**SAINT VINCENT AND THE GRENADINES**

**IN THE COURT OF APPEAL**

**HCVAP 2007/023**

**IN THE MATTER of an Application by Sir James Fitz Mitchell for Judicial Review of certain decisions of the Commission of Inquiry Appointed by His Excellency the Governor-General on 10th March 2003 under the Commissions of Inquiry Act Chapter 14 of the Laws of Saint Vincent and the Grenadines (Revised Edition) 1990 as amended to inquire into all of the facts and circumstances on and relating to the Ottley Hall Project in St. Vincent**

**BETWEEN:**

**SIR JAMES FITZ ALLEN MITCHELL**

Appellant/Applicant

and

**EPHRAIM GEORGES**
**(SOLE COMMISSIONER OF THE OTTLEY HALL COMMISSION OF INQUIRY)**

and

**THE ATTORNEY GENERAL**
**OF SAINT VINCENT AND THE GRENADINES**

Respondents

**Before:**

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| The Hon. Sir Brian Alleyne, SC | Chief Justice [Ag.] |
| The Hon. Mr. Hugh A. Rawlins | Justice of Appeal |
| The Hon. Ms. Ola Mae Edwards | Justice of Appeal [Ag.] |

**Appearances:**

Mr. Ramesh Lawrence Maharaj, SC, with him Ms. Mira E. Commissiong for the Appellant/Applicant
Mr. Anthony Astaphan, SC, with him Mr. Joseph Delves for the Respondents

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2007: November 29;
2008: April 7; reissued April 18.

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*Commission of inquiry – applications for leave to apply for judicial review and for constitutional redress – Part 56 of CPR 2000 – statements contained in letters from the commission to the*

*appellant and in a Report – whether arguable case for leave - whether the judge improperly exercised his discretion by refusing to grant leave to apply for judicial review and constitutional relief – whether there is any ground for interfering with exercise of discretion*

In March 2003, the Governor General of Saint Vincent and the Grenadines appointed the 1st respondent as the sole commissioner, pursuant to section 2 of the Commissions of Inquiry Act, to inquire into 2 failed development projects upon which the government had embarked during the 1990's when the appellant was the Prime Minister.

The terms of reference require the commission, *inter alia*, to inquire into and establish the *bona fides* of, and the facts and circumstances surrounding failure of the projects; to establish the identities of and inter-relationships between the persons and corporate entities involved in planning, establishing and developing the projects; to inquire into the beneficial ownership and/or control of the corporate entities and the names of their directors, officers and agents; and to establish the purpose of the transfer of lands to the projects or corporate entities involved in the project, and the persons responsible for the failure of the project. The terms of reference of the commission indicate that the appellant is a person whose conduct is a subject of the inquiry. Paragraph 13 of the terms of reference directs the commission to report immediately in writing to the Governor General and the Director of Public Prosecutions the facts, circumstances or evidence which in the opinion of the Commission may show or establish that a criminal act may have been committed by any person including any Minister of Government, whether any person obtained a personal benefit from the projects or whether there were any improper, corrupt or fraudulent relationship in relation to the projects.

On 17th November 2005, the commissioner sent copies of a Report to the Governor General and to the Director of Public Prosecutions pursuant to paragraph 13 of its terms of reference. On 20th August 2007 the commissioner sent a Salmon Letter and a summons to the appellant and asked him to appear as a witness in the inquiry in September 2007. Solicitors for the appellant informed the commissioner that the appellant would not appear unless the commission made a commitment that he was entitled to have his reasonable costs in the inquiry met. In a letter dated 20th August 2007, the commission informed the appellant that it could not make that commitment. The appellant thereupon made an application, pursuant to Part 56 of CPR 2000, for leave to apply for judicial review on the ground that the Report which the commission sent to the Governor General and to the DPP in November 2005 and the letters of 20th August 2007 evinced apparent bias and procedural unfairness towards him.

The appellant also claimed constitutional relief on the ground that the commission's refusal to make the commitment that he was entitled to his costs in the inquiry amounted to a deprivation of property and an unlawful interference with his right to access to the inquiry contrary to sections 6(8) and 8(8) of the Constitution.

