IN THE EASTERN CARIBBEAN SUPREME COURT

COURT OF APPEAL

COMMONWEALTH OF DOMINICA

CIVIL APPEAL NO. 12 OF 1998

BETWEEN:

THE CONSTITUENCY BOUNDARIES COMMISSION

1st RESPONDENT/1st APPELLANT

AND

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF DOMINICA

2nd RESPONDENT/2nd APPELLANT

AND

URBAN BARON

APPLICANT/RESPONDENT

BEFORE: **THE HON. MR. SATROHAN SINGH** **JUSTICE OF APPEAL**
THE HON. MR. ALBERT REDHEAD **JUSTICE OF APPEAL**
THE HON. MR. ALBERT MATTHEW **JUSTICE OF APPEAL (A.G.**

APPEARANCES: Mr. Anthony LaRonde, Attorney General, Mrs. Heather Felix-Evans with him for the appellants
Mr. Anthony Astaphan for the respondent

[April 22, 23: May 10, 1999]

JUDGMENT

SATROHAN SINGH JA

This appeal addresses the issues of the alleged bias of a **Constituency Boundaries Commission [The Commission]** appointed by the Government of The

Commonwealth of Dominica and the jurisdiction of the Court to adjudicate on that allegation.

THE COMMISSION:

S 56 (1) of the Commonwealth of Dominica Constitution Order 1978 provides for the establishment of a Constituency Boundaries Commission.

S 56 (2) prescribes the personnel for such a commission. By this provision, the **Speaker** of the House of Assembly would be the Chairman. The **President** will then appoint two members, acting in accordance with the advice of the **Prime Minister**, and two members, acting in accordance with the advice of the **Leader of the Opposition.**

Pursuant to these provisions, the Commission was appointed. The Speaker of the House of Assembly was appointed Chairman. Acting on the advice of the Prime Minister, the President appointed as members of the Commission,

Mrs. Bernie Didier and Mr. Meschack Linton, and on the advice of the Leader of the Opposition, Mr. Rupert Sorhaindo and Mr. Armour Thomas. It is not disputed that the United Workers Party (the governing party) commands the majority votes of the House of Assembly, and that as a result of that majority, the Speaker of the House of Assembly was elected. It is also not disputed that all the four members of the Commission have strong political and personal ties and/or affiliations with their respective political parties. It is also not disputed that the six constituencies recommended by the Commission in their report for alteration were constituencies, not represented by any member of the Parliament on the Government side. The respondent is a Member of Parliament of the Commonwealth of Dominica, in opposition, representing the constituency of Petite Savanne, one of the constituencies recommended for alteration by the Commission. It is also accepted that the report of

the Commission to the President was a majority recommendation, the two Members appointed by the opposition, having expressed their disagreement thereto and having submitted their own report. It is accepted that the recommendations from the commission need not be unanimous.

The Commission, having purportedly completed its mission, submitted its report to the President pursuant to **S57 (1)** of the Constitution. In accordance with **S 57 (3)**, the draft order from the President for giving effect to the recommendations in the report, is presently before the House of Assembly for approval. The House, most admirably, is awaiting the outcome of this matter before dealing with that order.

The respondent, not satisfied with the legality or integrity of the Commission, brought proceedings in the constitutional jurisdiction of the High Court of Dominica seeking reliefs therefrom. Cenac J heard the matter and found in favour of the respondent. The learned judge made the following declarations and orders:

> A(1) A declaration that the applicant=s right to vote in a constituency established in accordance with the provisions of section 57 of the Constitution and guaranteed by section 33 thereof has been and is being contravened in that the recommendations to alter the Constituency of Petite Savanne have not been made in accordance with section 57 (1)(a) of the Constitution.
>
> (2) A declaration that the Commission failed to act in accordance with the law, in particular section 57 (1)(a) of the Constitution, in reviewing the number and boundaries into which Dominica is to be divided.
>
> (3) A further declaration that its report, as a consequence, is hereby declared null and void.
>
> (4) An Order that the Commission and or its members whether by themselves, their servants, agents or

howsoever, be restrained from submitting its report to the President under the provisions of section 57(2) of the Constitution and there be a stay of all proceedings in relation to its report until the final determination of this matter.

