the current members of the 'inner bar' constitutes approximately 23, a proportion of approximately 6.6%. We are further told in Wikipedia, that the first woman appointed King's Counsel was Helen Kinnear in Canada in 1934. The first women to be appointed as King's Counsel in the United Kingdom were Helena Normanton and Rose Heilbron in 1949. Here the balance was adjusted last year when the first three women were appointed silk. They were Her Honour Madam Roxanne George-Wiltshire, S.C., Chief Justice (ag.); Justice Claudette Singh, S.C., Principal Police Legal Advisor and Ms. Rosalie Robertson, S.C. now Registrar of Lands. Today we have continued the historical imperative and are witnessing the appointment of Ms. Josephine Whitehead, S.C. Congratulations to the women in our profession who have at last received recognition.

We are further told in Wikipedia, that in 1994 solicitors of England and Wales became entitled to gain rights of audience in the higher courts, and some 275 were so entitled in 1995. In 1995, these solicitors alone became entitled to apply for appointment as Queen's Counsel, and the first two solicitors were appointed on March 27, 1997 out of 68 new QCs. These were Arthur Marriott (53), partner of the London office of the American law firm of Wilmer Cutler and Pickering based in Washington, D.C., and Lawrence Collins (55), a partner of the City law firm of Herbert Smith. Collins was subsequently appointed as a High Court judge and ultimately Justice of the Supreme Court of the United Kingdom.

SILK IN GUYANA

The appointment of silk in Guyana, has been made available to all members of the legal profession since approximately 1980 when the distinction of solicitors and barristers was dispensed with, and we became just Attorneys-at-Law, in a homogenous profession. Some say that the distinction may return *de facto* in response to the difficulties experienced in working out of the new Rules: that remains to be seen I think as time goes on. I note that the basis for appointment has not changed however, and a person held to be worthy of such an honour, should be one that upholds the dignity of the profession, is well recognized by his/her fellows, has shown merit and distinction in the conduct of their profession, is assiduous in his/her work, and independent in thought and practice, and of course charge the highest fees. Really however we are reminded of the words of Abraham Lincoln that we should *"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them, how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."*

APPOINTMENT

The method of appointment has changed over the years from one that was decided upon by the Judiciary

after consultation with the senior members of the Bar, to one where the appointment was premised on a formal application made to the Chancellor who was advised by a committee representative of Bench and Bar, to the prevailing one, where the President exercises his discretion after advice from the Bench, and with the assistance of the Attorney General. Whatever may be the method, the end result is a recognition of excellence in the conduct of law, and in this regard, we must salute the present lawyers on whose behalf we assemble today to observe and celebrate their entry into the inner bar.

CONGRATULATIONS

As we congratulate our fellows, we at the inner bar observe with great pride that in the case of Mr. Kamal Azad Juman Yasin, S.C. he has the distinction of being one of the longest serving and hardest working members of the Bar who has made great contributions both in law and athletics, and practices from his own Chambers in Carmichael Street. Ms. Josephine Whitehead, S.C. can very nearly be described as the doyen of former solicitors and who is a social activist and is a partner in the law firm of Cameron and Shepherd of High Street. Mr. Fitz Peters, S.C. is a virtual fixture in nearly every court of the High Court and has long striven to make persuasion an art form. He practices from his own Chambers in the Rex McKay building on Croal Street. Mr. Andrew Pollard, S.C. is noted for his intense and successful work in the field of contract and company law and is a partner in the law firm of Hughes, Fields and Stoby (which sounds familiar) of Hadfield Street.

We in the Bar Association hail you and recognize your contributions to the profession and join with others who have expressed their accolades in this induction into the Inner Bar. We of course can not end without a fond and absorbing reference to Paul's Letter to the Philippians 2: 3-4, where it is written ***"Do nothing out of selfish ambition or vain conceit. Rather in humility value others above yourselves, not looking to your own interests but each of you to the interests of the others."***

Corporate Tax Law Reform in Guyana: an overlooked opportunity for economic growth and development

by Mr. Rocky Hanoman, LLM, (International and European Business law), Attorney-at-Law - Guyana & Trinidad

INTRODUCTION

This paper seeks to address a crucial legal and economic problem extant in Guyana, upon which there has been surprisingly little academic commentary. The problem is an antiquated and complex corporate tax system made up of different bands of taxes for different types of companies with no rational explanation for such differentiation. To aggravate the problem all of the taxes applied in each case are high by international standards, as well as the standards of our CARICOM neighbours.

This discourages investment in Guyana and increases administrative costs for businesses and the Guyana Revenue Authority ('GRA'). Further, it also encourages the 'gaming' of the system and tax avoidance measures by businesses (and possibly even tax evasion).

Economic theory shows that countries are much better off in the long-run by having a relatively low, single rate of corporate tax applied across the board and a system based on this concept is what this paper proposes for Guyana.

This paper also suggests further reforms to the corporation tax laws of Guyana – reforms which will encourage the growth of small businesses, unleash entrepreneurship and reduce corruption.

What this paper DOES NOT DO is to suggest that Guyana be transformed into some 'offshore tax haven' with little to no corporate tax where foreign corporations are allowed to run amok. This paper is based on the thought that corporations should pay their fair share of corporate tax and the tax rates and reforms proposed in this paper are no less than the average of international corporate tax rates and no less than even our immediate CARICOM neighbours.

It is also worth mentioning that corporate taxation can be considered a form of double-taxation[27]. This is because the profits of a company are taxed once with corporation tax, and those very profits are taxed again when distributed to shareholders. There is therefore no need to have excessively high tax rates as the State is already earning revenue twice from the profits of the company. Secondly, this paper also discusses (using tried and tested economic theory) why corporate tax rates can be reduced without creating a deficit in the economy in the long term.

But first, a general commentary on the corporate tax legislation in Guyana is necessary.

OVERVIEW OF CORPORATION TAX RATES IN GUYANA

For the most part, taxes on corporations in Guyana are governed by the Corporation Tax Act, Cap. 81:03

27 Urban Institute and the Brookings Institution, *Is corporate income double-taxed?* Tax Policy Center, http://www.taxpolicycenter.org/briefing-book/corporate-income-double-taxed (last visited Aug 20, 2017).

('CTA'). The CTA, *inter alia*, outlines the general rates of corporation tax, provides the basis for assessment and many of the applicable deductions and exemptions.

In relation to the basis for assessment, section 5 of the CTA provides that:

> *"… a resident company shall be chargeable to corporation tax on all its profits wherever arising"*

Chargeable profits are defined by section 2(1) of the CTA as,

> *"… the aggregate amount of the profits of any company from the sources specified in section 9 remaining after allowing the appropriate deductions and exemptions under this Act"*

The actual rates are specified in section 10 of the CTA and are as follows:

> *"…corporation tax shall be paid at the rate of –*
>
> *a) forty-five per cent of the chargeable profits of a telephone company;*
>
> *b) forty per cent of the chargeable profits of a commercial company, other than a telephone company, and*
>
> *c) thirty per cent of the chargeable profits of any other company"*

The CTA defines a 'commercial company' as

> *"a company at least seventy five percent of the gross income of which is derived from trading in goods not manufactured by it and includes any commission agency, any telecommunication company, any body-corporate licensed or otherwise authorized by law to carry on banking business in Guyana, and any company carrying on in Guyana insurance business, other than long-term insurance business, as defined in section 2 of the Insurance Act."*

Resident companies[28], therefore, may be taxed at any of three separate rates (or a combination of these rates) in Guyana on the basis of their worldwide chargeable profits.

In addition, section 10A (1) of the CTA also provides a minimum corporation tax (MCT). This section provides:

> *"Where for any year of assessment the corporation tax payable by a commercial company is less than two per cent of the turnover of the commercial company in the year of income immediately preceding that year of assessment, then (…) there shall be levied on, and paid by, the commercial company a corporation tax (in this Act referred to as "minimum tax") at the rate of two per cent of the turnover of the commercial company in such year of income:*
>
> *Provided that no minimum tax shall be payable by a commercial company for any year of assessment where its turnover in the year of income preceding that year of assessment did not exceed one million two hundred thousand dollars."*

This provision is intended to prevent tax avoidance strategies employed by corporations to shift profits abroad (such as transfer pricing, for instance) and thereby reduce the profits which they declare for tax purposes. Essentially, the MCT provision means that companies must at least pay either the standard rate of corporation tax or the MCT (at a rate of 2% of the turnover of the company) - whichever is higher. 'Turnover' refers to the gross

28 Pursuant to section 2 (1), CTA a resident company is defined as *"a company the control and management of whose business are exercised in Guyana."* This is known as the 'management and control test' and differs from other countries, where a resident company is usually a company that is simply incorporated in the country (known as the 'incorporation test'), regardless where the control and management are exercised. Many commentators consider the management and control test a more modern and progressive approach which generally results in less abuse of the tax system than its alternative.

receipts of the company (s. 10A (7), CTA).

The 2017 National Budget proposed few changes in the corporation tax structure outlined in the CTA. Chief among these was the reduction in the corporation tax rate for non-commercial companies from 30% to 27.5%.[29]

The 2017 National Budget also included a dual tax-rate for Companies carrying out both commercial and non-commercial activities. This means that the non-commercial operations of the business will pay the revised rate of 27.5% while the commercial operations of the business will pay the higher rate of 40%.[30]

As such, the corporation tax rates for 2017 can be summarized as follows:

Category	**2017 Rate**
Telephone Companies	45%
Commercial Companies	40%
Non-Commercial Companies	27.5%
Both Commercial and Non-Commercial Companies	40% on company's commercial operations and 27.5% on company's non-commercial operations
Minimum Corporation Tax (MCT)	2% of Turnover

There are therefore five different possible rates of corporation tax which a company can pay, ranging from 2% of turnover to a whopping 45% of chargeable profits (which, incidentally, takes the ignominious place as one of the highest corporation tax rates in the world).

Having established these rates, the argument will be made that this state of affairs results in an unnecessarily complicated and expensive system of taxation both for the Guyana Revenue Authority ('GRA') and for businesses preparing returns, which serves to promote 'gaming' of the system and suppresses economic growth.

THE NEED FOR A REDUCTION IN THE CORPORATE TAX RATE

The evidence is incontrovertible that the more the production of a thing is taxed, the less incentive there is to produce it. This concept need not be very difficult to understand. If I told you that I could offer you a job in Copenhagen, Denmark that pays a salary of the equivalent of USD $100,000 per year in Danish krone, you might be quite interested. However, if I told you that the personal income tax rate on that income in Denmark was between 55-65% then your interest is likely to be very much diminished. The incentive to work and contribute to the economy is diminished because you might feel it is just not worth your time, considering the limited disposable income that you will be left with after taxes to pay expenses such as rent, heating, food, etc.

This concept isn't anything new either. In the 14th century, the Muslim philosopher Ibn Khaldun wrote in his book 'The Muqaddimah' that,

> *"It should be known that at the beginning of the dynasty, taxation yields a large revenue from small assessment. At the end of the dynasty, taxation yields a small revenue from large assessments'.*[31]

A much more modern expression of this idea was put forth by none other than John Maynard Keynes:

> *"When on the contrary, I show, a little elaborately, as in the ensuing chapter, that to create wealth will increase the national income and that a large proportion of any increase in the national*

29 Guyana National Budget Speech 2017, p. 79 at para. 6.6, Ministry of Finance (2013), http://finance.gov.gy/wp-content/uploads/2017/05/budget_speech_2013.pdf (last visited 13th August, 2017)

30 Ibid.

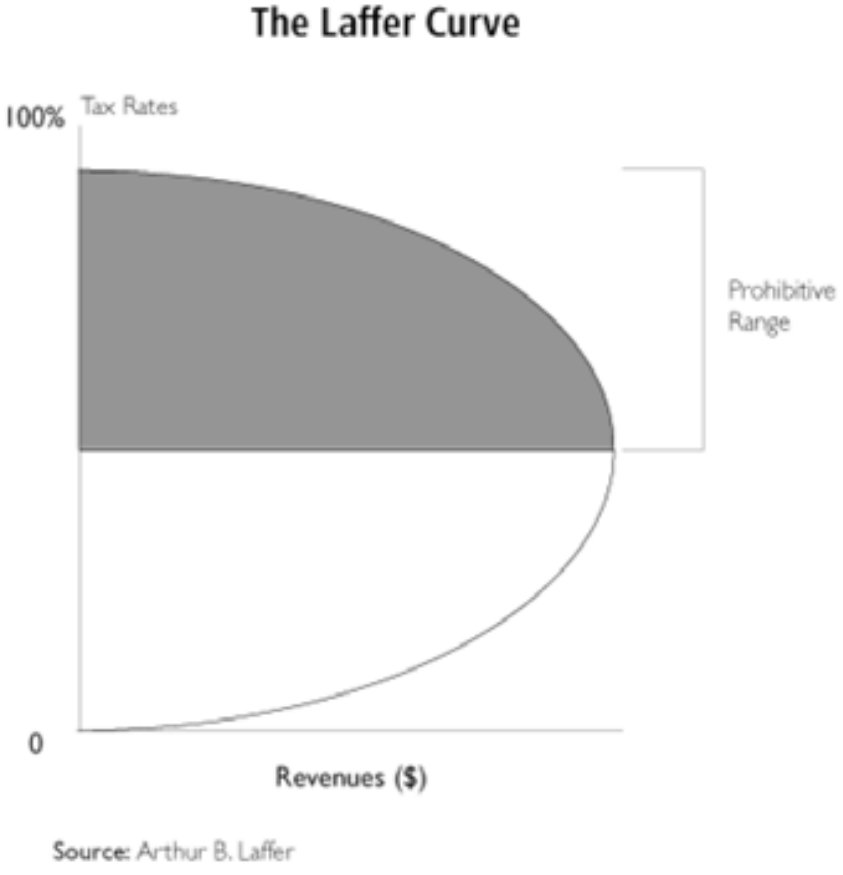
31 Laffer, A. (2017). *The Laffer Curve: Past, Present, and Future*. [online] The Heritage Foundation. Available at: http://www.heritage.org/taxes/report/the-laffer-curve-past-present-and-future#pgfId-1118367 [Accessed 12 Aug. 2017].

income will accrue to an Exchequer, amongst whose largest outgoings is the payment of incomes to those who are unemployed and whose receipts are a proportion of the incomes of those who are occupied…

Nor should the argument seem strange that taxation may be so high as to defeat its object, and that, given sufficient time to gather the fruits, a reduction of taxation will run a better chance than an increase of balancing the budget.

For to take the opposite view today is to resemble a manufacturer who, running at a loss, decides to raise his price, and when his declining sales increase the loss, wrapping himself in the rectitude of plain arithmetic, decides that prudence requires him to raise the price still more – and who, when at last his account is balanced with nought on both sides, is still found righteously declaring that it would have been the act of a gambler to reduce the price when you were already making a loss."[32]

For our age, it was the celebrated American economist, Arthur Laffer that distilled this concept into the simplest of expressions – a graph. Below is his 'Laffer Curve' which helped inspire the economic policy of both Ronald Reagan and Margaret Thatcher in the late 1980's.



Before explaining the curve, it is best to explain the economic theory behind the curve. Essentially, the curve is premised on the theory that changes in tax rates have two effects on government revenue. The first is an immediate effect (which Arthur Laffer describes as the 'Arithmetic Effect'). This simply means that the first and most immediate effect of a reduction in tax rates is a corresponding reduction in tax revenue, put another way – every dollar in tax cut translates directly to one less dollar in government revenue.

The other effect is longer-term, which Laffer describes as the "Economic Effect". It works in the opposite direction. This means that, over-time, the effect of a lower tax rate on an economy means that it becomes easier and more profitable for companies to do business, and puts more money in the hands of companies. These businesses then spend that additional money on investments, higher salaries, increasing production, etc., creating economic growth. It should be noted that saving money in a bank is the same as 'spending' it, simply because the bank lends

32 John Maynard Keynes, *The Collected Writings of John Maynard Keynes* (1971).

out the money in the form of loans to others who will invest it; money is almost always in circulation in a modern economy, whether it is being spent or saved. This boost to economic growth generates a larger tax base thereby generating additional government revenue. Therefore, in the long term, any revenues initially lost by a tax cut will eventually be replaced.[33]

Basically, the curve shows that at a 0% tax rate, the government would collect no tax revenue, no matter how large the tax base. Likewise, at a tax rate of 100%, the government would also collect no tax revenues because no one would willingly work for an after-tax wage of zero. Between these two extremes, there is an optimum level. This is a tax rate where the government would collect the greatest amount of revenue.

But what is the 'ideal' tax rate?

According to the Tax Foundation, a Washington D.C. based think-tank, the average corporate income tax, across 188 countries and tax jurisdictions surveyed, is 22.5%.[34] Our CARICOM neighbours, Trinidad and Tobago and Barbados come pretty close to that with their general corporation tax rate both set at 25%.

This gives companies a clear preference to invest in Trinidad and Tobago or Barbados than in Guyana. This is perhaps one reason why Foreign Direct Investment (FDI) inflows into Trinidad and Tobago and Barbados totaled USD $406,080,894 and USD $254,424,002, respectively, for 2015. While FDI inflows into Guyana only totaled a relatively paltry USD $116,958,230 for the same year.

It makes sense to at least work toward aligning our corporation tax rate to our CARICOM neighbours, not least because doing so will help to prevent tax avoidance strategies by local corporations who may be tempted to shift either their operations to these countries or at least their profits (by methods such as transfer pricing, for instance) to avoid the high tax rates that come with doing business in Guyana.

A common complaint among many Guyanese is that Guyana manufactures very little. Manufacturing companies in Guyana, who are actually eligible for the lower rate of 27.5%, (which is still high by international standards) struggle to produce goods at a price that is competitive on the world market because the cost to produce them in Guyana quite high – due partly to the higher tax rates they pay.

Banks and shops also pay the 40% tax rate. Bank perform a crucial role, especially in developing economies such as ours in providing credit for development.

To illustrate this, look no further than the successes of micro-lenders such as Grameen Bank in Bangladesh, which has helped pull untold numbers out of absolute poverty by lending at low rates to poor farmers. Granted, the interest rate at which a commercial bank lends is determined largely by the rate at which the Central Bank lends to it (known as the 'discount rate'), but it is also determined by the need to cover overheads, costs and to make a profit.

A reduction in the 40% tax rate that banks face would definitely cheapen credit and the costs of lending – which will make credit available to a greater number of Guyanese who could previously not afford such high rates, and can help unleash local entrepreneurship and investment capabilities.

As another example, shops which must also pay the 40% tax rate simply pass this cost on to consumers

33 Kimberly Amadeo, *Why Tax Cuts No Longer Work,* The Balance (2017), https://www.thebalance.com/what-is-the-laffer-curve-explanation-3305566 (last visited Aug 12, 2017).

34 Kyle Pomerleau & Emily Potosky, *Corporate Income Tax Rates around the World in 2016,* Tax Foundation (2017), https://taxfoundation.org/corporate-income-tax-rates-around-world-2016/ (last visited Aug 13, 2017).

in the form of higher prices for the goods sold (for which consumers must then pay VAT on top of that). This only increases inflation in the economy and makes it harder for the already struggling consumers to get by in purchasing daily necessities.