The judge heard the applications *ex parte*. He refused to grant the appellant leave to apply for judicial review on the ground that the appellant did not have an arguable case because the impugned statements were provisional and not final findings. The judge therefore held that the application for judicial review was premature. The judge also held that the commissioner's refusal to confirm the appellant's entitlement to his reasonable costs did not contravene sections 6(8) and 8(8) of the Constitution. He however held that inasmuch as the appellant was a person whose conduct was an object of the inquiry when the 2007 amending Act came into effect, the appellant had a vested right under the 1993 amending Act to have his costs met.

The appellant appealed.

**Held –** dismissing the appeal in relation to the application for constitutional relief and in relation to the statements contained in the Salmon Letter; but allowing the appeal and granting leave to apply for judicial review in relation to the statements contained in the November 2005 Report; maintaining the stay in the proceedings of the commission in relation to the appellant and remitting the matter of judicial review in relation to the statements contained in the Report for the High Court to determine whether the statements contained in the Report evince apparent bias and/or procedural unfairness:

(1) The appellant obtained a vested right under section 18 of the Commissions of Inquiry (Amendment) Act 1993 to have his costs in the inquiry met, which right accrued before the Commissions of Inquiry (Amendment) Act 2007, which came into force in June 2007, and which repealed section 18 of the Commissions of Inquiry (Amendment) Act 1993.

(2) Since the appellant's entitlement to have the reasonable costs for his representation in the inquiry arose under section 18 of the Commissions of Inquiry (Amendment) Act 1993, the Commissions of Inquiry (Amendment) Act 2007 does not violate the appellant's protection against unlawful deprivation of property and his right of access to the inquiry guaranteed under sections 6(8) and 8(8) of the Constitution.

(3) In order to obtain leave to apply for judicial review the applicant was required to show that he has an arguable case for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.
The dicta of Lord Diplock in **Inland Revenue Commissioners v National Federation of Self- Employed and Small Business Limited** [1982] AC 617 and of Lords Bingham and Walker in **Satnarine Sharma v Carla Browne-Antoine and Others** [2006] UKPC 57; [2007] 1 WLR 780 followed;
**Mass Energy Limited v Birmingham City Council** (1993) Env. L.R. 298; **The Queen on the Application of the Noble Organization Limited v Thanet District Council and others** [2005] EWCA Civ. 782 and **Tanfern Ltd. v Cameron-MacDonald** [2000] 1 W.L.R.1311 distinguished.

(4) The statements contained in the Salmon Letter do not present evidence upon which the judge could have found an arguable case on the ground of apparent bias or procedural unfairness.
**Canada (Attorney General)** v **Canada (Commission of Inquiry on the Blood System)** Court File No. 25810–151 D.L.R (4th); **Chesterfield Montgomery Thompson and others** v **Rawle Branker and others** Barbados Civil Appeal No. 24 of 2001; **Beno v Canada** (1997) F.C. 5278; **Attorney General of Canada v Canada (Krever Commission of Inquiry)** 3 S.C.R. 440; **Small and Others v Elliot Fitzroy Belgrave** Barbados High Court Suit No. 23 of 2000; **Allan Joseph v Sir Allister McIntyre and Others** Antigua and Barbuda High Court Claim No. ANUHCV 2002/0078; **Richard Joachim v The Attorney General of St. Vincent and the Grenadines** St. Vincent and the Grenadines Claim No. SVGHCV 2004/0241 (24th May 2004); **Simmonds and Others v Williams and Others (No. 2)** (1999) 57 WIR 95; and **Vaughn Lewis** v **The Attorney General of St. Lucia and Another** St. Lucia Civil Appeal No. 12 of 1997 (9 February 1998), explained.

(5) The statements contained in the Report which the commissioner sent to the Governor General and to the Director of Public Prosecutions in November 2005 present grounds

upon which the judge could have found an arguable case having a realistic prospect of success on the ground of apparent bias or procedural unfairness.

(6) The fact that the appellant did not first make an application to the commissioner to disqualify himself from conducting the inquiry in relation to the appellant before applying for judicial review does present an alternative remedy to an application for judicial review. In any event there is no practical advantage in asking the appellant to return to the commission for this purpose particularly because he is challenging the very jurisdiction of the commission to continue to hear the inquiry as against him.