(5) An order that the respondents pay the applicant=s costs to be taxed or agreed. And I so declare and order.

In arriving at this decision the judge expressed these opinions:

> AI am of the view that the delimitation of the constituency boundaries as proposed will eventually dilute the value of the citizens vote in the Constituency of Petite Savanne and contravenes the applicant=s constitutional right to vote as guaranteed under section 33 of the Constitution.
>
> Here, no legal basis has been put forward to justify the annexation of the communities of Pichelin and Bellevue Chopin to the Grand bay Constituency.
>
> When one examines the affidavit evidence of the applicant with the statistical information provided therewith (Ex. U.B.2.), and the reasons put forward by the Commission for the proposed alteration of the Constituency of Petite Savanne, which obviously do not conform with the provisions of Section 57 (1)(a) of the Constitution, one will have no difficulty in concluding that the whole exercise by the Commission was deliberately engineered so as to favour one political party over another. And I so conclude.
>
> I am therefore of the view that the Commission, in purporting to review the boundaries of the Constituencies, took into account, considered and acted upon irrelevant and extraneous matters which contravened section 57 (1) (a) of the Constitution. Accordingly, I hold that the Commission acted without jurisdiction or exceeded its jurisdiction which must render its review and its report null and void.@

The appellants have appealed from this decision, and, the two issues argued before us, addressed the concept of bias of the Commission and the jurisdiction of the Court to inquire into it at this stage. I propose firstly to address the question of jurisdiction.

JURISDICTION: OUSTER

In considering the question of ouster of jurisdiction, it is important to focus on the fact that the House of Assembly has not as yet approved of the draft order submitted by the President. In this context, I considered the authorities of **Bradlaugh -v- Gossett (1884) Q.B.D.) 271: Cormach and Another -v- State of Queensland (1974) 136 C.L.R. 432 and Rediffusion (Hong Kong Ltd) -v- A.G. of Hong Kong (1970) AC 1156,** and most of the numerous and voluminous authorities submitted by learned counsel for the respondent.

In the instant matter, the respondent sought relief in his motion before the High Court, under **Sections 33, 57** and **Schedule 2** of the Constitution. He sought to invoke the supervisory jurisdiction of the Court under the **Common Law** which was preserved by **S 121 (11) of the Constitution** which reads as follows:

> ANo provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law@

and **S 103** the relevant portions of which are:

> A(1) Subject to the provision of sections 22(5), 38(6), 42(8), 57(7), 118(3) and 12(10) of this Constitution, any person who alleges that any provision of this Constitution (other than a provision of Chapter 1 thereof) has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.
>
> (2) the High Court shall have jurisdiction on an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter 1 thereof) has been or is being contravened and to make a declaration accordingly.

> (3) Where the High Court makes a declaration under this section that a provision of this Constitution has been or is being contravened and the person on whose application the declaration is made has also applied for relief, the High Court may grant to that person such remedy as it considers appropriate, being a remedy available generally under the law of Dominica in proceedings in the High Court.@

The learned Attorney General submitted that based on the authorities aforementioned, the High Court had no jurisdiction to hear this matter. Learned counsel further submitted, that because S 57(8) of the Constitution empowered Parliament to provide for an appeal to the High Court, from a recommendation or statement made to the President by the Commission in pursuance of **paragraph (a) or (b) of S 57 (1)**, and because Parliament chose not to make such a provision, that the intention of Parliament was to oust the jurisdiction of the Court even before the House of Assembly had approved of the draft order of the President.

I do not agree that the authorities aforementioned support these submissions of the Learned Attorney General: In the **Rediffusion** case **Lord Diplock** said at page 1157:

> AThe immunity from control by the courts, which is enjoyed by members of a legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. If there will be no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships= view leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers.@

I accept this opinion as a correct proposition of the law. It demolishes the submission of Mr. LaRonde.