The highest rate of 45% is reserved for telephone companies. This outlandish rate only serves (as is usually the case) to hurt consumers and is one reason, why the Guyana Telephone and Telegraph Company ('GTT') maintains a monopoly in the landline telephone business. Even without the statutory protection of a monopoly, this super-high rate is a major barrier to entry into the landline telephone market and discourages investment by prospective investors who would otherwise be able to provide much-needed competition to GTT's monopoly in the landline telephone business and bring down prices for the Guyanese public.

A high corporate tax rate (and several different corporate tax bands) does us no favour as a small, developing economy. It discourages much needed investment, encourages 'gaming' of the system tax avoidance and even tax evasion-measures by companies and is an incentive for business to move operations and jobs overseas. It is also difficult, complicated and expensive to administer both for business who compile their returns and also for the GRA who must verify those returns.

It is instead preferable to have a single corporate tax rate with an initial reduced rate for small businesses until they increase in size, that is in line with the average international rate, or at least in line with our immediate, English-speaking CARICOM neighbours, Barbados and Trinidad and Tobago who employ a rate of 25%.

But could we afford a reduction in the corporation tax rate?

And for those who think that a reduction in corporation tax would create a massive black void in our revenue receipts which we would be unable to afford or from which we would be unable to recover - consider that in 2013 (the last year that corporate tax receipts were specifically reported as distinct from income tax)[35], revenues from corporate tax amounted only to GYD $19.6 billion. The total government revenue for that year was almost GYD $163 billion. This means that the receipts from corporate income tax amounted to only about 12% of total revenue. A decrease in the rate of corporation tax from 40% to 25% would therefore mean a shortfall in total revenue of only about 4.5%.

Remember, this would be an initial decrease. The effects of this reduction in corporation tax means that businesses would have more money left in their pockets to invest in expansion and production and in hiring more employees, thus increasing the tax base for both consumption and personal income taxes, which both make up a much larger share of the national revenue pie than Corporate Taxes do anyway. The result is that the State will be raking in more revenue than it currently is, due to a stimulated economy.

The idea that reducing corporate tax rates would encourage investment and eventually replenish any deficits that immediately accrue from such reduction is an economic concept accepted by our local Ministry of Finance as well.

In the 2017 National Budget Speech, the Hon. Minister of Finance Winston Jordan, when proposing cuts to the corporation tax rate, stated:

> *"These two measures[36]will result in a loss of $752 million in taxes. However, we anticipate this*

35 *Guyana National Budget Speech 2017*, p 11 at para. 3.22, Ministry of Finance (2013), http://finance.gov.gy/wp-content/uploads/2017/05/budget_speech_2013.pdf (last visited 13th August, 2017)

36 Referring to measures related to the reduction of corporation tax rates.

amount being invested in renewal and expansion of business."

Finally, any reduction in the corporate tax rate does not have to be done immediately – it can instead be done gradually - possibly over a five-year period – with a percentage reduction each year, so as not to punch a big hole in the public revenue all at once. However, if there is to be a gradual reduction to a specific rate over a five-year period, it should be publicized and businesses and the general public should be notified of the government's intention up front in order to get the benefits of investment sooner rather than later.

This will also provide a greater incentive for the government to keep committed to the reduction plan over five years.

A SPECIAL REDUCED RATE FOR SMALL BUSINESSES

Pursuant to the Barbadian Small Business Development Act, companies incorporated under the Barbados Companies Act with:

1. at least 75% of their shares owned locally,
2. having share capital of not more than BBD $ 1,000,000,
3. Annual sales not in excess of BBD $2,000,000,
4. And not more than 25 employees

are classified as 'Small Businesses'. Such companies are allowed to pay corporate income tax at a reduced rate of 15% from the general rate of 25%. They are also exempt from the payment of import duties on equipment imported for use in the business and, in some instances, from stamp duty as well.

Small businesses are the lifeblood of any economy, and usually make up the lion share of all businesses in the economy. In the United States for example, the US Small Business Administration (a US Federal Government Agency) reported that, according to 2014 US Census data, business with fewer than 20 employees made up 89.4% of all US businesses.[37]

Small businesses also represent the future of an economy. Many of these small businesses will one day go on to become the dominant firms in an economy, with the potential to employ many thousands of people and contribute a great deal to GDP.

However, at the initial stage, things can be tough for small businesses and small-business owners, and small businesses are prone to fail. Many small businesses have not yet been able to develop the economies of scale in production to compete with larger firms. Additionally, small businesses are especially vulnerable to predatory pricing and overcoming high barriers to entry – all obstacles that more established commercial giants use to preserve market share and beat potential competitors into submission early on.

It therefore makes sense that small businesses should be given some sort of advantage in an economy in order to stimulate their growth and provide a level playing field.

Many other countries wisely have deductions, exemptions or reduced tax rates for these small businesses to encourage their growth and also to encourage entrepreneurship among the populace.

The lone exception is Guyana. While Guyana does have a Small Business Bureau, established by the Small Business Act 2004, this bureau mostly concerns itself with providing low-interest loans and grant funding for small

37 US Census Bureau, *Data 2014 SUSB Annual Data Tables by Establishment Industry* (2016), https://www.census.gov/data/tables/2014/econ/susb/2014-susb-annual.html (last visited Aug 13, 2017).

businesses, training and government procurement opportunities. While these are all vitally important functions, there is still no legal relief provided in Guyana from the 40% corporate tax rate that small businesses must bear.

This of course discourages incorporation among small-business owners. As such, small business owners prefer to ply their trade as sole-traders. Without the cloak of incorporation, the personal assets of business owners are exposed to claims by creditors – making these business owners much more risk-averse than their larger competitors. In business, taking risks is crucial to success. Sadly, in Guyana, our legal system is set up in such a way that virtually ensures these small business owners remain risk-averse and stagnant in their development.

A similar, reduced rate of corporation tax for small businesses until they increase to a specific point in size – at which point they will begin to pay the standard rate of corporation tax – will unleash the entrepreneurship potential of Guyanese and will do a great deal to spur small business growth and help many out of poverty.

'DE-POLITICIZING' INVESTMENT: THE NEED FOR AUTOMATIC INVESTMENT INCENTIVES

Many of the common investment incentives in Guyana are contained in the Income Tax (In Aid of Industry Act) Act, Cap. 81:02. In particular, section 2(1) of this Act provides:

> *"Notwithstanding anything to the contrary contained in the Income Tax Act or the Corporation Tax Act, it is hereby provided that the Minister may grant an exemption from corporation tax with respect to income from new economic activity of a developmental and risk-bearing nature and qualifying under any of the following circumstances -"*

The Act then proceeds to mention a number of activities which qualify for the grant of these exemptions from corporation tax. The list is too numerous to mention for this article, but briefly, these activities include:

- Activities creating new employment in the regions of Guyana
- Activities creating new employment in fields such as agro-processing, Information and Communications Technology (ICT), petroleum exploration, extraction and refining, tourist facilities, bio-technology, development and manufacturing of new pharmaceutical products etc.

Pursuant to section 2 (1A) of the Act, the income tax exemptions granted shall be for periods ranging from five to ten years.

These are all very helpful in serving to promote investment. However, the problem is that all these incentives are granted at the discretion of the Minister. This means that prospective investors must therefore go cap-in-hand to the Minister and negotiate an exemption from Guyana's high tax rates.

This elevates the Minister to a remarkably powerful position over all new investors in Guyana, in that, he or she, by the stroke of a pen can decide the profitability of the business for the foreseeable future by either approving or rejecting the tax exemption.

This opens the door for corruption in the Ministry. Businesses understandably are desperate for a tax exemption given how high the current rates are. Being so desperate, they may give in to a dishonest Minister's request for bribes, special favours, or kickbacks in return for such exemptions.

What makes it worse, is that section 2 (7) of the same Act empowers the Minister to revoke the special exemptions given to the company. This means that once investors are given a tax exemption, they can potentially be forced to 'tow the line' and avoid creating political trouble to avoid their exemptions being revoked.

Now I'm sure that all of our Ministers thus far have been above such reproachable conduct, and I'm certainly

not saying that this has been done before. However, it is uncertain as to what future Ministers may do (and it's best to protect against these harms now while they are foreseeable).

A simple way to avoid these problems in the future is to take the power to make the decision as to whether a company can gain a tax exemption out of the hands of the Minister. This can be done in two ways.

The first is to make the exemption automatic (as far as it is possible to do so) once certain specified conditions are fulfilled. Many of the tax deductibles and exemptions provided by the various taxing statutes are automatic upon fulfillment of certain conditions and simply claimed in a tax return (subject to GRA's verification). One such example is section 7 (b) of the Corporation Tax Act, Cap. 81:01, which provides that the profits of an investment company are exempt from income tax. An investment company is specifically defined in section 2(1) CTA, and once a company fulfills the eligibility conditions to be considered an investment company it can simply claim an exemption from corporation tax in its tax return as a routine matter (without having to involve the Minister at any point).

However, in many cases it may not be so simple. In such cases, the solution could be to create an independent commission to handle these matters. Claims for exemption from corporation tax could be sent to this independent commission instead of the Minister. The commission could also be bound by specific rules to report all exemptions given and the reasons for rejection of any claims.

At the very least, this will provide an environment of greater certainty for businesses and will make tax-planning easier for foreign investors, and importantly, will help to reduce the potential for corruption in Government.

CONCLUSION

In conclusion, Guyana's potential for economic growth is stunted by the burden of a complex tax system made up of different bands of taxes for different types of companies with no rational explanation for such differentiation. To aggravate this problem, all of the taxes applied in each of the cases are high by international standards, as well as the standards of our CARICOM neighbours. This discourages investment in Guyana and increases administrative costs for businesses and the GRA. Further, it also encourages 'gaming' of the system and tax avoidance (and possibly even tax evasion).

Economic theory shows that countries are much better off in the long-run by having a relatively low, single rate of corporate tax applied across the board, and this is what this paper has tried to propose for Guyana.

This paper also suggests further reforms to the corporation tax laws of Guyana – reforms which will encourage the growth of small businesses and greater entrepreneurship and also to avoid corruption.

It is the author's hope that at least some of these reforms might be implemented in Guyana. Guyana is at a crossroads in its economic development. The recent discovery of oil and gas has caused many foreign corporations to take a good look at Guyana as a possible investment destination. However, these corporations also look very keenly at the tax code before making a decision whether to invest. Let us at least make it a bit more attractive and encourage them to invest. If we do that, Guyana's economy will truly be unleashed, and there is no telling how high we can soar. ⚖

EDITORIAL NOTE

The following address was delivered by The Rt. Hon. Sir Dennis Byron who bestowed the Bar Association with the honour of delivering the Keynote Address on the Importance of an Independent and Impartial Judiciary at the 37th Annual Bar Dinner held on November 11, 2017 at the Pegasus Hotel, Georgetown.

The Importance of an Independent and Impartial Judiciary: Placing the Spotlight on Judicial Accountability

The Rt Hon. Sir Dennis Byron, President, Caribbean Court of Justice

Protocols.

It is an honour and an immense pleasure to be invited to deliver the Keynote Address at the Annual Bar Association Dinner. I thank the Bar Association for their gracious invitation and I also take this opportunity to publicly congratulate the newly elected Executive and offer them my best wishes in their term. I also wish to acknowledge the great work the Executive have been doing thus far, and in particular their activism in marshalling support from the local legal fraternity in response to the recent hurricane events in the region.

Judicial Independence in Context

I was born during the Second World War. This was an era in which the Caribbean man and woman still lived under colonial rule. It was also during this era that the colonised people of our region fought side by side with the British colonial powers against the enemy of Nazism which sought world domination in the name of ethnic superiority. One sequel to the war was the Universal Declaration of Human Rights which was adopted in 1948. This proclaimed the concept of human equality and dignity, and today, countries such as Guyana can sit in the General Assembly of the United Nations and contribute to making decisions that influence world affairs with the same voting power as the most powerful nations in the world. I would like to recall an excerpt from the Preamble which is one of my articles of faith:

> "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"

As our communities in the Caribbean enjoy freedom, justice and peace, let us recall that social stability and economic development depend on a properly functioning justice system. In Guyana, we are fortunate to have a tradition of law and order. However, we complain that the administration of justice has not received an adequate share of the public purse to enable it to function as an efficient institution with the management tools of the 21st Century. Although this may reflect the perception that investments in the justice administration system is not a vote-catching activity, the government needs to strengthen the justice sector.

Tonight, I would like to suggest that one of the most important strengths of the justice sector is judicial

independence. It is of great importance to the citizens of the country and is guaranteed in the Constitution. Article 122A of the Constitution of Guyana provides:

> "All courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any other person or authority, and shall be free and independent from political, executive, and any other form of direction and control."

This sets out the essentials of judicial independence in Guyana. It is the ability of the judicial system to exercise its judicial role fairly, impartially, efficiently and effectively in a manner that is completely free from external interferences. It requires judges to adjudicate on cases based on merit by impartially assessing facts and objectively applying the law, and in keeping with the overriding objective to implement systems for efficient and effective disposal of the court's caseload. The judiciary serves a crucial function in maintaining the rule of law and protecting the civil liberties of citizens. Its ability to perform this role relies not only on the independence of the judiciary itself, but also on the public perception of the judiciary by the wider citizenry. Judicial independence exists as a right of, and a protection for, the people. It operates in the public interest for the benefit of the entire community. It is neither an end in itself nor is it a personal privilege of the judges. Assuring judicial independence has two aspects: the individual and the institutional components.

Let us look firstly at an institutional component. Judicial independence does not mean judicial autonomy. It is important to recall that there is one government with three distinctive and separate branches of powers. All three branches need to interact and cooperate for the public benefit. There is no need for the executive to fear the development of judicial authority. Each of the three branches is limited in its authority and its powers. None of them is omnipotent. The legislative branch, the executive branch and the judicial branch have no authority beyond that granted to them in and by the Constitution.

This is an important feature because the judiciary must depend on the other branches of government for the provision of adequate resources to do its work. This is a topical issue. At the beginning of this year, there was a declaration of intent to reform and improve the delivery of justice with the introduction of the new Civil Procedure Rules. It is beyond dispute that the judiciary needs to be better resourced in terms of its personnel, infrastructure and support systems. For example, there are existing vacancies in the current complement of judges and it is reasonably assumed that reducing the backlog to zero will require additional resources. This should be addressed with urgency because the failure to do so undermines judicial independence.

Judicial Accountability

I wish to now turn to the concept of judicial accountability. While judicial independence does not exist for the sole benefit of judges, it is nonetheless a powerful tool in their hands. It is important to appreciate, therefore, that judicial independence must be accompanied by judicial accountability. Accountability is not an uncommon notion since it permeates throughout the course of public life. Today, citizens are increasingly demanding that all aspects of government ought to be held accountable to the people they serve. In this sense, I believe it is a fair observation to make that the judicial branch of government has probably been, from a historical perspective, one of the most accountable areas of government.

This accountability is manifested in several ways. As a starting point, the business of the courts is, except certain specific instances, conducted in the public sphere. Trials are conducted in open court and judgments are

delivered in open court which keeps the work of the courts continuously before the public gaze. Judges resolve disputes under an implicit obligation to publish reasons for their decisions.[38] Additionally, decisions issued are typically subject to some prescribed appeal mechanism.

I now wish to discuss four specific issues which I believe contribute significantly to the judiciary being held to an accountable standard. These are: (i) judicial ethics; (ii) acting appointments; (iii) judicial education: and (iv) court performance standards.

I. Judicial Ethics

A high regard to ethical standards by judges is one of the most important dimensions of judicial accountability. Judicial ethics as a component of judicial accountability is a central principle of human rights. Unfortunately, history is replete with regrettable examples of judges falling well short of the required ethical standards. A Superior Court Judge of Quebec eventually resigned after facing disciplinary proceedings which held him unfit for office for remarks unsuitable to the office of a judge. During the proceedings, the judge not only made disparaging remarks to the jury but made further insensitive remarks about women and Jews.39 Closer to home was the case of Madame Justice Priya Levers who was removed from the office of judge of the Grand Court of Cayman on the ground of misbehaviour both on and off the bench. This misbehaviour was comprised of, *inter alia,* comments critical of her fellow judges, demonstrating bias, racism and contempt to persons before the court and attempting to procure acquittal of a defendant by improper means.[40] The case of George Meerabux from Belize is another regional example.[41] His removal was based on misbehaviour occasioned by him using his office corruptly for private gain and allowing his integrity to be called in question as well as demeaning his office by engaging in immoral conduct.

The context of the ethical standards to be followed by a judge was effectively framed by the words of the Honourable Dr. Abdulai Conteh, former Chief Justice of Belize, in the landmark case of George Merrabux v *The Attorney General of Belize & the Bar Association of Belize.*[42]

> "News that a judge of the Supreme Court is to appear before anybody for the purposes of investigation is certainly of general public interest. This must be so because of the position of a judge in nearly every society. It has been said rightly so; in my view, that society attributes honour, if not veneration, learning if not wisdom, together with detachment, probity, prestige and power to the office of a judge. Therefore, news of any probe concerning a judge would elicit public attention, whether of the concerned or the plainly curious. This may be for the public good.
>
> But the public weal itself will be damaged if the news is not handled with care and circumspection; for it may inevitably result in the corrosion of public confidence in the judiciary itself, with deleterious effects on the administration of justice as a whole.
>
> The public right to know and to be informed is one which the courts ought always to protect, but this must be balanced with the way that knowledge or information is purveyed. Anything tending

38 Public Service Board of New South Wales v Osmond (1986) 159 CLR 565; Soulenezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.

39 "The Bienvanne Inquiry", Canadian Judicial Council Annual Report 1996-97, p. 30.

40 PCA No 0092 of 2009 [2010] UKPC 24, Hearing on the Report of the Tribunal to the Governor of the Cayman Islands-Madam Justice Levers (Judge of the Court of the Cayman Islands, Referral under Section 4 of the Judicial Committee Act 1833 "The Priya Levers case".

41 Privy Council Appeal No.9 of 2003.

42 Action No 65 of 201.

> to convey unsubstantiated rumours, idle gossip or the salacious must be restrained, particularly in a society such as we have in Belize. which is a veritable fish bowl for almost every public office holder. Otherwise, the right to know becomes corrupted with the zeal to feed frenzy on unsubstantiated rumours and stories. This will be a positive disservice to all Belizeans, for when facts and fiction collide, faction is the result..."

While public criticism can serve as a useful check on the activities of the judiciary, a distinction must be made between criticism that is fair and reasonable and criticism that is malicious and scandalous in nature. Criticism of the latter nature has the danger of destroying the proper influence of judicial decisions by creating unfounded prejudices against the courts. We have repeatedly seen examples of such incidents. Recently, the Chief Justice of Kenya and his judiciary received sustained threats after a highly controversial ruling that resulted in the recently held general elections being declared void. Similarly, the Chief Justice of the United States Supreme Court has been the subject of attack by President Donald Trump. In the Caribbean, we have not been immune from such attacks and even I have been the target of false and scandalous attacks from a litigant who lost a case before the CCJ.