## JUDGMENT

[1] **RAWLINS, J.A.:** The appellant, Sir James Mitchell, instituted judicial review and constitutional proceedings in relation to statements contained in letters and an "Interim Report"[1] issued by the first respondent. The letters include a Salmon Letter[2] that the commissioner sent to the appellant in August 2007. The Salmon Letter contained allegations against the appellant, which the commissioner stated were raised by the evidence that was thus far presented to the inquiry. The first respondent is the sole commissioner appointed to enquire into the failed and abandoned Ottley Hall and Union Island Resort Development projects. The government embarked on these projects in the early 1990s, while the appellant was the Prime Minister of Saint Vincent and the Grenadines. A marina and shipyard were to be built at Ottley Hall. A shipyard was built, but the project was eventually abandoned because it ran into difficulties.

[2] There was a change of government in April 2001. On 10th March 2003, the Governor General, acting on the advice of the Prime Minister, Dr. Ralph Gonsalves, appointed the 1st respondent as the sole commissioner to inquire into the projects. The appointment was made pursuant to section 2 of the Commissions of Inquiry Act.[3]

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[1] Hereinafter this may be referred to as "the Report".
[2] Hereinafter this may also be referred to as "the Letter". A Salmon Letter is usually issued to a person whose conduct is a subject of an inquiry before the person is called as a witness by the inquiry. It is intended to apprise the person of any evidence adverse to the person in advance and thereby permit the person to meet that evidence.
[3] Cap 14 of the Laws of St. Vincent and the Grenadines, Revised Edition 1990.

**Terms of reference**

[3] It is clear from the terms of reference of the commission that the appellant is a person whose conduct is a subject of the inquiry. The terms of reference require the commission, *inter alia*, to inquire into and establish the *bona fides* of, and the facts and circumstances surrounding the projects. These include the circumstances leading to the establishment of the projects, and, in particular, the discussions and communications that occurred between Dr. Rolla, a primary player in the projects, the appellant, and other Ministers of the government in relation to the projects. The commission is also required to establish the identities of and inter-relationships between the persons and corporate entities involved in planning, establishing and developing the projects; to inquire into the beneficial ownership and/or control of the corporate entities and the names of their directors, officers and agents; and to establish the benefits which were to accrue to the people and the State from the projects, and the purpose of the transfer of lands to the projects or corporate entities involved in the projects, and the persons responsible for the failure of the projects.[4]

[4] The terms of reference further require the commission to establish what, if any, due diligence was requested or undertaken by the government on the corporate entities, which became involved in the projects;[5] to identify the persons or corporate entities that obtained a personal or unlawful benefit from the projects;[6] to establish whether any criminal act or offence may have been committed on the facts and circumstances relating to the projects,[7] and to establish whether there was any dereliction of duty, violation of any law, conflict of interest and/or breach of trust on the part of any Minister or civil servant, director or officer of any corporate entity involved in the projects.[8]

[4] See Clause 1 of the terms of reference of the Commission.
[5] See paragraph 2 of the terms of reference of the Commission.
[6] See paragraph 3 of the terms of reference of the Commission.
[7] See paragraph 6 of the terms of reference of the Commission.
[8] See paragraph 7 of the terms of reference of the Commission.

[5] Paragraph 13 of the terms of reference directs the commission as follows:

> "13. To report immediately in writing to His Excellency the Governor General and the Director of Public Prosecutions the facts, circumstances or evidence which in the opinion of the Commission may give rise to, show or establish that:
>
> (i) A criminal act, including any conspiracy to commit a criminal act or acts has been or may have been committed by any person including any Minister of Government or public servant or corporate entity.
>
> (ii) Any person obtained a personal and unlawful benefit by way of any large, unusual or non-commercial payments, transactions, transfers or receipts of money; or any other benefits were made to any persons or corporate entity, whether related to the Projects or not.
>
> (iii) Any improper, corrupt or fraudulent relationship between Dr. Rolla and/or any of the corporate entitles owned or controlled by him or his nominees and/or any Minister of Government or public servant or any other person."

[6] Paragraph 14 requires the commissioner to issue an interim report to the Governor-General within 6 months of the date of the establishment of the commission and a final report within 12 months.