I also do not agree with the reasoning of the learned Attorney General on **S 57(8) of the Constitution**. The absence of a right of appeal **per se** has never precluded the supervisory jurisdiction of the Court. As I see it, the intention or purpose of the Constitution at **S 57(8)** was to allow access to the Court. Mr. LaRonde in his submissions impressed upon this Court, quite correctly, to give a generous and purposive construction to the provisions of the Constitution, avoiding what has been called the austerity of tabulated legalism. [**O= Donovan -v- The Attorney General (1961) IR 114: Minister of Home Affairs -v- Fisher (1980) AC 319.**] If then that was the purpose of **S 57 (8),** I would conclude that the inaction on the part of Parliament to make the required appellate provision, was nothing more than an attempt at frustrating that provision of the Constitution. There is no merit in this submission. The Court must construe the Constitution so as to give to the individual the full benefit of the rights and freedoms so protected.

In my judgment, there is supervisory jurisdiction in the Courts in the context of this matter. No where in **S 57 of the Constitution** is the jurisdiction of the Court specifically excluded except for **S 57(7),** and this is at the stage of the proceedings when the draft order of the **President** has been approved by the House, a stage not yet reached in this matter. In my view, when **S 103** specifically excepted only **S 57 (7)** from its application, the clear implication was that every other aspect of **S 57** was justiciable. Until the **S 57(7)** stage is reached therefore, there is jurisdiction in the Courts to enquire into the matter and to grant relief. Without this jurisdiction to grant relief before the resulting act is completed , the citizen intended to be protected would be deprived of any remedy.

It is clear from the unchallenged evidence of the respondent, that the report of the Commission, if accepted as is, would seriously affect his future political career. In this context, to exclude the jurisdiction of Court to inquire into it, in order to decide

whether to grant relief to the respondent, the appellants had to show that the challenge of bias was purely an abstract question, the answer to which would be incapable of affecting any existing or future legal rights of the respondent. This they have not done. Just as it is the duty of the Court to attribute autonomy of decision to the approval of the Order of the President, so the counterpart of this autonomy is to ensure that the constitutional provisions were observed by the Commission. [**Anisminic Foreign Compensation Commission (1969) 2 AC 147**]

For these reasons, I hold that the submission of the learned Attorney General on ouster of jurisdiction is without merit and accordingly overruled. I now address the issue of bias.

BIAS

The rule against bias is one of the pillars of the principles of natural justice. It is rule that is concerned, not only to prevent the distorting influence of bias, but also to protect the integrity of the decision making process by ensuring that, however disinterested the decision maker is in fact, the circumstances should not give rise to the risk of bias. [**De Smith Woolf and Jowitt Judicial Review of Administrative Action 5th Edition page 52**]. The law on this concept is settled and I do not propose to have another discussion on it here. The accepted principle relied on in this matter by the respondent, was that there existed in the Commission, a real danger of bias or prejudice. If the evidence relied on by the judge supports this principle, then the learned trial judge would be found to be correct in his finding of bias in favour of the respondent. **{See Vaughan Lewis -v-**

Attorney General of St. Lucia and Compton -v- Attorney General of St. Lucia Civil Appeals 12 and 14 of 1997}

The evidence found by judge on the issue of bias in the Commission is fully set out in the very careful judgment of the learned trial judge. I will not rehash it here. This evidence did not limit itself to the fact of the strong and active political affiliations of the two nominees of the governing party. The evidence also disclosed that the six constituencies to be altered in the report were all constituencies not represented by any member on the Government side of the House. There was also ample evidence to show that a proper inquiry was not held before the recommendations in the report were made. The minutes disclosed that the inquiry was rushed through because of a limited time frame, and that an opinion of opportunity for gerrymandering was not without foundation. Despite the minutes showing that the members were addressing their minds to the relevant factors for their consideration as provided by **Schedule 2 of the Constitution**, the factual situation was that there were no consultations with the people in the respective constituencies. There was no evidence, material, data or information presented to the Commission to enable it in its deliberations on the said factors prescribed by Schedule 2 of the Constitution e.g. the density of the population and in particular the need to ensure the adequate representation of sparsely populated rural areas, the means of communication, geographical features and the boundaries of administrative areas.