The traditional response of the judiciary in these cases has been silence and refusal to enter the public discussion on these issues. However, this used to be accompanied by institutions which had a duty to society to protect the integrity of courts acting in defence of the courts, including institutions such as the office of the Attorney General and the Bar Associations. Now, when these institutions remain silent and inactive or even themselves make inappropriate attacks on the judiciary, does it imply that the rule of silence should be lifted?

The integrity of the judiciary is primarily a matter for regulation by the judiciary itself. It need not await intervention of the executive or legislature. I observe that such intervention did occur in Guyana where, due to a perception of persistent and systemic delay in judgment delivery, the legislature passed legislation regulating the time that judges must take to deliver judgments, and providing for a disciplinary process which involves the Parliament.[43] Given that judicial ethics is a critical component of the independence of the judiciary, the onus should be placed on national judiciaries to play an active role in developing and enforcing ethical regimes without the intervention of the executive or legislative branches of government. The process by which a judiciary adopts a code of judicial conduct influences the manner in which it is implemented. The Code has much more meaning when it is developed by thorough discussion and reflection by the judges and by agreement on the principles to be adopted. I think that judiciaries could have standing ethics committees whose scope would include disseminating information and providing guidance, as well as, periodic review of the Code itself. This is separate and apart from the collaborative efforts which can occur between Bench and Bar, as we all strive towards the realisation of a common goal, that is, the maintenance of the highest ethical standards in the profession.

II. Acting Appointments

Article 127(1) of the Constitution provides as follows: "The Chancellor and the Chief Justice shall each be appointed by the President, acting after obtaining the agreement of the leader of the opposition." This provision was a key subject of amendment in 2001. Whereas under the previous 1980 Constitution the appointment of the Chancellor and Chief Justice could be made by the President after "consultation" with the Minority Leader, under

43 Time Limit for Judicial Decisions Act 2009.

the 2001 amendments, the actual agreement of the leader of the opposition is now required. Twelve years ago, the Office of Chancellor of the Judiciary of Guyana became vacant when my sister judge, the Hon Mme Justice Desiree Barnard, joined the Bench of the CCJ. The ascension by a daughter of the Guyana soil to yet another professional first in her lifetime - the first female judge of the CCJ - was indeed a landmark accomplishment for celebration by Guyana and the region. So, it is with some disappointment that I acknowledge that since that time, successive Presidents and Leaders of the Opposition have been unable to agree on the substantive appointment of a Chancellor. This has brought us to the situation today where the number one and number two officials of the Guyana judiciary have not been substantively appointed. This is a most unfortunate state of affairs.

I draw attention to Article 127(2) of the Constitution which provides, in relevant part, "If the office of Chancellor is vacant ... then until a person has been appointed to and has assumed the functions of such office...the functions shall be performed by such other of the judges as shall be appointed by the President after meaningful consultation with the leader of the opposition." The language of Article 127(2) suggests to my mind that any appointment made pursuant to that provision is envisioned as a short-term appointment. This highlights a critical factor in the interpretation of Article 127 as a whole, i.e. Article 127(2) does not provide an alternative method of appointing the Chancellor and Chief Justice. The use of the word "shall" in Article 127(1) imposes a mandatory obligation upon both the President and the Leader of the Opposition to come to an agreement on the persons to be appointed as Chancellor and Chief Justice. Despite the subjective component of reaching agreement, the Constitution could not have intended the decade long paralysis that has resulted from the failure to agree. The importance of the appointment to good governance and the welfare of the citizens may explain why the bar was lifted from "consultation" to "agreement" in the 2001 amendment. But it should also indicate that the Constitution intended that the identified officials would exercise high standards of good faith and reasonableness because failure to agree is not an acceptable option in the interpretation of that constitutional provision.

Of course, I do acknowledge that there are practical problems in identifying precisely where the liability lies in the failure to come to an agreement. It seems entirely plausible for such liability to lie with either the President or Leader of the Opposition, or both, in accordance with the mandate of section 127(1) and depending on the process that has been followed to reach agreement between the two sides. This naturally raises the question of whether an appropriate statutory or regulatory framework to establish agreement is in existence. If the answer to this is in the affirmative, that may be a basis for judicial intervention, and if it is in the negative, now would be the opportune time to address such a regulatory or statutory lacuna if it does indeed exist, and that too may be a basis for judicial intervention.

This situation has moved well beyond what ought to be acceptable in a modern democracy where respect for the rule of law is maintained. The Constitution envisages the judiciary of Guyana to be headed by officials who are substantively appointed and enjoy all the legal and institutional mechanisms to secure their tenure. Anything otherwise is, to my mind, a violation of the spirit and intent of the Constitution. I wish to reiterate the provisions of Article 122A(1): "All courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any person or authority; and shall be free and independent from political, executive and other form of discretion and control." This provision effectively promises to every citizen of Guyana a judiciary that is completely independent in all aspects. It cannot be said that this provision contemplates and/or condones in any way prolonged acting services of the country's number one and number two judicial officers. Such a situation

poses a genuine "risk" to the constitutional promise to every citizen of an independent and impartial judiciary. As has been observed by a distinguished Guyanese academic, Professor Arif Bulkan, "Acting appointments for protracted periods are generally inimical to fearless, independent performance" and serve to place a judge "in a perpetual state of probation, and demands strength of character in order to rule fearlessly".[44]

The Constitution is the supreme law of the land and no authority is above it. It is the duty of the court to interpret it and ensure that its provisions are applied. The delay in complying with section 127(1) of the Constitution has long reached a level of justiciability and the most appropriate authority for resolving this situation is the court system. Section 127(1) ascribes an obligation to the President and the Leader of the Opposition that is mandatory in nature and not discretionary. Any failure in fulfilling this obligation must therefore be regarded as a breach of the Constitution. It is interesting to note that the interpretation of Article 127 has already been the subject of litigation in the court. Ten years ago, in the case of *Committee for the Defence of the Constitution v AG*[45] the court was confronted with a challenge to Justice Carl Singh performing the functions of both Chancellor and Chief Justice. The court ultimately determined that it was a breach of the Constitution for the functions of both offices to be performed simultaneously. What is interesting about this case is that while the court appears to have acknowledged that the failure to appoint a substantive Chancellor for a prolonged period violated Article 122A(1) of the Constitution, it seems to have viewed itself as constrained by Article 127 not specifying any time limit for the period of an acting appointment or within which agreement must be reached. With the passage of 12 years the undesirability of further delay could no longer be controversial. This is a very serious issue because attacking the problems of delay and all other issues that need reform requires strong leadership. It is simply obvious that a leader who is not appointed is under a disadvantage, and criticisms of the sector need to be received with the knowledge of the impediment that is placed on the leadership of the institution, an impediment which the Constitution specifically frowns on.

III. Judicial Education

Another important dimension of judicial accountability concerns judicial education. A culture of judicial education should be developed where training is organised, systematic and ongoing and under the control of an adequately funded judicial body. Continued legal education for judges is important for several reasons. It assists in keeping judges abreast of developments in the law and practice both at the domestic and international levels. Additionally, such continued training can employ a useful social context that enables judges to become more acutely aware of and allow them to better respond to the many social, economic and cultural factors that operate within the pluralistic societies of the Caribbean. The nuances that affect the work of judges are evolving with the passage of time. In criminal matters, judges are often required to deal with more specialised criminal offences, such as anti-money laundering, terrorism and trans-national criminal law issues. On the civil side, there is also an array of growing issues to contend with such as international trade and commerce and the expansion of judicial review and constitutional actions, especially in the area of human rights, as well as the profusion in the number of litigants who now seek the assistance of the court in solving their disputes.

In this regard, it is with great pleasure that I commend the recent launches of Judicial Education Institutes

44 D. Berry and T. Robinson, Transitions in Caribbean Law (Kingston, 2013), pp 208-209.
45 (Unrep) 16 Nov 2007, Civ Act No 993-S/A of 2006 (HC Guy).

(JEIs) in Guyana and Jamaica. These institutes are a critical mechanism for facilitating continuing legal education programs for Judges, Magistrates, Commissioners of Title, Registrars, and other court staff, to improve the way courts dispense with cases fairly and in a timely manner. They assist in ensuring an efficient, competent, transparent and impartial court system that commands public trust and confidence. The launch of the JEI in Guyana is particularly timely as earlier this year the new Civil Procedure Rules came into effect. Through partnerships with the JURIST Project, the CCJ has been pleased to lend its support in facilitating training sessions which are geared towards the efficient transition and application of these rules. For jurisdictions in the region without adequate training facilities, access to facilities in other jurisdictions ought to be provided. To this end, bodies such as the Caribbean Association of Judicial Officers (CAJO) and the Caribbean Academy for Law have been instrumental supporting continuing judicial and legal education initiatives across the region through its biennial conferences and various workshops and seminars.

IV. Court Performance Standards

Several complaints have been levelled against the performance of judiciary. The most common amongst these are inordinate delays, low performance and efficiency, high costs of court operations and low levels of public confidence. Discussions on judicial independence usually concentrate on the tensions between the executive and the judiciary. But let us recall the definition of judicial independence as the guarantor of the right of the citizen to a fair and timely trial. If the trial process fails to provide this, should the judges and the legal profession look at their influence on judicial independence?

I want to introduce some ideas that have influenced our operations at the CCJ. The concept of the framework of court excellence. This does not define excellence as a state that is achieved, but as the process of continuous improvement. So that the best courts are those that are continuously assessing where they are, developing plans to deal with weaknesses, implementing those plans, evaluating the effects of what they did, and then starting over.

In this regard, the International Framework for Court Excellence (IFCE) is a quality management system designed to help courts to improve their performance. The framework is particularly useful to judicial policymakers and practitioners, and it prescribes a set of focused, clear and actionable core court performance measures that deconstruct the ultimate question: "How are we performing?" by addressing two enabling questions: What should we measure? How should we measure it? The Framework makes it clear that a court's "pathway to excellence will also be enhanced by open communication regarding its strategies, policies and procedures with court users and the public in general". The Framework stresses the imperative for courts to be open and transparent about their performance, strategies and their processes to ensure public respect and confidence in the judicial system and to publish details of what actions they are taking to address problems within the court system. This goes hand in hand with strategic planning. One of the advantages of strategic planning is that the stakeholders, the Bar being the most critical, get an opportunity to contribute to the development of the strategies which will guide judicial performance. At the CCJ we also embraced this concept and now we are at the end of the first plan from 2012-2017. We are currently in the process of developing the new plan for 2018 - 2023. I recommend a similar process for the courts here.

a) Digital Recording of Court Proceedings

Reducing delay and improving court efficiency is often thought to be an expensive process. However, there are techniques that challenge that perception. One of the problem areas of trial management in Guyana is that the official court transcript is mostly managed manually by or under the supervision of the trial judge or magistrate. It is currently believed that moving to a digital transcript which is automatically recorded at the pace of the proceedings will not only improve the accuracy and fairness of the record and provide the litigant with improved access to it, but it will speed up the proceedings about three times. Making the court record available to the public, litigants and judges is important for open and fair justice for all. If one takes it to its logical conclusion, a relatively inexpensive process such as making the digital record the official transcript of the court, would have the same effect as hiring three times as many judges, and building, furnishing and equipping three times as many court rooms. We have set the example at the CCJ and those of you who practice before our courts would have seen and benefited from the process. Need I say more about the potential impact on the administration of justice?

b. Case Management Systems

Case management encompasses many court administration processes aimed at improving the primary processes of courts, i.e. processing filed cases to adjudication. Again, at the CCJ we set an example when we deployed the CURIA E-Filing and Case Management suite, which also incorporated a performance took-kit with the ability to generate statistical reports. This system has allowed our Court to be more efficient and responsive in delivering justice to the region. I am convinced that the transition to e-Filing is a logical and beneficial progression that allows litigants to file documents online thereby facilitating broader, cheaper and more effective access to the jurisdiction of the Court. It also facilitates the use by the court of technology systems that will improve its operations and reduce costs. This system takes us further into the realm of the 21st century with a mobile application component which allows the judiciary and senior court staff to now access and manage court information anywhere and at any time. This system is also available to the legal profession and will undoubtedly contribute to the efficient and effective management of their litigation workloads. The benefits of such a system are tremendous and far outweigh the cost of introduction. Since the decision to improve justice delivery has already been undertaken and is being implemented this will optimise the benefits from it. Adopting such e-Filing systems and other ancillary measures would go a far way in supporting the effective operation of the new Civil Procedure Rules, and as a compliment to a dedicated backlog reduction program.

c. APEX

One of the major accomplishments of my presidency occurred this year with the promotion of the Advanced Performance Exponents Inc. (APEX), which is a special-purpose, not-for-profit, agency, that is committed to delivering technology-based solutions and services to support court ecosystems. APEX is owned by the regional judiciaries and legal profession and has the potential to further advance the justice landscape of the region. APEX has developed technology modules specifically for the legal profession as well to support the litigation management in law offices. The Guyana Bar Association is an institutional member. The President and the Secretary for the Bar Association facilitated a road show for APEX yesterday during which its officers made presentations on the software. It was well attended and seemed to have been very well received and I expect that the quality of law

office litigation management will show considerable improvement. I challenge the legal profession to support the judicial effort to improve justice delivery with their own efficiencies. The Hon Chancellor attended the session and demonstrated her support for efforts to improve the quality of justice delivery among the profession.

As APEX develops I envision it continuing to facilitate programs and initiatives aimed at strengthening the justice systems of the region and improving the standards of efficiency of court-related services. Support for APEX has been strengthening and, in fact, the body is currently preparing to host its inaugural Stakeholders Convention. The gathering will be held at The Atlantis Hotel, Paradise Island, The Bahamas on Monday, 27th November 2017. As stakeholders you are all welcome to attend. Please check on the APEX website for particulars. This Convention will be a milestone event for justice sector in the Caribbean. Through APEX, the goal is to create an entire value chain to support the improvement and strengthening of Caribbean courts and justice sector institutions and the development of Caribbean jurisprudence.

Conclusion

In closing, I wish to reiterate that judicial accountability must be considered as a necessary corollary to the fundamental principle of an independent and impartial judiciary. We must strive to ensure that the two concepts co-exist and thrive for the benefit of all citizens. I also call on the high officials of our community to do their constitutional duty and appoint the highest judicial officials as an important element in guaranteeing judicial independence to our citizens. And to the judges and legal profession, we should always be aware that a tremendous amount of trust and faith is placed in the judiciary by the people to whom we serve. To safeguard their independence, we must therefore remain appropriately accountable to the people in the exercise of our functions. I am convinced that we in the Caribbean Judiciary will continuously strive to meet this standard. Our region continues to produce judges of great distinction who can stand shoulder to shoulder with the finest judges anywhere in the world. It is only through a recognition of these principles that a proper balance can be attained and preserved between accountability and judicial independence.

I thank you.

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA
CONSTITUTIONAL AND ADMINISTRATIVE DIVISION
2017-HC-DEM-CIV-FDA-160
MARCEL GASKIN v THE ATTORNEY GENERAL,
DR. BHARRAT JAGDEO and THE GUYANA BAR ASSOCIATION (*amicus)*

Before the Honourable Chief Justice Roxane George
Mr. Glenn Hanoman and Mr. Singh-Lammy for the Applicant
Ms. Judy Stuart and Ms. Leslyn Noble for the First Named Respondent
Mr. Rajendra Jaigobin for the Second Named Respondent
Mr. Teni Housty for the *Amicus* Party
(April 6; May 2, 16; June 5, 14; July 17, 2017)

Constitutional Redress –Locus Standi - Declaratory Orders - Interpretation – Article 161(2) of the Constitution of Guyana- Appointment of Chairman of the Guyana Elections Commission

Hon. R. George, CJ (ag):

The applicant seeks an interpretation of article 161(2) of the Constitution of Co-operative Republic Guyana pursuant to which the Chairman of the Guyana Elections Commission (GECOM) is appointed. More specifically, the applicant has applied for a declaratory order on:

(a) Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge.

(b) Whether the President is required under the Constitution to state reasons for deeming each of the six names on the List submitted by (sic) the President as unacceptable.

(c) Whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are unacceptable as a fit and proper person for appointment.

(d) Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable.

The respondents are the Attorney General and the Leader of the Opposition who both filed submissions. In addition, pursuant to Part 31:01(3) of the Civil Procedure Rules 2017, the Guyana Bar Association commendably applied for and was granted permission by me to present an amicus brief to assist the court.

In the context of this case, I concluded that since the issues to be determined were purely questions of law and interpretation, there was no need for an affidavit in answer by the respondents but that submissions on the issues raised would be adequate. Apart from the issue of standing, there has been no challenge to the jurisdiction of the Court to hear this application. Despite the lack of a specific provision as found in other Constitutions e.g. sections 120 and 124 of the Constitution of Sierra Leone (see also Sesay v President [2006] 2 LRC 704) or section 18(1) of the Constitution of Papua New Guinea (see Southern Highlands Provincial Government & Anor v Somare & Ors [2008] 2 LRC 372), the High Court of Guyana as a court of original and unlimited jurisdiction with inherent

jurisdiction and as guardian of the Constitution, has the authority to interpret the Constitution. (See Dumas v AG per Jamadhar JA Civ App P218/2014 CA TT para 128 confirmed by the Privy Council in Privy Council Appeal No. 0068/2015 [2017] UKPC 12 dated May 8, 2017). And as submitted by Mr. Hanoman, this inherent jurisdiction is confirmed by article 133(1) of the Constitution which provides for appeals the Court of Appeal shall lie as of right from final decisions of the High Court in any civil or criminal proceedings on questions as to the interpretation of the Constitution.

LOCUS STANDI

The applicant deposed that he is a citizen of Guyana whose name appears on the electoral list of GECOM. The Attorney-General filed an application challenging the applicant's locus standi to institute these proceedings. Due to my decision that there was no need for an affidavit in answer, there has been no opportunity for the applicant to dispute these assertions made in this application. The initial plank of the challenge by the Attorney-General to this application was advanced by Ms. Stuart at the first hearing. While not specifically contending that the applicant was not a citizen and an elector, Ms. Stuart contended that the applicant does not have locus standi to make this application. I concluded then that I did not consider that as a citizen and elector that the applicant could be considered not to have locus standi. Nevertheless, counsel for the Attorney-General filed written submissions on this issue which I will now more fully address. It was submitted that the applicant may be regarded as a meddlesome busybody and not a public benefactor, and that he has not established that he has a sufficient direct interest in the appointment of the Chairman of GECOM. Gordon v Minister of Finance & Others (1968) 12 WIR 416 (St Lucia) and Hughes et al v AG [2001] GLR 87 were cited.