**The challenges**

[7] The main thrust of the appellant's challenges to the impugned statements is that the commissioner displayed apparent bias and procedural unfairness and breach of natural justice when he stated in the Report that he (the appellant) was involved in criminal and civil wrongdoing, and made certain recommendations in respect thereof. The commissioner sent copies of the Report to the Governor General and to the Director of Public Prosecutions ("the DPP") in November 2005. The appellant contended that the commissioner displayed apparent bias in statements contained in 2 letters to him (the appellant) both dated 20th August 2007 and the Report because they are couched in language that evinces bias and animosity towards him. The appellant further contended that the impugned statements show evidence of breach of natural justice in that they were made without giving him the opportunity to test the evidence upon which they were made.

[8] In the letter dated 20th August 2007, which was not the Salmon Letter, the commission informed the appellant that it could not give a commitment that he sought that he was entitled to the costs for representation in the inquiry. Section 18 of the Commissions of Inquiry (Amendment) Act 1993[9] stated that a person whose conduct is an object of the inquiry or who is interested in the inquiry is to have his or her reasonable legal costs in the inquiry met. However, the Commissions of Inquiry (Amendment) Act 2007[10] repealed that section. The appellant contended that the commission's refusal to provide the commitment was an unlawful denial of his legal costs. He insisted that he has a vested right under the 1993 amending Act to have his costs met by the government. He complained that the judge erred when he did not hold that by not giving the commitment the commission committed an error of law, acted unfairly or abused its power.[11]

[9] The appellant also insisted that the 2007 amending Act contravened his constitutional rights because the commission's refusal to confirm his entitlement amounted to a deprivation of property and an unlawful interference with his right of access to the inquiry contrary to sections 6(8) and 8(8) of the Constitution.

**The judgment**

[10] The learned judge refused to grant the appellant leave to apply for judicial review. He found that the appellant did not have an arguable case because the impugned statements were provisional and not final findings. He therefore held that the application for judicial review was premature. The judge also held that the commissioner's refusal to confirm the appellant's entitlement to his reasonable costs did not contravene sections 6(8) and 8(8) of the Constitution. He however held that inasmuch as the appellant was a person whose conduct was an object of the inquiry when the 2007 amending Act came into effect, the appellant had a vested right under the 1993 amending Act to have his costs met.

[9] No. 23 of 1993, hereinafter referred to as "the 1993 amending Act".
[10] No. 17 of 2007, hereinafter referred to as "the 2007 amending Act".
[11] See paragraph 2.5 of the Notice of Appeal.

[11] In his judgment, the learned judge first considered the constitutional issues. He then considered the application for leave for judicial review. He noted that the appellant brought the constitutional and the judicial review applications in a single set of proceedings. He further noted that while leave was required for the judicial review proceedings no leave was required for the constitutional proceedings.[12] These statements were informed by Part 56 of the Eastern Caribbean Civil Procedure Rules 2000 ("CPR 2000"), which now governs proceedings for administrative orders in the jurisdiction of this court. Both constitutional and judicial review proceedings are now subsumed under applications for administrative orders under rule 56.1 of CPR 2000.

[12] Part 56 contemplates that applications for administrative orders will be considered urgently.[13] The appellant's claim in which he sought both constitutional redress and judicial review, was issued on 6th September 2007 by fixed date claim form pursuant to rule 56.7(1) of CPR 2000. Where this procedure is used and the claim is undefended or the court considers that it could be dealt with summarily, rule 27.2(3) empowers the court to treat the first hearing as the trial. The appellant prayed for a hearing of the application during the court's vacation on the ground of urgency. His solicitors filed skeleton arguments on 7th September 2007. On the same date the judge heard counsel for the appellant in Chambers and issued the following order:

> "1. That the matter be and is hereby deemed fit for hearing during the Court vacation.
> 2. That the application for leave for judicial review be and is hereby adjourned to Friday the 14th day of September 2007 at 10 o'clock in the morning at the Court House for the decision of this Honourable Court; and
> 3. That the entire inquiry by the Commissioner be and is hereby stayed pending further order of this Honourable Court."