The accepted evidence was that the Commission held two meetings. At the first meeting Bernie Didier a Government nominee made certain proposals. One of her proposals affected the respondent=s constituency of Petite Savanne. This proposal made the already small Petite Savanne smaller and the already large

constituency of Grand Bay larger. Grand Bay is represented by a member on the Government side of the House. At this meeting letters were also sent to Parliamentarians of the affected constituencies for their views. Five Parliamentarians, including the respondent, replied that no justification having been given for the alteration of their constituencies, they considered the alterations to be gerrymandering. At the second meeting, the Government side of the Commission interpreted the responses as offering no real opposition or objection to the Didier=s proposals and by a majority vote made their recommendations to the President.

From the evidence, the report does not appear as if it was crafted out of any evidential or factual basis or from any logically probative material. It appears to be a totally arbitrary recommendation. In my view, if true, such a recommendation is totally unacceptable to the rule of law. The learned Attorney General submitted that the report was not conclusive, it only made recommendations which recommendations need not be acted upon by the House. I do not disagree. However, only someone who does not have his feet firmly planted on the earth, will not see that such a proposition is mere rhetoric and that there was real danger of bias from the accepted evidence in this matter. The reality of the situation is that when such a Commission is being set up, the respective sides will recommend members whom they are satisfied will look after each side=s respective interests. Their concentration will be more on political advantage than constitutional requirement. I agree that the Speaker as the Commission Chairman stands in the middle. But again one has to be real. The Speaker was elected by the Government majority.

It is my considered opinion that such a Commission, will always lean more towards political loyalty than constitutional integrity. What would assist in order to

avoid the appearance of this mischief of bias, is that if, when members are to be

recommended to the President, the respective politicians give names of those who are less politically conspicuous. Life would be so much simpler. **S 56 (4)** of the Constitution precludes from membership to the Commission, a member of the House. The obvious purpose of this provision was to avoid this very danger of bias. In this context, it is my opinion that there is very little difference between members of the House and political activists.

The Constitutional importance of a Boundaries Commission cannot be overstated. It plays a pivotal role in ensuring free and fair elections. The right to vote as contemplated by the Constitution is a right to vote in a constituency without gerrymandering. Gerrymandering, or any unfair attempt to alter the boundaries of any constituency, contrary to the provisions of the Constitution, violates the very fabric of our Parliamentary system of democracy. It is my view that the evidence shows real risk of bias with respect to all four nominated members of the Commission, but more so, of those on the side of the Government. That was not the intention or purpose of the aforementioned Constitutional provisions.

When the evidence as it related to the alleged bias is looked at in its entirety, I therefore can find no justifiable reason to dilute the finding of the trial judge that it appeared as if the whole exercise by the Commission was deliberately engineered so as to favour one political party over another. As a result, there appears to be, what can be described, as an imposition of the paramountcy of the Government=s party or its political will on the Commission. In my view, the appearance of such an imposition is completely alien and repugnant to the Constitution and will have to be rejected as an insidious contravention of the Constitution.

I do not wish what I am saying to be misunderstood or misinterpreted. The fact that the Commission was appointed in accordance with **S 56 of the Constitution,** triggered the presumption of impartiality in favour of the members regardless of their personal affiliations. That means that the onus was then placed on the respondent to rebut that presumption by cogent evidence on a balance of probabilities. In doing so the respondent did not have to prove actual bias. All he was required to prove was a real danger of bias or prejudice and that was all the Court was required to find.