The Hughes' case can be distinguished because the action was between the plaintiffs and the State in which it was alleged that the plaintiffs' fundamental rights had been violated. Thus, it was held that the proceedings were a matter between the plaintiffs and the State to which the intervention of the applicant was neither necessary nor instrumental. So Hughes, I find, does not assist the first respondent.

In Gordon, as quoted by counsel for the Attorney-General, Bishop J stated at p 419 E that:

> " ... firstly, it is not just any person who makes an allegation of a contravention of the Constitution of the State who has the right of application to the High Court. This right is specifically conferred upon a person with a relevant interest - not just an interest, but a relevant interest. Further, a person is to be considered as having a relevant interest if the contravention which he alleges, is a contravention that affects his interests. (It is not his interest in or concern over the matter.)
> ... the onus rests on the applicant to establish to the satisfaction of the court that he is a person who is qualified under the subsection, and unless he proves his qualification then his complaint cannot be entertained by the Court. In other words, the applicant must prove that such contravention of the Constitution as he alleges, is one which affects his interests."

However, it is apposite to note that this case and therefore the passage quoted are premised on specific provisions of the then St. Lucia Constitution Order in Council 1967 in circumstances where it was alleged that there was a contravention of a provision of the Constitution. Here the applicant alleged that enactment of the Appropriation Act 1968 was unconstitutional for non-compliance with the procedure for its enactment. It was held that the applicant had not established that he possessed relevant interests which would be affected by the alleged

contravention and as such he failed to discharge the burden of proving he was qualified to bring the application. Unlike Gordon, the case at bar is not based on an alleged contravention of the Constitution. As in Dumas v AG, (2014 CA & 2017 PC, TT) it is a case in which the applicant seeks an interpretation of a provision of the Constitution. Dumas has confirmed the broader and more liberal thinking as regards *locus standi* in constitutional cases.

Justice Jamadhar in his analysis of the jurisprudence in this regard at para 42 quoted from the 1995 edition of the text 'Judicial Review of Administrative Action' as follows:

> "All developed legal systems have to face the problem of resolving the conflict between two aspects of the public interest - the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper invoking the jurisdiction of the courts in matters in which he is not concerned. The conflict has been resolved by developing principles which determine who is entitled to bring proceedings: that is who has *locus standi* or standing to bring proceedings. If those principles are satisfactory they should only prevent a litigant who has no legitimate reason for bringing the proceedings from doing so."

Then having analysed the development of the common law around the world on the issue of standing, the learned judge noted that "courts have been working assiduously, if not uniformly, to open the gates to general grievances public interest litigation, where an applicant is not directly affected by the impugned legislation or public/governmental action." (Dumas CA para 67.) At the end of the day, judicial discretion will have to be exercised in each case depending *inter alia* on their legal and factual context, the merits of the challenge, the importance of the issue and the public interest in having it determined. (Dumas CA para 95.) In Prasad v Republic of Fiji [2001] 1 LRC 665, after a coup, an indigent farmer who claimed to have lost rights because of the purported abrogation of the Constitution, sought and obtained declarations upholding the validity of the Constitution as the supreme law and restoring the status quo subject to the appointment of the Prime Minister by the restored President. The Court considered that "the proceedings could not be considered frivolous or the work of a mere busybody since the applicant was claiming to have lost rights by the purported abrogation and seeking to be re-assured that the Constitution was still in place so as to protect him and to maintain those rights." The Court considered that "the issues raised were sufficiently grave, or of sufficient public importance and involved high constitutional principle" such as to permit the applicant's case to be considered. Using the language of Bishop J in Gordon, I consider that as a citizen and elector the applicant in the case at bar definitely has a relevant and sufficient interest in knowing how the position of such an important office is to be filled and to have the Court interpret the relevant article of the Constitution in circumstances where it may be that there is ambiguity or uncertainty in its interpretation and thereby application. The appointment of the Chairman of GECOM is one of national interest and importance, moreso to those who are entitled to vote in the national, regional and local government elections in the country, which elections are part of the foundation of our democracy. I do not consider the declarations sought to be of academic interest only and thus unfit for the intervention of the Court as contended on behalf of the Attorney-General. I therefore hold that as a citizen and an elector, the applicant has a relevant interest in the appointment of a Chairman of GECOM and as such has *locus standi* to make this application.

SUBSTANTIVE ISSUES

Constitutional provisions

Article 161 (1) and (2), as is relevant to a determination of the issues in this case, and which was inserted into the Constitution of Guyana by Act 15 of 1995 (as amended by Act No. 2 of 2000 to replace the words 'Minority Leader' with the words 'Leader of the Opposition' with other consequential amendments, that are not relevant), provides as follows:

> "161(1) There shall be an Elections Commission for Guyana consisting of a Chairman, who shall be a full-time Chairman and shall not engage in any other form of employment, and such other members as may be appointed in accordance with the provisions of this article.
>
> (2) Subject to the provisions of paragraph (4), the Chairman of the Elections Commission shall be a person who holds or who has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge, **or any other fit and proper person**, to be appointed by the President from a list of six persons, **not unacceptable to the President**, submitted by the Leader of the Opposition after meaningful consultation with the nongovernmental political parties represented in the National Assembly.
>
> Provided that if the Leader of the Opposition fails to submit a list as provided for, the President shall appoint a person who holds or has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge." (Emphasis mine.)

Paragraph 161(4) states that persons are not qualified to be appointed the Chairman and members of GECOM if they are aliens.

Historical Perspective

A review of the 1970 and 1980 Constitutions reveals an incremental addition to the category of persons who could be appointed as Chairman of the Elections Commission. Article 68(2) of the 1970 Republic Constitution provided that the Chairman of the Elections Commission be appointed by the President (then a non- Executive President) on the advice of the Prime Minister "from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court". Article 161(2) of the 1980 Constitution maintained this criteria for appointment of the Chairman of the Elections Commission by the President which, by this Constitution, had become an Executive President, but an additional qualifying criterion was added, that is, that persons "who are qualified to be appointed as any such judge" could also have been considered for appointment. Thus in the context of Guyana, High and Appellate Court judges of Guyana and the Commonwealth or such former judges as well as persons who were qualified to be appointed to the High or Appellate Courts of Guyana or the Commonwealth became eligible to be appointed. Although expanded, the category provided for was still limited to what I would term the 'judicial category' requiring as it did that a person was the holder or held the office of judge or a person who was qualified to be appointed to such a post. Therefore, the provision in effect limited the pool of qualified

persons to those who are legally trained. In its wisdom, no doubt to widen the pool of possible candidates, in 1995, Parliament added another category by including for consideration "any other fit and proper person" which I will term the 'non-judicial category'.

It is against this background that this application is to be determined. I have concluded, relying on a number of authorities, that the Constitution, and in this case article 161(2), is to be given a generous and purposive interpretation. Indeed, the Constitution has to be seen as a living document, with the interpretation of it as far as possible adapting to the times or period to which it is being applied; and in this case, article 161(2) itself has been adapted by amendments to the Constitution to meet changing circumstances. In the context of this case, the purpose of article 161(2) - to widen the categories of persons who may be appointed as Chairperson of GECOM - should be the basis for ensuring its implementation. (See State v Makwanyane [1995] 1 LRC 269 and Kannadasan v Khose [2010] 1 LRC 105.)

Basis for this application

The applicant bases his application on the fact and so deposed that the Leader of the Opposition, who is named as the second respondent, submitted a list of six persons deemed by him to be fit and proper for appointment as Chairman of GECOM to the President by way of letter dated December 21, 2016. The persons named were Ms. Ryaan Shaw - business woman, columnist and Indian rights activist, Mr. Ramesh Dookhoo - business executive of Banks DIH Limited and former Chairman of the Private Sector Commission, Mr. Lawrence Latchmansingh - governance and peace practitioner, Mr. Norman McLean - former Chief of Staff of the Guyana Defence Force and current mining executive, Mr. Christopher Ram - chartered accountant and attorney-at-law and Dr. James Rose - Professor of History at the University of Guyana. Subsequently, on December 28, 2016 the curriculum vitae of these persons were submitted to the President by the Leader of the Opposition. This list was rejected and according to the media - Stabroek News of January 20, 2017 - which was exhibited to the applicant's affidavit, it was reported that the President stated as follows: "I am going to choose somebody who is fit to be a judge and who can discharge the functions of the office of Chairman of the Elections Commission with integrity, with impartiality and with intelligence. So many writers seem to be putting so much emphasis on 'any other fit and proper person'. Fit and proper means you have to possess those three qualities." The applicant stated that he had learnt that Mr. Ram was a person who was qualified to be a judge, he having been admitted to practice at the bar in excess of seven years. Article 129 of the Constitution provides for the qualifications of judges and states:

> "129(1) A person shall not be qualified to be appointed to hold or to act in the office of a Judge unless -
> (a) he or she has been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court; or
> (b) he or she is qualified for admission as an attorney-at-law in Guyana and has been so qualified for such period as may be prescribed by Parliament.
> (2) Parliament may prescribe different periods under subparagraph (b) of the preceding paragraph in relation to the office of the different judges mentioned in article 126."

> Article 126 provides that "Except as otherwise expressly provided or required by the context, in this Constitution the word 'Judge' includes the Chancellor, the Chief Justice, a Justice of Appeal, a Puisne Judge and a part time Judge." The High Court Act, Chapter 3:02, section 5, provides that the period for which one must be an attorney-at-law in order to qualify for appointment to hold or act in the office of Puisne Judge is seven years. However, it is to be noted that years of call are not necessarily the only criteria for qualification to be appointed as a judge. Considerations of age and suitability would also be factors, though having considered the Indian case of State of Uttaranchal v Balwant Singh Chaufal & Ors [2010] 4 LRC 54 the age of retirement of a judge may not be applicable to the post of Chairman of GECOM. I make no definitive pronouncement on this, it not being necessary for the determination of the issues in this case.

The applicant further swore in his affidavit in support of application that having carried out research he ascertained that the provision for the appointment of the Chairman of GECOM in article 161 (2) was "to give effect to a recommendation made in 1992 by President Carter of the United States of America and accepted by President Desmond Hoyte to reflect a consultative process with regard to the Chairman of GECOM." His research also revealed that of the five Chairmen of GECOM since 1992, only one person was qualified to be a judge - that is Mr. Doodnauth Singh SC, attomey-at-law, who was appointed in 1997. The other Chairmen were Mr. Rudy Collins - diplomat (1992), Mr. Edward Hopkinson - geologist (1994), Major General Joe Singh - army officer (2001) and Dr. Steve Surujbally -veterinary doctor (September 2001).

The applicant urged that based on the advice of his lawyer, "once a list of six persons has been submitted, none of whom the President has found to be unacceptable, the President was obligated under the Constitution to appoint someone from the list." The applicant has asked this Court to find that the words in article 161 (2): "or any other fit and proper person" should be construed disjunctively and that the list submitted by the Leader of the Opposition met the requirements of this sub-article.

QUESTIONS FOR INTERPRETATION

The first question for which the applicant seeks an interpretation is as follows: **Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge.**

Judicial and Non-Judicial categories

The Attorney-General filed three submissions in which ultimately two opposing positions were canvassed. It was firstly submitted that the Constitution did not create any preferential order as regards the three categories named i.e. 1) judge or former judge; 2) person qualified to be a judge, which, as I have stated earlier, I have termed the judicial category, and 3) any other fit and proper person which I have referred to as the non-judicial category. As such it was concluded in this part of the submission that the sub-article is wider in scope and therefore permits the submission of a list that may comprise "six judges, six former judges, six persons qualified to be judges, or six

fit and proper persons. The list can also be comprised of one judge or former judge and five persons qualified to be judges or considered fit and proper persons not unacceptable to the President." (Quoted from the submission.) It was submitted that in the final analysis the entire list must be acceptable otherwise the conditions of article 161(2) would not be met and the President would be entitled in his discretion to reject the list.

To my mind, if a person from the judicial category is listed, it would be a matter for the President if it is that he decides to consider the judicial category as being in order of priority. It does not mean that anyone else named is automatically not fit and proper. Thus, with great respect, I consider the latter submissions on behalf of the Attorney-General to be fundamentally flawed. It does appear that by submitting that the President must first consider a sitting judge, and if such a person is not available, then a former judge or person eligible to be a judge, before exercising a discretion to determine who is fit and proper, that this does not embody the true meaning and intent of article 161(2). While it is appreciated that the President will ultimately make the appointment, it must be from the list of six persons that has been submitted to him by the Leader of the Opposition once he finds the list not unacceptable.

The further submission on behalf of the Attorney-General which states that if there is no single nominee that satisfies the mandatory qualification on the list then the President can resort to alternative qualifications is untenable for the following reasons:

> (a) How would the President resort to alternative qualifications if it is that no other category should be included in the list as advanced in the submission on behalf of the Attorney-General?
>
> (b) If there is no mandatory nominee listed, such that the President "can resort to alternative qualifications which gives him wide discretionary powers in considering the list [including the power] to reject the list in its entirety" (quote from the submission), then what alternative qualifications would he be considering?

It was submitted on behalf of the Leader of the Opposition that question (a) should be answered in the negative since there is nothing in the provision that expressly or by implication lends to the view that the list of persons submitted must include anyone from the judicial category, moreso given the expansion of the categories of persons as evidenced by the amendments to the Constitution as outlined above. It was further submitted that applying the Interpretation and General Clauses Act, Chapter 2:01 which Act pursuant to section 5 is applicable to the interpretation of the Constitution, the words 'or any other fit and proper person' should be read disjunctively. It was contended that the sub-article contemplates two different, separate and distinct categories of persons bearing little or no similarity.

The Bar Association submitted that article 161(2) simply categorises those who may be appointed as Chairman into those who are presumptively fit and proper persons to be appointed because they fall into the 'judicial category', and any other fit and proper person. Put another way, the words 'or any other' indicate that the judicial category is considered to be presumptively 'fit and proper'. But, it was submitted, the provision does not create a hierarchy of appointees. Any person who qualifies to be in either category would be eligible for appointment. Thus, anyone from either category can be included in the list submitted by the Leader of the Opposition.

It is common knowledge that a second list was submitted by the Leader of the Opposition in which three of the persons named fell into the mandatory judicial category advanced by Ms. Noble. In these circumstances, I

enquired of her, if it is her position that this mandatory category must be considered, then it begged the question, without more, why a GECOM Chairman had not been chosen. Ms. Noble made no submission in answer.

Meaning of Fit and Proper Person and Who Determines This

The issue then is - how is the term 'or any other fit and proper person' to be interpreted? As noted above, this category is an alternative to that of the judicial category. In the context of this case, there are no objective criteria for a determination of who can be deemed to be a fit and proper person. Mr. Hanoman submitted on behalf of the applicant that 'any other fit and proper person' "does not necessarily include a person with the requisite qualifications and characteristics of a judge' and he emphasised that apart from Mr. Singh, the other persons who would have served as GECOM Chairmen would have come from the category of 'any other fit and proper person'. He cited the cases of R v Crown Court at Warrington ex parte RBNB [2002] 1 WLR 1954 HL(E) and Democratic Alliance v President of the Republic of South Africa [2013] 2 LRC 617, a decision of the Constitutional Court. In Ex parte RBNB the issue was whether an employee of the unlimited company RBNB was a fit and proper person to hold a justices' licence to sell intoxicating liquor. The licensing policy which the court at first instance accepted stated that no licence would be granted to a person of bad character or to a person who was outwardly fit and proper but who may be influenced by others in the management of the premises that were to benefit from the licence. Lord Bingham said (at pages 1955 F and 1960 B-D):

> "This apparently simple question has proved difficult to resolve.
>
> ... some consideration must be given to the expression 'fit and proper' person. This is a portmanteau expression, widely used in many contexts. It does not lend itself to semantic exegesis or paraphrase and takes its colour from the context in which it is used. It is an expression directed to ensuring that an applicant for permission to do something has the personal qualities and professional qualifications reasonably required of a person doing whatever it is that the applicant seeks permission to do.
>
> ... But the focus is on the particular applicant's suitability ... ."

In Democratic Alliance, the Court considered s 179 of the Constitution of South Africa which established a National Prosecuting Authority with a National Director of Public Prosecutions (National DPP) as its head who was to be appointed by the President. Pursuant to the Constitution and an Act of Parliament, the National DPP was to be a person with "(a) ... legal qualifications that would entitle him or her to practise in all courts of the Republic; and (b) be a fit and proper person with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned." The appointment made to this office by the President of South Africa was challenged on the ground that the appointee was not a fit and proper person. It was held that the requirements for appointment as National DPP represented "objective jurisdictional facts" based on the requirement that the appointee had to be appropriately qualified as provided for by an Act of Parliament. It was further held that "the Constitution did not, in terms, leave the determination of appropriate qualification to the President" for whether a candidate fulfilled the fit and proper requirement stipulated by the Act involved a value judgment. However, "a construction that rendered the determination of the qualification criteria to the President's subjective opinion was not in keeping with the constitutional guarantee of prosecutorial independence." Thus for any decision to be constitutional it had to be rational - both as to "the process by which the decision was made and the decision itself... ." It was therefore held that in assessing the qualifications of an applicant for the post of

DPP, the President was enjoined by law to act rationally and reasonably. I do not consider this case entirely helpful given its facts because there were objective criteria as provided for in the Constitution and the Act of Parliament for determining who would be the National DPP and the facts disclosed that despite adverse findings against him, the President still went ahead and appointed the person as National DPP. Therefore, when considered objectively, the appointee was not a fit and proper person to be appointed. Nevertheless, what is evident from this case is that the personal qualities of conscientiousness and integrity as well as experience were part of the criteria to be applied in assessing who would be fit and proper to be appointed.

The submissions on behalf of the Attorney-General did not seek to interpret the phrase 'any other fit and proper person', merely contending that "the meaning of the phrase 'fit and proper' is subjective" and that it was for the President and not the Leader of the Opposition to decide who is fit and proper, moreso because the list of persons must not be unacceptable to the President. The submissions on behalf of the Leader of the Opposition are that the President is to simply decide if the persons named are acceptable or not, and not whether they are fit and proper. While Mr. Jaigobin for the Leader of the Opposition contended that a decision whether a person is fit and proper is objective, and not subjective, having regard to the circumstances there is still imported an element or elements of subjectivity. Re Chikweche [1995] 2 LRC 93 was cited. In this case, a lawyer was refused admission to practice as a lawyer at the bar of Zimbabwe as being not a fit and proper person because he was a Rastafarian who wore dreadlocks. On assumption that the judge at first instance considered that the applicant was not a fit and proper person, the Supreme Court of Zimbabwe held that his appearance did not and could not affect whether he was a fit and proper person to be admitted to the practice of law. Chief Justice Gubbay, giving the main decision of the Court stated (p 101 e) said:

> "Construed in context, the words 'a fit and proper person' allude, in my view to the personal qualities of an applicant - that he is a person of honesty and reliability. ... I am not persuaded that the lawmaker intended by use of the phrase to embrace the physical characteristics of an applicant. For appearance bears no rational connection with the object of maintaining the integrity and honour of the profession."