[13] Essentially, the matter was heard and determined *ex parte*. Rule 56.3 of CPR 2000 permits a party to make an application for leave without notice. Rule 56.4(1) requires a judge to hear the application forthwith. The judge obviously proceeded pursuant to these rules. On 14th September 2007 he gave the judgment in which he refused the leave

[12] See generally paragraph 6 of the judgment.
[13] See rules 56.7(7)-(10); and 56.11(1) of CPR 2000.

application and the application for constitutional relief. There was no hearing in open court in keeping with rule 56.4(3) of CPR 2000, which requires an open court hearing if he or she is minded to refuse the leave application. This is to permit the parties to be heard before the refusal. However, the appellant has not appealed on this ground preferring to challenge the merits of the judge's decision.

**This appeal**

[14] In relation to the appeal against the refusal to grant leave, the appellant contended that the judge erred in law and in fact when he did not hold that he had an arguable case. He challenges, in particular, the judge's findings that there was no apparent bias by the commission. He also challenges the judge's finding that the application for leave was premature because the terms of the Report and the letters were provisional. The appellant further challenges the judge's finding that the commission's letter to him in relation to his costs was non-committal and that his claim on that basis was also premature. The appellant complains that having found that the 2007 amending Act did not take away his vested right to have his costs met, the judge erred in failing to hold further that the commission committed an error of law, acted unfairly or abused its power.[14]

[15] In his appeal in relation to the constitutional aspects of the claim, the appellant contended that the learned judge erred in law because, having held that he (the appellant) had a vested right to his costs in the inquiry, he failed to hold further that the commission's failure to confirm his entitlement amounted to an unlawful deprivation of property and an interference with his right of access to the inquiry.

**The salient issues**

[16] The notice of appeal essentially seeks from this court the same reliefs sought in the application.[15] Even the written submissions in these proceedings tended to raise the

[14] See paragraph 2.5 of the Notice of Appeal.
[15] See the whole of paragraph 1.1.5 of the Notice of Appeal and paragraph 5 of the application.

issues which will be within the purview of the High Court if the appellant obtains leave to apply for judicial review. This court cannot in the present proceedings issue the reliefs which the appellant seeks in the substantive claim.

[17] The central issue that arises on the judicial review aspect of this appeal is whether the learned judge erred when he failed to give leave to apply for judicial review on the basis of the contents of the Salmon letter; the Report and the commission's letter in which it made no commitment that the appellant was entitled to have his costs in the inquiry met.

[18] First, however, I shall consider the appeal against the constitutional aspect of the judgment. It is noteworthy that in relation to this issue, the appellant also raised the question whether the judge misconstrued section 18 of the 1993 amending Act when he found that the appellant has a vested right to his costs, exercisable at the end of the commission's hearing. The question also arises whether the judge erred when he held that the appellant's constitutional rights were not contravened by the 2007 amending Act.

[19] I note in passing that Mr. Maharaj, SC, raised before this court the question whether paragraph 13 of the terms of reference of the commission is *ultra vires* section 7 of the Commissions of Inquiry Act. I however agree with the submissions made by Mr. Astaphan, SC, that the appellant is not entitled to challenge the *vires* of the section on this appeal, having not raised it for consideration by the High Court.

[20] An overview of the inquiry proceedings to date will provide a helpful perspective from which to consider the issues.

**The inquiry to date**

[21] The commission commenced its hearings in 2003. In a letter dated 14th August 2003, the commission informed the appellant that it thought that he could assist in the inquiry. The letter asked the appellant to provide a written statement of his involvement in and knowledge of the projects. The letter also requested him to provide any relevant

documents that he may have had in his possession. The appellant replied, by letter dated 14th October 2003, in which he stated that he had no documents as all relevant documents should be in the office of the Prime Minister. He did not mention the written statement that was requested and he did not provide one.

[22] By letter dated 13th November 2003 the commission invited the appellant to attend an interview which was to be conducted by Mr. Howard Jones, a retired Scotland Yard detective. The appellant asked to be excused on the ground that he was not provided with the particulars of the proposed interview. He complained that he was not given sufficient time to seek legal advice.[16] At that time, he had not been summoned or asked to testify. By letter dated 17th November 2003, Mr. Maharaj informed the commission that constitutional principles made it mandatory for the commission to provide the appellant with the particulars of any allegations against him before the appellant could be interviewed by investigators. Mr. Maharaj gave the commissioner 21 days to provide the particulars failing which the appellant would not attend.