Bias has a legal meaning but it is basically a human concept. **Byron CJ in Vaughan Lewis (supra),** defined it as a predisposition to favour or disfavour a party or result, in a manner that is wrongful, and which can lead to a denial of the judicial imperative of impartiality in the particular matter. Given the accepted evidence in this matter, (1) four political activists in the Commission (2) no consultations (3) no documentary readings (4) all the constituencies to be altered not represented by any Government member (5) all votes taken at the second meeting split down the middle with the Speaker giving the casting vote at all times in favour of the Government nominees (6) Petite Savanne, an already small opposition constituency, being made smaller so that the Government won constituency of Grand Bay can become larger, what, in all probability, would the man on the Pais Bouche bus think? The Speaker might have cast his vote with all the honesty and integrity becoming his very high office. But, that is not the issue. The fact is that he voted at all times with the Government side and the man on the bus knows he was elected by a Government majority in the House. Even if in fact the report was prepared with honesty and in the spirit of the Constitution, because of these facts, the ordinary reasonable man would be hard put to accept that. On these facts he

will see a possible invasion of his Constitutional rights. Bias is such an insidious thing, that a person, while he may in good faith believe he was acting impartially, his mind may unconsciously be affected by bias. Nothing should be done which could create a real danger of bias [**R -v- Gough (1983) AC 646**].

CONCLUSION:

For these reasons, I agree with the judgment of **Cenac J**. The appeal is dismissed with costs to the respondent to be taxed if not agreed. The judgment of the trial judge is affirmed.

SATROHAN SINGH
Justice of Appeal

I concur

ALBERT REDHEAD
Justice of Appeal

MATTHEW J.A. (Ag.)

I agree with the conclusions arrived at by my learned brethren. For the reasons given by Singh J.A. the High Court has a supervisory jurisdiction to ensure that institutions or bodies set up to established by the Constitution act in accordance with the Constitution.

The Constituency Boundaries Commission was established by Section 56 of the Constitution.

It consists of:-

(1) the Speaker, as Chairman;

(2) two members appointed by the President, acting in accordance with the advice of the Prime Minister; and

8 two members appointed by the President, acting in accordance with the advice of the Leader of the Opposition.

Section 57 of the Constitution authorises the Commission, in accordance with the section, to review the number and boundaries of the constituencies into which Dominica is divided and submit to the President reports either:-

(1) showing the constituencies into which it recommends that Dominica should be divided in order to give effect to the rules set out in Schedule 2 to this Constitution; or

(2) stating that, in its opinion, no alteration is required to the existing number or boundaries of constituencies in order to give effect to those rules.

I do not think it can be disputed that for the purposes of this case the Commission or the majority of its members acted under (a) above.

Schedule 2 to the Constitution is as follows:

ARULES CONCERNING CONSTITUENCIES

All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this principle to such extent as it considers expedient to take account of the following factors, that is to say:-

(1) the density of population, and in particular the need to ensure the adequate representation of sparsely populated rural areas;

(2) the means of communication;

(3) geographical features; and

(4) the boundaries of administrative areas.@

I agree with the submission of Learned Counsel for the Respondent that the primary duty of the Commission is to act in accordance with the Schedule. It seems to me that the principal guiding factor is to make all constituencies contain as nearly equal numbers of inhabitants. But the framers of the Constitution realized that this cannot always be practicable so it permits the Commission to depart from the principal guiding factor to take account of other factors in paragraphs (a) to (d), not of course obliterating the principal guiding factor.

It has not been disputed that the constituency of Petite Savanne is one of the smallest constituencies, and Grand Bay one of the largest, in the island. That was the position before the Commission or the majority of them made recommendations in accordance with Section 57 of the Constitution. How can one, in the light of the rules in Schedule 2 justify cutting off a part of the constituency of Petite Savanne and annexing it to the constituency of Grand Bay.

In my judgment the Commission or a majority of its members did not act in accordance with the law and the purported recommendations must therefore be declared null and void.

A.N.J. MATTHEW
Justice of Appeal (Ag.)