Counsel for the Guyana Bar Association have made submissions in this regard and cited a number of constitutional provisions regarding the qualifications of persons for membership of Electoral Commissions of Commonwealth countries of Uganda, Sri Lanka, Nepal, Pakistan, Ghana, Jamaica and Trinidad and Tobago. They in effect speak to the members having qualities of integrity, impartiality and independence. The Bar submitted that the interpretation of who would be fit and proper 'must only be that the person is fit and proper for the appointment at hand, in this case, Chairman of GECOM, no other inference would be appropriate'. However, it is unclear what was meant when, like Mr. Hanoman, the Bar then submitted stated that 'there is no requirement that the person must have judge like qualities'. In my view it is precisely the judge-like qualities that are required of the Chairman even though they may not be a judge, former judge or a person eligible to be a judge. The sub-article is therefore to be read disjunctively with the words 'any other' indicating a separate but equal category of person. Though linked to the judicial category, this category is not circumscribed by the *ejusdem generis* rule. (Badri Prasad v Demerara Mutual Life Assurance (1981) 31 WIR 196)

It is presumed that persons who are or were judges or who are eligible to be so appointed would be fit and proper persons to hold the office of judge i.e. persons of integrity, honesty and impartiality and thereby, all things

being equal, persons in the 'judicial category' are prima facie eligible to be appointed as the Chairman of GECOM. Thus, the reference to "any other fit and proper person" in the context of art 161 (2) speaks to the qualities that one would look for in the appointment of someone as a judge but a nominee does not have to have legal qualifications or training. The word 'any' widens the types of persons who may be identified. Permitting the appointment of any other fit and proper person does not restrict the type of person or profession or other qualification of a person who can be chosen - just that looked at objectively the person would have the qualities that one would expect to see if one were considering the appointment of a judge. It cannot be gainsaid that the said qualities of integrity, honesty and impartiality are what are required in a GECOM Chairman. In this regard, the reported statement of the President that he would choose someone who is 'fit to be a judge' mirrors my interpretation of who a fit and proper person to be appointed to the post of Chairman of GECOM should be. However, I emphasise that there is no mandatory category and the categories have equal weight. The list of persons therefore as pointed out before can include persons from the judicial category who one may say are presumptively fit and proper by virtue of their office or eligibility for such office "or any other fit and proper person" who would be anyone who would be considered to be a person of integrity, honesty and impartiality. Article 122A of the Constitution gives some idea as to what is expected of a judge in the performance of his or her functions. It provides that "All courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any other person or authority; and shall be free and independent from political, executive and any other form of direction and control." Similarly, in addition to the qualities just outlined, one would expect that the Chairman of GECOM to be independent.

I therefore agree with counsel for the respondents and the Bar Association (which is in accord with the abandoned position on behalf of the Attorney-General) and hold that the sub-article permits the submission of names of six judges, six former judges, six persons who are eligible to be appointed as judges, as well as six persons who are fit and proper, or any combination of persons from these categories. There is no mandatory category. There is no order of preference in the categories of persons listed in relation to nominees for the post of Chairman of GECOM. Persons from each category are each equally entitled to be appointed.

If there are any persons named on the list as falling into the judicial category and the President chooses to consider them in priority to the other persons named but who do not so fall, then that is in his discretion so to do. But the Leader of the Opposition cannot be fettered into naming persons who are, or have been, or are qualified to be a judge in the list of persons. There is nothing in the sub-article that so requires. What if there are no sitting judges who are available or agree to be listed? What if there are no former judges who are available or agree to be listed? What if there are no persons who are qualified to be appointed judges who are available or agree to be listed? I hold that art 161(2) does not contain any provision creating a mandatory category and which as such should have priority of consideration. The sub-article provides for alternatives and thus gives the Leader of the Opposition a wider field of persons to advance as candidates for the post. Clearly, from the history of the article from the 1970 Constitution onwards, there was a decision to expand the categories of persons qualified to be appointed to the position of Chairman of GECOM. And it must be noted that while the focus appears to be on identifying a local candidate, the Constitution recognises that this may pose a difficulty and allows for a sitting judge, former judge or person eligible to be a judge from the Commonwealth to be appointed. And in the context of the provision for "any other fit and proper person", the sub-article would include a fit and proper person of the Commonwealth.

The affidavit of the applicant states that the Leader of the Opposition submitted a list of persons whom he deemed to be fit and proper. One would not expect otherwise of the Leader of the Opposition for it is expected that he would act judiciously and not capriciously in naming persons who are prima facie fit and proper whether presumptively so from the 'judicial category' or so deemed pursuant to the non-judicial category.

Who then is to make this determination is thus in issue, as well as the criteria in so determining? Given that the list of persons must not be unacceptable to the President, it follows that it is he who will ultimately make the final determination of who is a fit and proper person to be appointed as Chairman of GECOM. The residuary proviso to article 161(2) emphasises that the person to be appointed the Chairman of GECOM must not be unacceptable to the President because it provides that the President independently of anyone and without the assistance of a list, would clearly be acting in his own deliberate judgment in appointing someone from the judicial category who is presumptively fit and proper to be Chairman.

Also this is to say that in determining whether the list of persons is acceptable or not, as advanced in the submissions on behalf of the Leader of the Opposition, the President "is obliged to act reasonably, rationally and objectively and not capriciously and arbitrarily. He must objectively assess the person's ability to discharge the functions of his office, their integrity, political impartiality and such like." In like vein, the Solicitor General in her submissions for the Attorney-

General, submitted that "It is only hoped that the discretion be exercised in a manner that promotes the public interest and the common good."

Given my analysis of article 161(2), the answer to the first question in the application - 'Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge' has to be in the negative.

It is in this context of determining whether the exercise of a discretion as regards determining whether the list or the persons is acceptable that I turn now to questions (c) and (d) which in my view overlap or are complementary. **Question (c) asks - 'Whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are unacceptable as a fit and proper person for appointment.' Question (d) asks - Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable.'**

I consider these questions to be asking whether the President must choose a Chairman unless he finds all of the nominees to be unacceptable; that is, is the President obliged to make a choice once any of the names is or some are acceptable? This is to say must every person listed be individually "not unacceptable" or is it the entire list that must be "not unacceptable" to the President?

As noted earlier, the applicant deposed that based on the advice of his lawyer, "once a list of six persons has been submitted, none of whom the President has found to be unacceptable, the President is obligated under the Constitution to appoint someone from the list." In his oral submissions, Mr. Hanoman acknowledged that each of the named persons in the list must be acceptable so that the President would have a full list from which to choose a candidate. He submitted that it would appear that the entire list had to be acceptable to the President otherwise there would be a limitation on the President's ability to choose a Chairman. This submission accords with that on behalf of the Attorney-General.

The Bar Association on the other hand contended that the President is obliged to appoint a person who is not unacceptable so that 'a person must be positively identified in the determination of the President to be unacceptable for his appointment not to take place.' So a person who is found not to be acceptable can be rejected. It was also submitted by the Bar Association that grammatically the subject of art 161(2) is the person being appointed to the office of Chairman and not the list that is to be submitted to the President. Indeed, when one parses the sub-article it would read that the Chairman shall be a person (qualified as outlined) who is not unacceptable to the President. Therefore the list of six persons only becomes the mechanism by which the President can, in the first instance, appoint such a person. In this regard, each person would have to be considered by the President for a determination whether each is acceptable.

I am of the view that ensuring that each person named is acceptable to the President may be difficult to achieve unless the President provides the Leader of the Opposition with guidelines for choosing who should be listed. The Constitution provides a framework for consultation by the Leader of the Opposition with the non-governmental political parties represented in the National Assembly. Needless to say, this provision cannot be honoured because there is no longer a plurality of non-governmental political parties represented in the National Assembly.

However, not because a person named falls into any of the categories provided for by the Constitution it means that they must be appointed. A person may be included in the list as being fit and proper, whether because they are so presumed by virtue of being in the judicial category or whether they can be so deemed as any other fit and proper person, but may yet be considered to be unacceptable for some valid reason e.g. it may be known that the person has not been or is not in the best of health, or is otherwise unable to withstand the rigours of, or is unsuitable for such a demanding job as Chairman of GECOM, or there may be national security concerns, or as submitted on behalf of the Leader of the Opposition, which I quoted earlier, a nominee may not be considered to be politically impartial. In my research I found the case of Kannadasan v Khose *(supra)* in which the fact of being a former judge was held not to mean automatic eligibility for appointment to a state commission as provided for in the Constitution. It was held that having regard to the purpose and object of the constitutional provision, "it had been assumed by the Supreme Court to be available for the eligible persons who were retired judges, which meant those judges who had retired from service without a blemish and not merely a person who ᶜhas been a judgeV' (pi06) Thus it was considered that a former judge who had not been confirmed in the position would not qualify for appointment because "[i]f a person did not have the qualification for continuing to hold the office of judge of a High Court, it would be difficult to conceive how, despite such deficiency in qualification, he could be recommended for appointment to a statutory post, the eligibility criteria wherefor was, inter alia, being a former judge." (pi 07.) Thus, in short, eligibility does not *ipso facto* equate with suitability.

Despite Mr. Hanoman's concession in this regard, it would appear to me to adopt a restrictive position if it is maintained that all the persons on the list must be acceptable before a choice can be made. If in the entire list there is one person who is eminently qualified and therefore is fit and proper and acceptable, then one would expect that that person would be chosen. The choosing of one of the listed persons would mean that the others have not been considered suitable for the post for whatever reason. Otherwise the list would always have to be rejected in its entirety with the consequence that the acceptable person could not be appointed. Thus, it is not mandatory that the entire list of names be acceptable. One or some may be either acceptable or unacceptable. If

only one is acceptable then the President may choose such person; moreso because at the end of the day only one person can be appointed so automatically that person would be deemed to be acceptable for appointment. It would seem to me that a commonsense approach would be that once there is a person named who is acceptable, then the President has the discretion to choose this person. However, the President can nevertheless exercise his discretion to reject the entire list as being unacceptable as submitted by Mr. Hanoman and on behalf of the Attorney-General.

It would be up to the President to determine whether he would choose a person who is eminently qualified even though no other person on the list is acceptable or whether he would reject the entire list. In making this determination, the President would perforce have to consider whether each person named is acceptable or not. Simply, where the President has determined that some persons on the list are unacceptable he is not obliged to select anyone else from the six names for appointment. Thus, if the President considers that one or more persons on the list is not a fit and proper person and therefore unacceptable, then he may decide to reject the entire list as being incomplete or restrictive, or he may decide to choose one of the persons if they qualify even though every person named in the list is not acceptable. Therefore the whole list need not be rejected.

Thus, the questions at (c) **whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are unacceptable as a fit and proper person for appointment,** and (d) **Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable**.' are answered in the negative.

Giving reasons for who is or is not a fit and proper person

Where the President is dissatisfied with persons named in the list or the entire list - what is the process for so indicating? This leads to the final question for determination in this application: (b) **Whether the President is required under the Constitution to state reasons for deeming each of the six names on the list submitted to the President as unacceptable.** This is to say: Does the President have to give reasons for rejecting the individuals named or the list as a whole if it is that all the persons named are considered by him to be unacceptable?

The submissions on behalf of the Attorney-General indicate that the President's discretion in this regard is unfettered and cannot be questioned. They speak to the immunity of the President and cited arts 111(1) and 182(1) of the Constitution. Article 111(1) states that -

> "In the exercise of his or her functions under this Constitution or any other law, the President shall act in accordance with his or her own deliberate judgment except in cases where, by this Constitution or by any other law, he or she is required to act in accordance with the advice or on the recommendation of any person or authority."

Article 182 (1) provides *inter alia* that the President is not to be personally answerable to any court for the performance of the functions of his office.

It was therefore submitted that the President is beyond the reach of judicial direction.

As I stated earlier, one would expect that the Leader of the Opposition would name persons who are *prima facie* fit and proper to be appointed to such an important post as Chairman of GECOM. Article 161(2) to my mind therefore speaks to the need for dialogue and compromise. And as I said, fit and proper must speak to integrity, honesty, impartiality and independence - qualities expected in a judge and by the extension of the Constitution, in any other person who is to be appointed the Chairman of GECOM. So as mentioned earlier, the report in the

media that the President stated he would appoint a person who is fit to be a judge and who can function with integrity, impartiality and intelligence, if accurate, would accord with the provisions of the Constitution. But as I have concluded above, these attributes are not to be found in persons who would qualify for the judicial category alone. The Constitution recognises that other fit and proper persons can have these necessary attributes which one presumes that persons in the judicial category would possess.

There is no requirement under the Constitution for the President to state reasons for deeming each of the six names on the list or the entire list to be unacceptable. Nevertheless, the modern thinking is that reasons for decisions and actions should be given. The giving of adequate reasons is in effect the essence of democracy and good governance. (Re Eianoman (1999) 65 WIR 157.) It was held in the case of R v. Secretary of State for the Home Department, Exp Fayed and Another [1997] 1 All E.R. 228 that even where a provision of an Act expressly states that there is no requirement to give reasons, in order to be fair, where the decision involved the exercise of discretion, there is a requirement to give sufficient information as to the subject matter of concern to enable the aggrieved party to make representations.

There is no aggrieved party as such in this case, but the Leader of the Opposition is entitled to know the reason for the rejection of persons named on, or of the entire list which he would have submitted pursuant to the Constitutional provisions permitting him to do so.

In Malawi in the State v President [2008] 4 LRC 239, it was the President who wrote the opposition parties inviting feedback on the names and resumes of the intended appointees to the Electoral Commission. In this case, the facts disclose that in rejecting the proposal of the opposition parties regarding the appointment of the members of the Electoral Commission, the President gave his reasons for disagreeing with the proposal with one of the reasons being the need for a politically neutral commission. The leaders of the opposition parties also gave their reasons for their concerns about some of the President's nominees and those were that they were not politically neutral.

The constitutional provision in the case at bar highlights that more than consultation is required; a consideration of a list that is supplied is required. The fact that pursuant to article 111(1) the President shall act in his own deliberate judgment does not mean that he should not provide reasons for arriving at his decision to reject the list because in the context of article 161(2) where the Leader of the Opposition is constitutionally mandated to submit and has submitted lists of names for consideration one would expect that the President would have a reason or reasons why in his deliberate judgment the list was rejected. Given that article 161(2) requires the involvement of the Leader of the Opposition, the exercise of the President's discretion is not and cannot be considered to be absolute or singular. The Leader of the Opposition, and others for that matter, may not agree with the reasons given, but they must be given so that the parameters for the submission of another list, if required, would be set. Such reason or reasons should be communicated to the Leader of the Opposition moreso as clearly a decision was taken that a second list be submitted. It is now common knowledge that a second list was also rejected. By being given reasons, the Leader of the Opposition would be given an indication of who, in the sense of the qualities in persons, would be acceptable. Further and importantly, the exercise of his judgment to reject the list and giving reasons therefor could support the resort to the proviso to article 161(2) which permits the President to act independently to appoint a person of the judicial category to be the Chairman of GECOM, that is a person who is presumptively fit and proper.

Therefore, I hold that reasons for rejection must be given whether as regards the entire list of names that is unacceptable or some of the names on the list that has resulted in the rejection of the list.

The submission of the list does not mean that the President is obliged to accept the list or the persons named in it. If the President is of the view that the list is deficient either in totality or in the names that have been included, he can exercise his discretion to deem the entire list unacceptable. He must, however, give reasons for so doing so that it is known why there was a rejection so that he could properly move to apply the proviso to article 161(2) which allows the appointment of persons from the judicial category only. While the President is immune from suit, his decisions and actions are not. Thus, whether in the exercise of his discretion there has been compliance with the Constitution is justiciable. The case of Re Blake (1994) 47 WIR 174 cited on behalf of the Attorney-General can be distinguished. There it was for the Governor-General to decide who would be appointed Prime Minister. In this case, the activation of article 161 (2) commences with what is in effect a recommendation of the Leader of the Opposition which starts the process for the selection of a Chairman of GECOM. It is also noted that while Dr. Fiadjoe was quoted from his text 'Commonwealth Caribbean Public Law' (p71) in the further additional submissions on behalf of the Attorney-General to contend that the discretion of a Head of State cannot be questioned, in my view the learned author did not exclude this totally. Dumas v AG (PC, 2017, *supra* para 34.) confirms this. In any event, in this case, the applicant is not seeking to enquire into the discretion exercised and the judgment arrived at but to have clarified how such discretion or judgment should be exercised given the provisions of article 161 **(**2**).**

The observation of the Court in State v President, that the process seeks to build consensus and thereby the acceptability by all stakeholders is relevant to Guyana so that the bona fides of the Commission is maintained moreso as the other members of the Commission are chosen by the political parties. It is nevertheless also pointed out in State v President, at p 249, that "it does not automatically follow that belonging to a political party makes one lose their independence or professionalism. ... that they would not discharge their duties in a professional, neutral and objective manner."

It is now common knowledge that more than one list has been submitted and/or requested. However, while the applicant has not applied for a determination of this issue, it was raised by the Bar Association in its brief which was filed and served on all parties. It was submitted that the Constitution only contemplates the submission of one list. Neither the Attorney-General nor the Leader of the Opposition sought to address this issue. For completeness, since it was raised, I have decided to mention it moreso because, as noted above, it speaks to the issue of why reasons for rejection of anyone listed or the entire list are important. It does appear, as canvassed by the Bar Association, that article 161(2) does not contemplate the submission of more than one list. The proviso states that if the Leader of the Opposition fails to submit a list as provided for, then the President shall appoint someone from the judicial category only. It does appear to me that failure to submit a list as provided for speaks to the provision of an acceptable list as discussed earlier. If by not choosing any of the persons listed the President thereby finds the list unacceptable, the proviso to art 161(2) would apply and the President should then go on to appoint a judge or former judge or person who would qualify for appointment as a judge in Guyana or the Commonwealth to the post of Chairman of GECOM. But all of this is in effect academic because more than one list has been sought and provided. And in this context I re-quote from the submission of the Solicitor-General as regards the President choosing a Chairman of GECOM: "it is only hoped that the discretion be exercised in a manner that promotes the

public interest and common good."

So in conclusion it is declared that the answers to the questions posed are as follows:

(a) Whether the list of persons for appointment as Chairman of the Elections Commission required to be submitted by the Leader of the Opposition under the said article 161(2) must include a judge, a former judge or a person qualified to be a judge The answer to this question is hereby declared to be in the negative - No.

(b) Whether the President is required under the Constitution to state reasons for deeming each of the six names on the List submitted by (sic) the President as unacceptable. The answer is hereby declared to be in the positive - Yes.

(c) Whether the President is obliged to select a person from the six names on the list unless he has determined positively that the persons thereon are unacceptable as a fit and proper person for appointment. It is hereby declared that the answer is in the negative - No.

(d) Whether a finding of fact by the President that any one or more persons is not a fit and proper person renders the entire list as unacceptable. It is hereby declared that the answer is in the negative - No.

Judgment accordingly with no order as to costs.