[23] The inquiry commenced. Notices were published in the press and the proceedings were broadcast live by the media. Neither the appellant nor his counsel attended. The commission heard evidence from several witnesses between November 2003 and May 2004. The inquiry was then interrupted because of Richard Joachim's challenge to the appointment of the commissioner in court proceedings. The inquiry was suspended while that challenge was litigated.

[24] In November 2005 the commissioner submitted the Report to the Governor General and the DPP.[17] The appellant has stated that he knew of the Report[18] and that he obtained a copy which he produced in these proceedings.[19]

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[16] Affidavit of Sir James Mitchell, Record of Appeal, Tab 2, paragraphs 13 and 16.
[17] It is the primary case for the Commissioner that that report is a private privileged report on the basis of public interest immunity submitted in accordance with the Commissioner's mandate.
[18] See paragraphs 19 to 21 of his Affidavit in Support of the application for leave to apply for judicial review.
[19] As exhibit "**JM 8**".

[25] Joachim's challenge to the appointment of the commissioner was dismissed by the Privy Council in January 2007. On 21st March 2007 the commission informed the appellant that the inquiry was scheduled to resume. It requested him to inform his counsel to liaise with counsel to the commission in order to facilitate the fixing of a convenient date for the appellant to appear as a witness in the inquiry. That letter also informed the appellant that a formal summons and the Salmon Letter would be sent to him as soon as a date was agreed for his appearance before the inquiry.

[26] On 5th April 2007 the commission informed counsel for the appellant that counsel to the commission was waiting to hear from him in order to fix the date for his appearance before the inquiry. By letter dated 24th April 2007, the appellant informed the commission that he would not be available before 15th August 2007. Counsel to the commission wrote to Mr. Maharaj on 4th May 2007 inquiring as to convenient dates.

[27] The commission had written to the appellant on 30th April 2007 again requesting a written statement on or before the 31st May 2007. That letter also informed him that the commission was of the view that no public or constitutional law rights or safeguards were threatened or infringed by that request. The 2007 amending Act, which repealed sections 18(1) & (2) of the 1993 amending Act came into effect on 22nd June 2007.

[28] Mr. Maharaj wrote the letter dated 31st July 2007 to the commission seeking the commitment in writing from the commission or the government that the appellant's costs in the inquiry would be met. In reply, the commission stated in one of its letters of 20th August that it could not give that commitment. It also informed the appellant that copies of all transcripts of the evidence and exhibits taken to date would have been delivered to him. On 20th August 2007, the commission also sent the Salmon Letter to the appellant[20] together with a witness summons dated 24th January 2007, summoning him to attend the inquiry on 10th September, 2007.

[20] See exhibit "JM18", Tab 19 of the Record of Appeal.

[29] On 3rd September 2007 solicitors for the appellant wrote to the commissioner requesting that he not proceed with the inquiry, *inter alia*, on the ground of apparent bias. The appellant then instituted the present proceedings, which, in effect, challenge the jurisdiction of the commission to continue the investigation into the projects as against him.

**The Constitutional Prayers**

[30] In paragraph 5 of the notice of application the appellant prays, *inter alia*, for a declaration against the Attorney-General that the 2007 Amending Act contravened and/or was likely to contravene his rights under sections 6(8) and 8(8) of the Constitution and is therefore unconstitutional and of no effect. The materials upon which these prayers were premised will be considered for the true context of these prayers.

[31] In a letter dated 31st July 2007 to the secretary to the commission, Mr. Maharaj acknowledged receipt of the commission's letter dated 25th July 2007 which informed him that the inquiry was due to resume on 10th September 2007. Mr. Maharaj indicated in his letter in response that he spoke with Mr. Astaphan in London in May 2007 in relation to the appellant's entitlement to his costs in the inquiry. Subsequently, Mr. Astaphan informed him that the commissioner could find no provision which entitled the appellant to have his costs in the inquiry paid by the State. Mr. Maharaj informed Mr. Astaphan of section 18 of the 1993 amending Act, which stated as follows:

> *"Representation 18.(1) Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated or concerned in the matter under inquiry shall be entitled –*
>
> *(a) to be represented by a legal practitioner at the whole of the inquiry:*
>
> *(b) to the payment of such reasonable costs of legal representation as may be determined by the Registrar of the Supreme Court,*
>
> *and any other person who may consider it desirable that he should be so represented may, by leave of the Commission, be so represented.*"