IN THE FULL COURT

(CRIMINAL JURISDICTION)

APPEAL NO. 7 OF 2017

CHRISTOPHER RAJKUMAR v KEVIN GRANT CPL 19581

and

APPEAL NO. 8 OF 2017

GAJANAND SINGH v SUDANNAY KESNEY L/CPL 21759

Before The Honourable Justices Navindra A. Singh and Jo-Ann Barlow
Mr. Horatio Edmondson for the Appellants
Ms. Natasha Backer for the Respondent/Director of Public Prosecutions
(March 20, 2018)

Criminal Offence - Motor Vehicle and Road Traffic Act, Chapter 51:02 – Section 39 – driving while breath alcohol level in excess of prescribed limit – elements of the offence which must be proved by the State

Hon. N. Singh, J:

On February 8th 2017 Christopher Rajkumar was found guilty of "*Driving motor vehicle while breath alcohol level exceeded the prescribed limit*" contrary to section 39A(i) of the Motor Vehicle and Road Traffic Act, CAP 51:02 of the Laws of Guyana. It is from this conviction that this appeal lies.

On February 22nd 2017 Gajanand Singh was found guilty of "*Driving motor vehicle while breath alcohol level exceeded the prescribed limit*" contrary to section 39A(i) of the Motor Vehicle and Road Traffic Act, CAP 51:02 of the Laws of Guyana. It is from this conviction that this appeal lies.

These appeals have been heard together because they raise common issues with respect to what evidence is required to prove the elements of the offence for which the Appellants have been convicted.

The concentration of alcohol in the blood is what governs the effects on the nervous system, influencing the individual's behaviour, judgment and ability to function. To determine the blood alcohol concentration, a direct measurement is therefore preferred, but in practice there are several serious drawbacks to this. Blood collection is by nature intrusive and requires specially qualified personnel to conduct the collection since there is always some danger of injury or infection.

Indirect measurement of blood alcohol concentration by determination of the alcohol concentration in the breath does not have these disadvantages. The collection and test can be performed simultaneously by police officers, with immediate results obtained and is therefore widely used.

There are however serious problems involved in converting breath alcohol measurements to blood alcohol concentrations.

The basic principle on which breath testing is based is Henry's Law, which states that if a gas and liquid are in a closed container, the concentration of the gas in the air above the liquid is proportional to the concentration of the gas which is dissolved in the liquid.

If a sample of blood is kept in a stoppered bottle, alcohol will evaporate from the blood until the concentration of alcohol in the air above the blood reaches equilibrium. The higher the blood alcohol concentration, the higher the concentration of the alcohol in the air, which is called Henry's Constant.

Section 39C of the Motor Vehicle and Road Traffic Act; CAP 51:02 contains several subsections which guides a Court on the elements that must be proven by the State/ Police before a conviction can be obtained and it goes without saying that these elements must be established beyond a reasonable doubt.

Section 39C (3)

(a) provides "a person shall provide two separate specimens of breath for analysis";

and,

(c) provides "there must be an interval of not less than two minutes and not more than ten minutes between the provision of specimens".

Section 39C (7) provides

"As soon as practicable after a person has submitted to a breath analysis, the member of the Police Force operating the breath analysing instrument shall deliver to that person a statement in writing signed by that member specifying –

(a) the concentration of alcohol determined by the analysis to be present in that person's breath and expressed in micrograms of alcohol in 100 milliliters of breath; and

(b) the time of day and the day on which the breath analysis was completed."

Section 39C (9)(c) provides "the apparatus used by him to make the breath analysis was a breath analysing instrument approved by the Minister."

It is noted that this subsection refers to a certificate in proceedings for an offence under section 39B and the

offence that is the subject of this appeal falls under section 39A, nevertheless, this subsection demonstrates that the breath analysing instrument for offences of this nature has to be an apparatus approved by the Minister.

Section 39C (10) provides "In proceedings for an offence under this section a certificate purporting to be signed by the Minister that the member of the Police Force named therein is authorised by the Minister to operate breath analysing instruments shall be prima facie evidence of the particulars certified in and by the certificate."

ISSUE I

Was compliance with section 39C (7) of CAP 51:02 proven?

Based on the record of the evidence from both trials, the subject of these appeals, the provisions of section 39C (7) was not complied with by the police operating the breath analysing machine, not that there is no evidence of compliance, the evidence conclusively demonstrates non-compliance with the section.

In fact based on the Magistrate's decision, the Magistrate accepts that such a statement was not **given** to either Appellant.

In Rajkumar's case the Magistrate determined that the Legislators simply intended that the person submitting to the test "must be made aware of the alcohol concentration" contrary to what the section clearly states thereby demonstrating complete disregard for the rules of statutory interpretation.

The Magistrate states further in Rajkumar's case that "*This court applied the presumption of irregularity which does not make the proceedings void*". This Court is unfortunately unfamiliar with this principle and was unable to find merit in such a presumption.

ISSUE II

Did the State have the burden of proving that the breath analysing instrument used was one approved by the Minister?

Section 39C (9)(c) provides that a Member of the Police can sign a certificate certifying that "the apparatus used by him to make the breath analysis was a breath analysing instrument approved by the Minister" in proceedings for an offence under section 39B.

This subsection demonstrates that the breath analysing instrument for offences of this nature has to be an apparatus approved by the Minister.

It is therefore an element that must be proven and/ or established in the course of the prosecution; that the breath analysing instrument used was approved by the Minister

Based on the record of the evidence from both trials, the subject of these appeals, there is no evidence that the breath analysing instrument used was an apparatus approved by the Minister.

ISSUE III

Was it proven that the policeman/ policewoman operating the breath analysis machine was authorised to operate that machine by the Minister?

Section 39C (10) of CAP 51:02 provides "In proceedings for an offence under this section a certificate purporting to be signed by the Minister that the member of the Police Force named therein is authorised by the Minister to operate breath analysing instruments shall be prima facie evidence of the particulars certified in and by the certificate."

The section, in no uncertain terms, requires that a certificate, the certificate is what would be *prima facie*

proof "*that the member of the Police Force named therein is authorised by the Minister to operate breath analysing instruments*".

The Magistrate, without venturing a reason or explanation, found that the witnesses' testimony that they were approved by the Minister to operate the instrument sufficient to establish that element.

The Court finds that it was not proven that the policeman/ policewoman operating the breath analysis machine was authorised to operate that machine by the Minister as is required under Section 39C (10) of CAP 51:02.

ISSUE IV

Was compliance with section 39C (3)(c) of CAP 51:02 proven at Gajanand Singh's trial?

Based on the record of the evidence from the trial there is no evidence of compliance with this section.

ISSUE V

The Appellants further raised the issue that it was brought out in the evidence that the breath analysis machine used was last calibrated in excess of 29 months prior to it being used to obtain the readings from the Appellants.

The Appellants argue that the Court ought not to have found or could not have reasonably have found that the machine was accurate at the time of taking the samples since it had not been calibrated for such an extended period of time.

The Appellants argue that the State has to establish beyond a reasonable doubt that the machine, upon which they rely for their sole evidence to obtain a conviction, was operating the way the manufacturer's intended.

The State relies upon Section 39C (11) of CAP 51:02, which provides "*In any proceedings for an offence under this section, evidence of the condition of a breath analysing instrument or the manner in which it was operated shall not be required unless evidence that the instrument was not in proper condition or was not properly operated has been adduced*" to say that the evidence that the Appellants claim should have been led was not required.

Based on the record of evidence in Rajkumar's trial, Corporal Grant, the policeman operating the machine testified that the machine has to be tested to see if it is accurate and he further testified that he did not know if the machine was calibrated.

This must be evidence that, either the machine was not in proper condition or that it was not properly operated.

Based on the record of evidence in Singh's trial, Lance Corporal Kesney, the policewoman operating the machine testified that the first reading was 122 micrograms and the second reading was 91 micrograms, a difference of 31 micrograms. In addition, the slip that was produced at the trial was not clear, described as illegible by the Appellant's Counsel.

Surely, this must be evidence that the machine was not in proper condition or that it was not properly operated.

In these circumstances brought out in the evidence the Court finds that the State cannot use Section 39C (11) of CAP 51:02 as a shield to avoid leading evidence to establish the reliability and/ or proper functioning of the breath analysing machine used.

Further, in the case of People v Hargobind 2012 NY Slip Op 50450(U) [34 Misc 3d 1237(A)], Criminal Court of the City Of New York, Kings County, which I accept as persuasive authority, Gerstein, J. stated;

"*Thus to establish the reliability of the results of the particular Intoximeter administered to Defendant, the People will have to show at least the following: that the device had been tested, producing a reference standard, within a reasonable period prior to Defendant's test; that the device had been properly calibrated; that the device was properly functioning on the day the test was administered; that the test was administered properly, including that the device was purged prior to the test, by a properly qualified administrator; and that Defendant was observed for at least 15 minutes prior to the test to ensure that Defendant had not "ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have anything in his/her mouth.*"

The reason for the requirement of observing the Defendant for at least 15 minutes prior to testing being that it has been scientifically accepted that, (1) if the subject has recently consumed alcohol it may take 15 to 30 minutes for the last traces in the mouth and respiratory system to be eliminated and (2), if alcohol is still in the stomach, one burp may bring up enough alcohol vapour to contaminate the respiratory system for 5 to 10 minutes.

It must be noted that the CMI Intoxilyzer 400 has a countdown clock that enables it to "countdown the 15 minute observation period".

Also in the case of People v Bosic 2010 NY Slip Op 08380 [15 NY3d 494] Court of Appeals, which I also accept as persuasive authority, Graffeo, J. stated;

"*Breath-alcohol detection machines have long been considered scientifically reliable, but it remains necessary for the proponent of breath-alcohol test evidence to establish an adequate evidentiary foundation for the admission into evidence of the results of the test (see e.g. People v Mertz, 68 NY2d 136, 148 [1986]). The issue here is whether, as a predicate to the admissibility of this evidence, there needed to be proof that the instrument used to test defendant had been calibrated during the past six months. Defendant claims that People v Todd (38 NY2d 755 [1975]) established a six-month calibration requirement that was not met here. Although Todd is susceptible to such an interpretation, we do not read it in such a rigid manner.*

The trial evidence in Todd indicated that the breathalyzer machine "was constantly left on at the [state police] barracks and never turned off," and had been calibrated more than six months before it was utilized to test the defendant (79 Misc 2d 630, 633 [County Ct, Delaware County 1974]). The intermediate appellate court believed that those "two factors taken together raise[d] a reasonable doubt . . . as to the reliability of that particular machine" (id.). We agreed in a memorandum decision, explaining that "[t]he People failed to establish that the breathalyzer apparatus had been timely calibrated" and that "[i]t was incumbent upon the District Attorney to show that the machine was in proper working order" (38 NY2d at 756)."

Based on the foregoing both appeals are upheld and the convictions are vacated.

Gajanand Singh was also found guilty of disorderly behaviour but since no submissions were advanced with respect to this conviction, the Court finds that the Appellant Gajanand Singh has opted to not pursue his appeal with respect to that conviction and so the appeal with respect to that conviction is dismissed.

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA
CONSTITUTIONAL AND ADMINISTRATIVE JURISDICTION

2017-HC-DEM-CIV-FDA-1372

VINNETTE JAMES et al for and on behalf of DELLON ST. HILL and others v
THE ATTORNEY GENERAL OF GUYANA et al

Before The Honourable Justice Jo-Ann Barlow
Mr. Eusi Anderson for the Applicants
Mrs. Onika Archer-Caulder for the Respondents
(March 28, 2018)

Penal Provisions – Narcotics Drugs and Psychotropic Substances Control Act, Chapter 10:10 – Firearms Act, Chapter 16:05 – whether imposition of mandatory minimum sentences is unconstitutional – Acts provide that the Court can impose another sentence for special reasons – discretion of Court thereby preserved – no violation of the constitution
Separation of Powers – Legislature can make laws and impose penalties – does not affect separation of powers principle once there are sufficient checks and balances in place
Constitutional redress – whether person can approach the Court for constitutional redress on behalf of another – no need to await breach of constitution - can approach in the face of likelihood of breach.

Hon. J. Barlow, J:

The Applicant Vinnette James has moved the Court by Fixed Date Application 1337/2017 challenging the penal provisions of the Narcotics Drugs and Psychotropic Substances Control Act Chapter 10:10 and the Firearms Act Chapter 16:05 herein after referred to as the Narcotics Act and the Firearms Act respectively. The Applicant filed this action for and on behalf of Dellon St Hill, a citizen of Guyana. Subsequent to the filing of this Application by Vinette James, two other Applications were filed – one by Indrani Dayanarain on behalf of Parsram Shancharra and the other by Karen Crawford on behalf of Khalil Mustafa also known as Khalil Mustapha. The Applications are identical in every material particular. By Order of the Court they were consolidated and heard together.

The Applicants challenged the constitutionality of the imposition of the mandatory minimum sentences prescribed by the Narcotics Act and the Firearms Act. They contended that the mandatory minimum sentencing provisions in the Narcotics Act and the Firearms Act are contrary to Articles 8, 39, 40, 65, 122(A), 141 and 154(A) of the Constitution of the Co-operative Republic of Guyana.

While many breaches of the Constitution and their consequences were cited in the Application, the challenges can be summed up as follows:-

1. That the mandatory minimum sentencing provisions of the Narcotics Act and the Firearms Act are unconstitutional, null, void and of no legal effect insofar as they render nugatory the doctrine of Separation of Powers.
2. That the mandatory minimum sentencing provisions of the Narcotics and the Firearms Act are unconstitutional in that they are grossly disproportionate, arbitrary and excessive.

3. That mandatory minimum sentencing provisions of the Narcotics Act and the Firearms Act amount to torture, cruel and inhuman punishment.

The Respondents contended:

1. That the mandatory minimum sentencing provisions contained in these Acts do not offend the provisions of the Constitution.
2. That the power is and has always been vested in the Legislature to make laws for the peace, order and good government of Guyana.
3. That the mandatory minimum sentencing provisions as contained in the Narcotics Act and the Firearms Act are proportionate and just considering the nature and seriousness of the offences and the prevailing legal, social and economic climate.

History of the Matter

Dellon St Hill, Parsram Sancharra and Khalil Mustafa also known as Khalil Mustapha appeared before Magistrate's Courts charged with offences under the Narcotics Act. Trials ensued and they were convicted and sentenced. In addition to these Applications, citing breaches of the Constitution, they have all filed appeals against the convictions.

Issues

The issues which the Court must address can be summarised as follows:

- Can Vinette James and the other Applicants challenge the constitutionality of the provisions of the Narcotics Act on behalf of Dellon St Hill and others?
- Can Vinette James and the other Applicants challenge the constitutionality of the penal provisions of the Firearms Act, given that their contentions relate to possible future breaches?
- Are the Mandatory minimum sentences of the relevant pieces of legislation unconstitutional?

The first two issues can with swift dispatch be answered in the affirmative. In the first instance, Vinette James and others are proper parties in the Applications relative to the penal provisions of the Narcotics Act since Article 153(1) of the Constitution of the Co-operative Republic of Guyana confers a right on any person acting on his or her own behalf or on behalf of another to apply to the High Court in enforcement of the protective provisions of the Constitution. In the second instance, the Caribbean Court of Justice in the case of the Attorney General of Belize v Zuniga and others, CCJ Appeal No.8 of 2012, made it clear that a citizen need not await a breach of the Constitution to approach the Court but is at liberty to do so in the face of a likelihood of breach.

The third issue must perforce be treated under different sub heads:

1.SEPARATION OF POWERS

Counsel for the Applicants argued that the Legislature by fixing a mandatory minimum sentence has blurred the lines between two arms of the state - that is the Legislature and the Judiciary. He contended that by stipulating an upper and lower ceiling for sentencing offenders under the relevant penal sections of the Acts, the Legislature is dictating to judicial officers what course of action they must take when sentencing an offender. With this argument the Court disagreed.

It is the Legislature that is tasked with ascertaining through measures available, what ills or mischief beset a society. Armed with such information, the Legislature must then determine what reasonable measures would treat with those ills or with the particular mischief. While this may seem to be an overlap between the powers of the Legislature and the Judiciary, the principle of Separation of Powers remains unaffected as long as there are sufficient checks and balances in place. *In Hinds v. R [1975] 24WIR 326 @ 341 Lord Diplock* in addressing the question of separation of powers in Caribbean Constitutions opined that-

> *"The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law: …. In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence- as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case. Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried, to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case."*

This Court found favour with these sentiments and did not accept that the mere setting of parameters within which a court ought to act blurs the lines and creates an obfuscation of the doctrine of Separation of Powers.

2. REMOVAL OF JUDICIAL DISCRETION

The Applicants' arguments in relation to the removal of the judicial discretion by the Legislature are in some senses tied to the separation of powers argument but warrant separate treatment. One of the arguments advanced by the Applicants is that by fixing a mandatory minimum sentence, the Legislature has removed from the sentencing court that discretion which any sentencing court must possess thereby rendering the provisions unconstitutional. This Court found that this is not an accurate assessment of the nature of a mandatory minimum sentence and that in holding that view, the Applicants are mistaken.

In *Reyes v. R [2002] 2 AC 235 @245* Lord Bingham of Cornwall addressed what can only be described as necessary interdependence that exists between the Legislature and the Judiciary. He said -

> *"In a modern liberal democracy it is ordinarily the task of the democratically elected Legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal law which the Legislature has enacted. This is sometimes described as deference shown by the courts to the will of the*

democratically - elected Legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it".

The abovementioned judicial pronouncements make clear the fallacy in the argument of the Applicants. That notwithstanding, a Court's task in matters such as these is to examine the legislative framework to be sure that while there exits that interdependence, there is no crossing of the line and sentencing remains in the hands of the judicial arm of the state.

Ó›Dálaigh CJ in the Irish case of *Deaton v A-G and Revenue Comrs [1963] IR 170 said at 182—18:*

'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case ... The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive ...'

Lord Diplock in *Hinds v R*, [1975] 24 WIR 326 referred to that passage with approval. He observed that that statement, uttered in relation to the Constitution of the Irish Republic, applied with even greater force to Constitutions based on the Westminster model.

In examining the provisions complained of in the extant Applications the Court examined the penal provisions to determine in which arm of the State the sentencing of offenders rests. That examination revealed that there are sufficient safe guards to keep the powers of sentencing exclusively within the purview of the Judiciary. To this issue the Court will return shortly.

3. GROSSLY DISPROPORTIONATE, ARBITRARY AND EXCESSIVE

Another limb on which the Applicants based their challenge to the mandatory minimum sentences prescribed by the Legislature is the view that mandatory minimum sentences are grossly disproportionate, arbitrary and excessive and therefore amount to cruel and inhuman punishment.

It is a hallowed principle that the penalty must fit the crime and a penalty that is out of proportion with the offence is liable to be struck down on the grounds that it offends not only general sentencing principles but also offends the fundamental rights of the citizen and is therefore unconstitutional.

The Applicants rely on *R v Lloyd [2016] SCR 130* and other Canadian cases where mandatory minimum sentences were struck down by the Supreme Court of Canada as being unconstitutional. Counsel for the Applicants pointed to M^{c}Lachin CJ's views @ page 152 para 35 of that judgment. There he said -

"The reality is this: mandatory minimum sentence provisions that apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are constitutionally vulnerable. This is because such provisions will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional."

It is not every sentence, even a mandatory minimum sentence, that appears harsh or excessive that amounts to cruel, inhuman or degrading punishment and therefore unconstitutional. To be cruel, inhuman or degrading punishment a sentence must be more than merely excessive. It must be "so excessive as to outrage standards of

decency" and be "abhorrent or intolerable" to society ..." per McLauchlin CJ in Lloyd's case (supra)@ page 149 para 24.

It is clear too that being "constitutionally vulnerable" is not the same as being unconstitutional if there are appropriate checks and balances in place to ensure that no offender would be subject to the mandatory minimum sentence if the circumstances of his case warrant a lesser sentence. In Lloyd (supra) McLauchlin CJ said:-

> *".....If Parliament hopes to maintain mandatory minimum sentences for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit that mandatory minimum sentences. In the alternative, Parliament could provide for judicial discretion to allow for a lesser sentence where the mandatory minimum would be grossly disproportionate and would constitute cruel and unusual punishment..."*
>
> *.... no precise formula and only one requirement — that the residual discretion allow for a lesser sentence where application of the mandatory minimum would result in a sentence that is grossly disproportionate to what is fit and appropriate and would constitute cruel and unusual punishment."*

Examples of legislative preservation of the judicial discretion in the face of mandatory minimum sentences can be found in the Precious Stones Trade Act 1982 of Zimbabwe, New Zealand Sentencing Act 2002 and the Misuse of Drugs Act 1990 as amended by the Justice Act 26/1994 of Belize. These Acts all provide that a Court may impose a sentence lower than the mandatory minimum sentence if there are reasons for doing so which must be recorded. Some pieces of legislation speak of "special reasons" while others simply speak of "reasons."

Both the Narcotics Act and the Firearms Act contain similar provisions. These are sections 73(2) of the Narcotics Act and sections 16 (a) and (b), 32, and 39 of the Firearms Act.

4. SPECIAL REASONS

The sections of the Firearms Act which are the subject of these Applications are sections 16, 32, 38 and 39. Section 38 does not prescribe a mandatory minimum penalty but the other sections do. All of the sections of the Firearms Act that prescribe a mandatory minimum sentence also provide:- ***".....provided that the Court may for special reasons to be recorded in writing impose any other sentence...".***

Section 73 of the Narcotics Act states;

> *(1) "where any provisions of this Act requires imposing on any person convicted of any offence under this Act a sentence of death or a sentence of imprisonment for life or imprisonment for a minimum term or imprisonment then notwithstanding anything contained in any other provisions of this Act or any other written law but subject to the provisions of section 166 of the Criminal Law (Procedure) Act*
>
> *(a) no other punishment shall be substituted for the sentence of death or the sentence of imprisonment as the case may be; and*
>
> *(b) the sentence of imprisonment for life or imprisonment for a minimum term is required to be imposed, the sentence of imprisonment shall not be a lesser tern than life or the minimum term so required as the case may be* ***unless there are special reasons for doing so which shall be recorded in writing.***

Section 73(2) (a) and (b) then lists what this Court has found to be two examples of special reasons. Section 73(2) (a) refers to the fact that the person was a child or young person at the date of commission of the offence and section 73 (b) speaks to a person convicted for an offence of possession where the substance is cannabis, the amount does not exceed five grams and the court is satisfied that the cannabis was for the offender's personal

consumption.

Counsel for the Applicants argued strenuously that section 73(2) (a) and (b) are restricted in their scope and application because there listed are the only two special reasons. Extending his argument in relation to this issue he argued that given the narrow limits of the section, it rendered the penal sections invalid to the extent that they left susceptible to cruel and inhuman punishment many offenders who did not fall within those two special reasons. This Court found no such restriction imposed by section 73(2) (a) and (b). Section 73(2) (a) and (b) merely provide two examples and not a closed list of special reasons.

The Court was also cognizant of the fact that the Guyana Court of Appeal in the case of *Knights v De Cruz (1996) 54 WIR 252*, relying on the principles in *R v Crossen [1939] NI 10* which were cited with approval by Goddard CJ in *Withal v Kirby [1946] 2 All ER 552*,held that a 'special reason' within the exception is one which is special to the facts which constituted the offence, and not one which was special to the offender, as distinguished from the offence. In *Knights v De Cruz*, the Court excluded considerations personal to the offender such as his plea and family hardship from affecting sentencing in a firearms matter. This Court distinguished that case from the present in relation to the Narcotics Act and will explain its applicability to the provisions of the Firearms Act shortly.

Statutory provisions cannot be examined and interpreted based on principles imported wholesale from another offence or another set of circumstances. Statutory Provisions must be interpreted by examining its sections as a whole. The Legislature in providing those examples of "special reasons" in section 73(2) (a) and (b), set out examples that that are special both to the offence and the offender and thereby departed from the *Knights v DeCruz* formula. That formula therefore has no applicability to narcotics matters.

The Firearms Act has no examples to which the Court may look to determine the Legislature's intent in relation to 'special reasons'. In relation to cases decided on the issue, there is *Knights v De Cruz* (supra). In that case Kennard C as he then was @ p 253 cited with approval from *R v Crossen* (supra); the following principle;

> *A "special reason" within the exception is one which is special to the facts of the particular case that is special to the facts, which constitute the offence. It is, in other words, a mitigation or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not "a special reason" within the exception.'*

An analysis of this principle reveals that it does not shut out reasons special to the offender if those reasons are directly connected to the commission of the offence.

Examples of a "circumstances peculiar to the offender" would be the fact that financial hardship would befall his family. See *R v Wickins (1958) 42 Cr App Rep 236; Basil Mortimer Bernard [1997] 1Cr App R 134* (illness of convicted person). Those reasons have no connection to the "circumstances of the offence" and therefore are outside of the exception.

Notwithstanding *Knights v De Cruz* (supra) this Court has found that the discretion to go below the mandatory minimum sentence prescribed in the Firearms Act exists. Courts are urged to guard against excluding every fact personal to the offender in their analysis of the circumstances under this Act. Proper analysis of the circumstances before a sentencing court will often reveal that reasons special to an offender may be so inextricably

bound up with other circumstances that separation is not possible.

Counsel has invited the Court to provide a list of examples that amount to special reasons. The principle *expresis unius est exclusion alterius* obliges the Court to decline the invitation. To create a list of special reasons is to immediately exclude from the operation of section 73(1) and those provisions of the Firearms Act that speak of special reasons, an offender whose circumstances do not fall among those matters on such a list. Sentencing must always be a stage in the proceedings that is entirely in the hands of the tribunal seized of the matter, knowledgeable of all the circumstances and in a position to assess all mitigating and aggravating circumstances - *Ponoo v Attorney General of the Seychelles [2012] 5 LRC 305 @ 305 para 37-39.* It is not for a court sitting as this Court is, to dictate to a sentencing court what are special reasons in the matter before that court.

In arriving at an appropriate sentence under the Narcotics Act and the Firearms Act, a court in assessing the circumstances to determine what are special reasons, must bear in mind that both narcotics offences and firearms offenses are serious offences and that the Legislature by fixing mandatory minimum sentences in all of the sections complained of was saying that these offences must be treated with seriousness given the effect that they have on society. Having noted the seriousness with which the Legislature treats such offences, the court must embark on a search of the circumstances before it to determine what sentence best suits the case and that individual offender before the court. Special reasons are reasons not special to the general public but peculiar to the case before the court and the offender before the court. By way of example and not by way of creating a list this Court is of the view that an early guilty plea from a young offender may be seen as a special circumstance while for another young offender with an equally early guilty plea, a court may find that because of the repeated nature of his appearances and because of the less aggravating or more aggravating circumstances that attended his previous appearances before a court, an early guilty plea coupled with his youth do not have the same value. In each case it is for the sentencing court to make a value judgment of the information that is before that Court.

CONCLUSION

In concluding, this court determined that section 73 of the Narcotics Act and the provisions of the Firearms Act that speak to special reasons preserve for a sentencing court that inherent jurisdiction that every judicial officer must possess at the time of sentencing an accused person. The safety net that those special reasons provisions provide, renders baseless the challenges raised by the Applicant. The declarations of unconstitutionality sought by the Applicants are therefore refused.

Before leaving this matter this Court takes occasion to observe that both pieces of legislation have been engaging the attention of the Courts for some considerable period of time. The ills that they sought to address may still exist but the question to be answered is whether the legislation in its present form adequately treats those ills. Has the time not come for there to be comprehensive review of these pieces of legislation? Such review would include mature deliberation on whether mandatory minimum sentences are still necessary. It might also address whether the present sentencing regime which contemplates mainly custodial sentences is still necessary.

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
CIVIL JURISDICTION

2017-HC-DEM-CIV-FDA-78

MOHABIR ANIL NANDLALL

v

THE MINISTER OF LEGAL AFFAIRS et al

Before The Honourable Justice Nareshwar Harnanan
Mr. Mohabir Anil Nandlall, Applicant, in person
Hon. Basil Williams S.C. for the Respondents
(April 19, 2017)

Judicial Review – Prerogative Order – Mandamus – material non-disclosure – setting aside nisi order – Separation of Powers – Deeds and Commercial Registries Authority Act – statutory duty of Minister to appoint to Governing Board – duty to appoint arises on the expiration of the life of the Governing Board – failure to appoint 'wrongful inaction'

Hon. N. Harnanan, J.:

Factual matrix:

1. On the 8th March, 2017, after hearing a Fixed Date Application for judicial review, *Hon. Justice Brassington Reynolds* granted an order *nisi* of *mandamus* compelling the Minister of Legal Affairs to appoint the members of the Deeds and Commercial Registries Authority, a statutory body corporate, in accordance with and mandated by **Sections 5(2)(a), (f), (g), (h)** and **6(4)** of the **Deeds and Commercial Registries Authority Act**, No. 4 of 2013, unless the Minister of Legal Affairs shows cause why the order *nisi* of *mandamus* should not be made absolute.
2. Before the date appointed by the Court (3rd April, 2017) for the Minister of Legal Affairs to show cause, a Notice of Application was filed on behalf of the Respondents on the 24th March, 2017, contending that the Court should not exercise its jurisdiction to determine the Fixed Date Application filed by the Applicant, on the following grounds:
   i. The Applicant failed to disclose all material facts pertinent to the application when he approached the Court *ex parte* for the Order Nisi – more particularly, as a Member of Parliament he would have known that the Deeds and Commercial Registries (Amendment) Bill, published on the 24th Jan. 2017, was placed before the National Assembly on an Order Paper for a sitting of the National Assembly on the 9th Feb. 2017 and on the 9th March 2017 – the first reading thereof was done on the 30th Jan. 2017 – a fact not disclosed within his application for judicial review;
   ii. The provisions of the aforesaid Bill proposes to amend the substantive Act to increase the number of members of the Board and it would be impractical for the Minister to appoint a Board;
   iii. The order *nisi* is tantamount to interfering with the functions of the Executive, which is a breach of the doctrine of separation of powers.
3. As a result, the Respondent further contended that this non-disclosure was material and entitled the

Court to discharge the order *nisi* by Hon. Justice Brassington Reynolds.

4. On the 3rd April, 2017, when the substantive matter came up for hearing, the Applicant declined to file any evidence in the Notice of Application filed by the Respondents, since the issue was one of law, and sought an opportunity to argue on the merit of the aforesaid Notice of Application.
5. Arguments were entertained by the Court on the 5th April, 2017 on the Notice of Application to discharge the order *nisi*. On that day, a commendable position was taken by the Hon. Attorney General, that should the Court not find favour with the order sought in the Notice of Application, in the interest of expediency, he would wish the Court to treat his arguments, the Notice of Application, and the documentary evidence filed therewith, as his response to the Fixed Date Application, since his major contention is that the Applicant was guilty of material non-disclosure which entitles the court to discharge the order *nisi*.
6. The Court therefore proposes to treat the arguments collectively to determine the proceedings. A finding by the Court in either application before it will result in a final determination of the matter.
7. The Applicant indicated his no objection to this course, and thereafter the Court invited arguments on the Notice of Application, and also substantively on whether cause was shown to discharge the order *nisi*, both of which are inextricably linked.

The Respondent:

8. The Hon. Attorney General relied substantially on the effect of the Applicant's failure to disclose the Bill proposing an amendment to the *Deeds and Commercial Registries Act*, more particularly its membership, which is currently before Parliament. He submitted that this is a material breach and likened it to the position which obtains in the grant of *ex parte* injunctions, that the Applicant has a duty to make a full and fair disclosure of all the material facts, since he was approaching the court *ex parte* for the *nisi* order, citing **R. v. Kensington Income Tax General Commissioners, ex p Princess de Polignac** [1917] 1 KB 486 and **Kevin Millien v. BT Trading et al.** No. 325 of 2014, Supreme Court of Belize [Unreported] and **GPL v. Wong** 78 WIR 344, in support of his proposition.
9. He submitted that had Justice Reynolds been made aware of the proposed Bill tabled in Parliament, he would not have issued the order *nisi* of *mandamus*. He further submitted that nowhere in the Fixed Date Application was there a reference to the Bill, and that it was on two order papers in Parliament, the latest being at that time (of filing the FDA – 6th March, 2017), the 9th March, 2017.
10. The Hon. Attorney General extended his position further when he invited the court to consider that if it finds that the proposed amendment exists, then the court ought to conclude that it is through no fault of the Minister of Legal Affairs that the Board is not constituted.
11. The Hon. Attorney General also submitted that in any event, the Court cannot intervene in the internal affairs of the executive as it goes against the grain of the Constitution premised on the doctrine of the Separation of Powers – that asking the Court to get into the internal affairs of the Government and Parliament, that is, the appointment of the Board, without cogent reasons would amount to interference by the Judiciary, relying on **Carltona, Ltd. V. Commissioner of Works and Others** [1943] 2 All ER 560 and **The Methodist Church of the Bahamas v. The Attorney General** (not cited)
12. He further argued it was not competent for the Court to inquire into the grounds, or reasonableness

of the decision to not appoint the members of the Board that he had the responsibility to appoint, in the absence of an allegation of bad faith on his part, citing **Carltona, Ltd. V. Commissioner of Works and Others** [1943] 2 All ER 560 in support of this contention.

13. The Hon. AG continued that the Court does not act in vain when it should recognise that the Minister only appoints the Chairman to the Governing Board. In relying on the provisions of the *Deeds and Commercial Registries Authority Act,* the Hon. AG submitted that there is no Board if the other entities who are represented on the Board do not nominate persons to be so appointed and the application before the Court does not show that persons were nominated and the Minister refused to act on the nominations. He further submitted that no time limits were prescribed by the Act for appointments to be made, but undertook that as soon as the proposed amendments were passed by Parliament, he will appoint nominees as soon as they are submitted to him.

The Applicant:

14. After giving a brief history on the object and purpose of prerogative remedies, the Applicant urged the Court to consider the invitation to decline the exercise of the Court's jurisdiction by the Hon. Attorney General as one to abdicate the Court's responsibilities. He submitted that the Court functions to ensure the Executive exercises its operations in accordance with the law, and that in any event, the claim of material non-disclosure does not operate against the Court's jurisdiction. Further, he submitted that even if there is material non-disclosure, it does not automatically lead to a discharge of the order *nisi,* but only in circumstances where the omission is deliberate and intended to gain an advantage.
15. However, the Applicant did not dispute the obligation of full disclosure, but contended that the fact that there is a proposed Bill in Parliament is not a material fact to the application before the Court. He submitted that had it been included, it would not have made an impact on whether the Court, as constituted then, would have issued the order *nisi*.
16. The Applicant further submitted the existing law, that is, the *Deeds and Commercial Registries Authority Act,* has been in force from the time of its assent, that is, 31st May, 2013. He argued that the Act mandates the Minister to appoint members to the Governing Board by *sections 5(2)* and *6(4)* which he is refusing to do.
17. The Applicant relied on the contents of a letter he wrote to the Minister dated the 27th January, 2017 calling on him to forthwith appoint a Governing Board pursuant to the statutory obligations contained in the Act, which he said was to no avail. He now relies on the application before the Court to compel the Minister to perform his obligations pursuant to the Act.
18. Relying on **S. 15** of the **Interpretation and General Clauses Act, Cap. 2:01** of the Laws of Guyana [Publication (in Official Gazette) and commencement of Acts (on date of publication unless provided in the Act, or in any other law)], the Applicant submitted that the law does not cease to operate, or is suspended, because a Bill to amend it is promulgated in Parliament. He posited that the proposed amendment may not survive the Parliamentary process, or the President may never assent, and as such, the Court has an obligation to enforce the laws passed by Parliament.
19. He continued that the issue here is not whether the Court is called upon to substitute the authority of

the Minister, or, a question of the Judiciary interfering with the affairs of Parliament.

20. Mr. Nandlall argued that the Notice of Application was misconceived as the Court must exercise its jurisdiction in the performance of its Constitutional mandate.

Legal framework:

21. As noted above, an order *nisi* of *mandamus* was issued by the Hon. Mr. Justice Brassington Reynolds on the 8th March, 2017, compelling the Minister of Legal Affairs to appoint the members of the Governing Board of the Deeds and Commercial Registries Authority, a statutory body corporate, in accordance with *sections 5(2)(a)(f)(g)* and *(h),* and *6(4)* of the *Deeds and Commercial Registries Authority Act*, unless the Minister of Legal Affairs shows cause why the order *nisi* of *mandamus* should not be made absolute.
22. The applicant therefore seeks a mandatory order to compel the Minister of Legal Affairs to perform a statutory obligation as contained in the above referred Act.
23. In Clive Lewis's **Judicial Remedies in Public Law** (3rd edition, 2004) the learned author states the following at paragraph 6-050 at page 229 in relation to mandatory orders and clear and qualified duties: A mandatory order can issue to order a body to perform a specific act, ***where statute imposes a clear and qualified duty to do that act***. This may take the form of a duty imposed on a public body or the conferment of a specific public law right on an individual which he may enforce by way of a mandatory order. (emphasis supplied)
24. Describing the nature of *mandamus,* the learned authors of Short & Mellor, **The Practice on the Crown Side of the King's Bench Division** (2nd edition) state at pages 198 –199:
    Mandamus is only used where the inferior tribunal has declined jurisdiction, the object of *mandamus* being not to review or control the action of the inferior court, but merely to compel it to act
25. The Hon. Mr. Justice Carl Singh, Chancellor (ag), as he then was, in delivering the judgment of the Court of Appeal, in **The Medical Council of Guyana v. Muhammad Hafiz**, 77 WIR 277 had this to say at page 283 of the Report:
    A clear and settled principle of law is that the person compelled to the performance of an act by an order of *mandamus* ***must have a clear duty imposed on him*** as opposed to a mere discretion". (emphasis supplied)
26. 24. **C.K. Thakker's, Administrative Law**, 2nd Edn, at page 980 of the text, considered the latin meaning of the term 'mandamus' meaning a 'command' or an 'order', directing a person or authority to perform a public duty imposed on him or it. The authors quoted *Corpus Juris Secundum*, Volume 55 at page 5, defining mandamus:
    Mandamus is a writ directed to a person, officer, corporation or inferior court commanding the performance of a particular duty which results from the official station of the one to whom it is directed or from operation of law.
27. The learned authors continued at page 981 of the text as follows:
    The primary object of *mandamus* is to supply defect of justice. It seeks to protect rights of a citizen by requiring enforcement and fulfilment of imperative duty created by law. It thus promotes justice.

It should, therefore, be used at all occasions where the law has conferred right but has created no specific remedy…

The main function of *mandamus* is to ***compel action***. It neither creates nor confers power to act. It only ***commands the exercise of power already existing*** when it is the duty of the person or authority proceeded against to act. (emphasis supplied)

28. In **Belize Institute for Environment Law v. Chief Environmental Officer** BZ 2008 SC 13, as cited by *Professor Eddy Ventose* in his work, **Commonwealth Caribbean Administrative Law**, Routledge, 2013 at page 411, the court considered the issue of an order of *mandamus*. *Professor Ventose* wrote:

The court claimed that there should be no doubt about the power of the High Court, in an appropriate case, to issue an order of *mandamus*. It then quoted from *Wade and Forsyth* in **Administrative Law**[46], who, in discussing the nature of *mandamus* as a public law remedy, stated, first, '[t]he commonest employment of *mandamus* is a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him …

mandamus deals with wrongful inaction'; and second, '[t]he essence of *mandamus* is that it is a… command…ordering the performance of a public legal duty…' (emphasis supplied)

Separation of Powers:

29. Much of the Hon. Attorney General's submissions referred to the doctrine of separation of powers and the interference of one arm of State in the internal affairs of the other two, when the Court would have issued the order *nisi* of *mandamus* to the Minister of Legal Affairs.

30. Professor Ventose (cited above) at page 56 of his text noted the following:

It is arguable, therefore, that judicial review attempts to ensure that the bodies that are directly entrusted with the governance of the country do so on terms that are fair and do not impact negatively on the common law rights of the citizens and also to ensure that they act lawfully. Where any of these bodies act contrary to the provisions of the Constitution, it is clear that judicial review will lie, as was the case in *Hinds v R*[47], where Parliament acted unlawfully in creating a court that usurped the powers of the High Court without appropriate constitutional amendment; *Maharaj v Attorney General for Trinidad and Tobago*[48], where a member of the judiciary acted contrary to the rules of natural justice which breached the fundamental rights and freedoms of a citizen; and *C.O. Williams Construction Ltd. V Blackman*[49], where it was accepted that the Executive (Cabinet) arguably acted unlawfully in taking into account irrelevant considerations in awarding a government contract…It is clear, therefore, that the state institutions, namely Cabinet, the Legislature and the Judiciary, must not act in ways that affect the common law rights of persons and they must not act ultra vires, particularly where that affects the rights of the citizenry.

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46 9th Edition at 615 and 616
47 [1977] AC 1
48 [1977] 1 All ER 411
49 [1995] 1 WLR 102

31. In the **Williams**[50] decision, the Privy Council in a speech read by Lord Bridge, said:

    The contention advanced by Mr. Newman, on behalf of the Attorney General, that in awarding the contract to Rayside, the Cabinet was exercising a prerogative power, seems to their Lordships to be quite ***untenable***. It is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously have been exercised is superseded and **so long as the statute remains in force, the function can only be exercised in accordance with its provisions**…

    When the Cabinet exercises a specific statutory function which, had it been conferred on a minister instead of the Cabinet, would unquestionably have been subject to judicial review, their Lordships can see no reason in principle why the Cabinet's exercise of the function should not be subject to judicial review to the same extent and on the same grounds as the minister's would have been. (emphasis supplied)

32. 30. In his well-known work, **Commonwealth Caribbean Public Law**, 2nd Edn., Cavendish, 1999, *Professor Albert Fiadjoe* commented on the **Williams** decision as being reflective of the proposition that:

    …despite the constitutional position of the Cabinet in the constitutional schema of things, which thus insulates it generally from review because it is the ***principle instrument of governmental policy***, where it purports to exercise administrative authority under the aegis of a statute then it is as much a subject of judicial review as any other public authority. No stronger signal of the ***subjugation of the executive authority of the State to judicial scrutiny*** could have been given than this. (emphasis supplied)

33. *Charles-Louis de Secondat, Baron de La Brède et de Montesquieu*, the French political philosopher, in his treatise, De l'esprit des loix (The Spirit of the Laws), 1748, translated from french to english by Thomas Nugent in 1750, is famous for propounding the separation of powers doctrine. He wrote:

    When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again there is no liberty if the judicial power be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

    Miserable indeed would be the case, where the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

34. In commenting on the importance of the doctrine of separation of power, **Thakker** (cited above) noted that its value lies in the 'checks and balances' which are necessary to prevent an abuse of enormous powers of the executive. At page 45 of the text, he writes:

    The object of the doctrine is to have '***a government of law rather than of official will or whim***'.

50 Ibid n. 5

Montesquieu's great point was that if the total power of government is divided among autonomous organs, one will act a check upon the other…Again, almost all the jurists accept one feature of this doctrine that the judiciary must be independent of and separate from the remaining organs of the government, *viz.* legislature and executive.

The Report of International Congress of Jurists held at New Delhi in 1959 states:

An independent Judiciary is an indispensable requisite of a free society under the *Rule of Law*. Such independence implies freedom from interference by the Executive or the Legislature with the exercise of the judicial function.

If there is one bulwark that guards the freedom of the average citizen, it is the law court. Courts of justice are more important than even the military to guard the freedom of the country and of the individual or for ***enforcing an adherence to the rule of law***. (emphasis supplied)

35. In **V.G. Ramachandran's Administrative Law**, 1984, at page 27 of the text, the author opined:

Even the supreme law-making Parliament of the land exalts itself when it respects by convention the judicial pronouncements of the Supreme Court of the land in its interpretive jurisdiction.

36. Notwithstanding, some authorities refer to a theory of *judicial restraint*, in appropriate instances, within the realm of judicial review cases. In other words, some courts decline to review what may be, *prima facie*, an apt circumstance. *Professor Fiadjoe*, as cited above, posits at page 81 of the text:

Part of the explanation for this must lie in the doctrine of the *separation of powers*; and part in the doctrine of *judicial restraint*. So it is acknowledged that ***courts will not, as a general rule, review policy of government*** … In ***R v Ministry of Defence ex p Smith***[51], a number of individuals sought judicial review of the policy which required the dismissal of homosexuals from the armed forces. It was held that there were no national security arguments and the policy was subject to judicial review, particularly as there were human rights implications. The appropriate test laid down by the court was that of *Wednesbury* unreasonableness. *Simon Brown LJ* said that even if having homosexuals in the forces would not impair operational efficiency and fighting effectiveness, the policy was not irrational or incompatible with accepted moral standards.

Council of Civil Service Unions v. Minister for the Civil Service[52] provides yet another example of situations where the courts are loathe to intervene. These relate to ***national security considerations***, ***relations with foreign governments*** and ***personal prerogatives*** of the monarch…

It must be pointed out, however, that the doctrine of *judicial restraint* is an unruly and unpredictable horse … Caribbean public law jurisprudence is at one with the common law in stipulating that no power or discretion is unfettered…

Analysis and conclusion:

37. The Applicant complains that the Governing Board of the Deeds and Commercial Registries is non-functional and not properly constituted, it having expired on or about June, 2016. This is so because as the applicant contends, the Minister of Legal Affairs who has responsibility for the appointment of

51 [1995] The Times, 13 June

52 [1985] AC 374

members as mandated by *sections 5(2)(a)(f)(g)* and *(h)* and *6(4)* of the *Deeds and Commercial Registries Authority Act* (hereinafter, DCRA).

38. The above referred Act established as a corporate body, the Deeds and Commercial Registries Authority to, *inter alia*, promote the efficient and orderly operation of those registries. Combined, the Authority exercises functions under 9 specified independent Acts of Parliament, and other Act which may be applicable in the circumstances, with a power to regulate its own procedure. See *sections 4(1)* and *(2)* of DCRA.

39. To ensure the proper and efficient performance of the functions of the Authority, *section 5* of DCRA established a Governing Board consisting of:
    (a) *Chairman appointed by the Minister*
    (b) the Registrar of Deeds
    (c) the Registrar of the Commercial Registry
    (d) a nominee of the Ministry of Finance
    (e) a nominee of the Ministry of Housing and Water
    (f) *a nominee of the Guyana Bar Association*
    (g) *a nominee of the Guyana Association of Legal Professionals; and*
    (h) *a nominee of the Private Sector*

40. *Section 6(4)* of DCRA further mandates that members being the nominees of the Guyana Bar Association, the Guyana Association of Legal Professionals and that of the Private Sector must be appointed by the Minister. *Section 2* of the said Act specifies that the '*Minister*' means the **Minister of Legal Affairs**.

41. **Bennion on Statutory Interpretation**, Section 15, at page 66 states:
    Unless Parliament otherwise provides, every Act falls within the ***administrative responsibility*** of one or more government departments.
    Except in so far as an Act contains express provision naming its administering agency, constitutional practice requires the Prime Minister to determine (either directly or by delegated authority) which Minister, and therefore which government department, is to have the *responsibility of administering it*. (emphasis supplied)

42. DCRA provides, and specifies that the Minister who has administrative responsibility is the **Minister of Legal Affairs**. The Act is replete with provisions bestowing on the Minister statutory duties and responsibilities. Amongst them, is the appointment of the Chairman of the Governing Board, along with 3 other board members. Out of the 4 remaining members, 2 are automatic appointments by their position as Registrars of the respective registries. The remaining 2 are nominees of government ministries.

43. Further, once the Governing Board is constituted, each member holds office for 2 years from date of appointment, after which the Minister may re-appoint for a further period he determines. See *section 6(1)* of DCRA.

44. It is not contested by the Hon. Attorney General that the life of the Governing Board came to an end on or about June 2016, without it being re-appointed or reconstituted pursuant to the provisions of the

Act.

45. The Applicant contends that the non-appointment of those members, and/or the omission to re-appoint members pursuant to the provisions of DCRA, after the expiration of the life of the Governing Board, constitutes multiple breaches of the said Act, the result of which is inefficiency in the services offered at the registries, adversely affecting his practice as an Attorney-at-Law, in the discharge of his duties to his clients.
46. As alluded to earlier, the Hon. Attorney General relies on the doctrine of separation of powers, and material non-disclosure by the Applicant, for the proposition that the Court ought not exercise its jurisdiction, and for the Court to discharge the order *nisi* of *mandamus* issued by the Hon. Mr. Justice Brassington Reynolds.
47. In the first instance, this Court considers the heavy reliance on the doctrine of separation of powers to be misplaced. Even if it were argued, and it was not, that the Court ought to exercise *judicial restraint* in its consideration of the instant case in which the jurisdiction of the Court is invoked, do the circumstances justify invoking the theory?
48. The authorities as highlighted above are clear that the doctrine of separation of powers exists to ensure respect for the rule of law and the proper functioning of the machinery of the state. In its role, the judiciary must play its part in the maintenance of the rule of law and this court will most respectfully decline the invitation by the Hon. Attorney General to not exercise its jurisdiction in the instant proceedings.
49. A clear duty is imposed on the Minister of Legal Affairs to appoint the majority of members of the Governing Board, on the expiration of a previously fully constituted Board, or re-appoint those members for a period of time he determines. Further, *section 26(1)* of the **Interpretation and General Clauses Act, Cap. 2:01** of the Laws of Guyana mandates:

    Where any written law confers a power or imposes a duty, the power may be exercised and *the* ***duty shall be performed*** *from time to time as* ***occasion*** *requires*. (emphasis supplied)
50. Therefore, the contention by the Hon. Attorney General that no time limits are imposed by the DCRA for the appointment of the members by the Minister of Legal Affairs is without merit. The ***duty*** to appoint members arises on the ***occasion*** of the expiration of life of the Governing Board, pursuant to the provisions of the DCRA.
51. The Hon. Attorney General had further contended that the application before the court is without any factual basis, that even though the Minister has the obligation to appoint members of the Board, there is nothing before the court to suggest that nominations were received by him and he has failed to appoint them.
52. The Court considers this argument to be unmeritorious. As pointed out earlier, the Minister with responsibility for the administration of the Act is the Minister of Legal Affairs. Nowhere in the affidavits, or other documentary evidence before the Court, is there a contention that the Hon. Minister of Legal Affairs, in his administration of the Act, invited nominations for appointment as members of the Governing Board, from the respective organisations or sectors as stated in the Act.
53. This Court is of the view that there is a concomitant duty on the Minister with responsibility for

the administration of the Act to take active steps in the appointment of the Governing Board of the Authority, which will involve inviting nominations, and processing them *per* the Executive's policy, towards eventual appointment to the Governing Board.

54. This Court would not, and cannot intervene in the policy considerations for the selection of actual members of the Board, which remains within the realm of the Executive arm of government. However, where there is a clear statutory duty to act, and there is inaction and/or refusal to perform that statutory duty, the Court must intervene when called upon by an aggrieved party, enforcing an adherence to the rule of law in the appropriate circumstance.
55. The further contention by the Hon. Attorney General regarding the material disclosure by the applicant in his failure to state in his application that there is a proposed amendment to the extant DCRA currently before Parliament is also without merit.
56. The uncontradicted fact before the Court is that since on or about June 2016, the life of the Governing Board of the DCRA expired. To date, there is nothing before the court which suggests that steps are or were taken to have that Board re-appointed or reconstituted. The promulgation of a proposed amendment of the extant Act, does not operate as a stay on the statutory obligations contained therein. Even so, according to the Hon. Attorney General, this proposed amendment was only tabled in Parliament in the latter part of January, 2017, approximately 7 months after the life of the Governing Board expired. It is factual that there was no Governing Board for some 7 months before a proposed amendment was tabled in Parliament. To date, the Authority is without a Governing Board for approximately 10 and ½ months.
57. Whilst the Court can take judicial notice of the proposed amendment, there is no clear timeline at the stage of the current parliamentary process, at least up to the date of this ruling, that the proposed amendment will be passed and assented to. For such a vital statutory entity to be without a Governing Board, for such an extended time, is clearly an untenable situation.
58. It would indeed be a shirking of the Court's constitutional mandate to not exercise its jurisdiction in the most apt of circumstances, outlined herein. The Court welcomes the undertakings by the Hon. Minister of Legal Affairs in open court, when he says he will appoint the Governing Board, as soon as the amendment to the principal Act is passed.
59. Notwithstanding, the Court views his continued failure to appoint the members of the Governing Board for which he has the statutory responsibility, in accordance with the current provisions of DCRA, more specifically, *sections 5(2)(a)(f)(g)* and *(h)* and *6(4),* to be unjustifiable. The failure to perform that statutory duty, even when called upon to discharge those obligations, clearly illustrates a '*wrongful inaction*' as coined by **Wade and Forsythe**, cited earlier.
60. In the circumstances, there being insufficient cause shown on the part of the Hon. Minister of Legal Affairs, the order or rule *nisi* of *mandamus* issued on the 8th day of March, 2017 is accordingly made absolute. There will be costs to the Applicant in the sum of $100,000.00 to be paid within 3 months of the date of this ruling.

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE
DECLARATION OF TITLE

No. 306-P of 2015 (Demerara)

In the matter of a Petition for a
Declaration of Title by prescription to Lot 2 being portion of Republic Park,
Plantation peters Hall, by SABITRI NARINE.

Before Madam Nicola Pierre, Commissioner of Title & Judge of the Land Court
Mr. Bernard De Santos S.C. with Ms A. Lall for the Applicant/Petitioner
(February 22, 2018)

Application by way of Summons to amend description of prescribed property – Summons dismissed – difference between Council and neighbourhood - Council a group of persons not geographical location – property cannot be described to be located within a group of persons

Madam Nicola Pierre:

1. On June 16, 2017, in petition 306 of 2005, I made a declaration of title in favour of Sabitri Narine to "Lot 2 being portion of Republic Park, Plantation Peters Hall, within the Peters Hall Local Government District situate on the East Bank of Demerara, in the county of Demerara, and in the Republic of Guyana."
2. On February 8, 2018, the petitioner filed the summons now heard seeking leave to amend the description of the land by deleting the words "Local Government District" and substituting therefor the words "Neighbourhood Democratic Council" so that the description of the land may be "Lot 2 being portion of Republic Park, Plantation Peters Hall, within the Peters Hall Neighbourhood Democratic Council, situate on the East Bank of Demerara.
3. I dismiss the application because a 'council' is a group of persons, not a geographic location in which land can be located. A "council" is defined in the Oxford Dictionary as "A body of people elected to manage the affairs of a city, county, or other municipal district." A piece of land cannot be situated within a "Neighbourhood Democratic Council."
4. The Co-operative Republic of Guyana is divided into areas. There are ten regions, and then in descending order, there are sub-regions and neighbourhoods: section 4 of the Local Democratic Organs Act, Chapter 28:09. The neighbourhoods are named by the Minister of Local Government: s.5. The neighbourhoods in Guyana are listed in column (1) of the Schedule to the Local Democratic Organs (Neighbourhood Democratic Councils) Order 1990.
5. The Minister by section 3 of that Order, pursuant to section 5 of the Act, established a Neighbourhood Democratic Council for each neighbourhood. A list of the Neighbourhood Democratic Councils is in column (2) of the Schedule to the Local Democratic Organs (Neighbourhood Democratic Councils) Order 1990.
6. A neighbourhood is an area of land the boundaries of which are set by the Minister: section 5 of the Act. A neighbourhood democratic council is a group of people, the composition and membership of which is decided by the Minister: section 3 of the Order. Column (3) of the Schedule to the Local

Democratic Organs (Neighbourhood Democratic Councils) Order 1990, lists the number of members for each council named in column (2) for each area named in column (1). That group of people, that Council, maintains public property and is responsible for the management of the area.

7. Plantation Peters Hall is not a person and therefore cannot be situate in a 'Neighbourhood Democratic Council'. Plantation Peters Hall is land situated or located in a named area of land specifically, the Ramsburg/Eccles neighbourhood, in region 4, in the county of Demerara, in the Co-operative Republic of Guyana. The Ramsburg/Eccles neighbourhood is to be managed by the group of 18 people who are members of the Ramsburg/Eccles Neighbourhood Democratic Council.
8. I therefore dismiss the application to insert the words "Neighbourhood Democratic Council" into the description of the property.
9. The Court on its own motion hereby amends the description to delete the words "within the Peters Hall Local Government District situate on the East Bank of Demerara" and to substitute therefor the words "in the Ramsburg/Eccles neighbourhood, on the east bank of the Demerara River in the county of Demerara, in the Co-operative Republic of Guyana"