Mr. Maharaj's letter stated that he subsequently discovered that the legislature passed the 2007 amending Act in June 2007 repealing section 18 of the 1993 amending Act. The letter then continued:

> "I wish to point out to the Commission that at the time of the repeal of Section 18 Sir James Mitchell had a vested right for the government to pay his reasonable legal expenses and it was not lawful for steps to have been taken by the government to use its majority in the Parliament to take away his vested right.
> I therefore request that the Commission, the Counsel to the Commission and by extension the government take the necessary steps to ensure that the entitlement which Sir James Mitchell had by Section 18 of the Commission of Inquiry (Amendment) Act 1993 be enjoyed.
> I expect to get a commitment in writing from the Commission or the Government to that effect by the 20th August 2007."

[32] On 20th August 2007, the commission responded in the following terms:

> "Dear Sir,
>
> In response to your facsimile letter dated 31st July 2007 seeking a commitment in writing from the Commission or the Government to the effect that your client Sir James Mitchell has a vested right to payment by government of the reasonable costs of his legal representation before the Commission notwithstanding the provisions of the Commission of Inquiry (Amendment) Act No 17 of 2007, I have been directed to inform you that the Commission as a creature of statute is guided by the enabling Act as amended and cannot therefore give the commitment as to costs which is requested.
>
> Parliament's position on the issue is explicit.
>
> Meanwhile I am further directed to let you know that there is available for yourself and your client bundles of the relevant exhibits and transcripts of evidence to date upon which Counsel to the Commission intends to rely in examination of this witness. In fact efforts are being made to deliver the documentary exhibits to him personally at his address in Bequia within the next day or two and the transcripts will be forwarded direct to his e-mail address."

[33] In correspondence dated 3rd September 2007, directed to the commissioner, solicitors for the appellant complained, *inter alia*, that the commission's failure to provide the commitment in relation to the appellant's costs was a ground for concluding that the commission was biased against the appellant.

[34] In a letter of even date in reply on behalf of the commission, Mr. Astaphan stated, *inter alia*:

> "[A]s your client is well aware the Parliament of St. Vincent and the Grenadines repealed the provision of the law governing the payment of costs of any witness. In view of that repeal, the Commission possesses no inherent or other discretion or power to agree to or order the payment of costs by the State of St. Vincent & the Grenadines."

**Vested right**

[35] In holding that the appellant's application raised no constitutional issues for determination, the judge stated that the commission's letter of 20th August 2007 was non-committal in relation to the appellant's costs. He further stated that the application was premature because the commission has not completed its work so that the appellant could not seek his costs or the assistance of the court until after the whole of the inquiry.[21] The judge held that the appellant had a vested right under section 18 of the 1993 amending Act to have his costs met, which accrued before the 2007 amending Act came into force in June 2007 so that the 2007 amending Act did not extinguish his right. I agree with this ultimate decision, and Mr. Astaphan correctly conceded the point at the appeal hearing.

[36] However, the judge held that the appellant's vested right crystallized when the commission required the appellant to provide written statements or when it required him to attend the inquiry.[22] In my view section 18 was intended to financially facilitate persons whose conduct becomes the subject of an inquiry to secure legal representation to ensure that they are not prejudiced. The terms of reference of the commission indicate that the appellant was a person whose conduct was a subject of the inquiry from the outset. This was confirmed when the letter which he received from the commission in 2003 requested that he provide the written statement with respect to his involvement and/or knowledge of the projects. His vested right had accrued at least by this time.

[37] It is noteworthy that, after the learned judge held that the appellant had a vested right under the 1993 amending Act, solicitors for the appellant sought an assurance from the Attorney General that the government would meet the costs. They did not receive the assurance that they sought. Mr. Maharaj contended that this amounted to a refusal to give an assurance. He submitted that the appellant's primary case is that the judge misconstrued section 18 of the 1993 amending Act on the basis of the denial to give the assurance. According to Mr. Maharaj, section 18 conferred 2 compendious rights upon the

[21] See paragraphs 19 and 20 of the judgment.
[22] See paragraph 10 of the judgment.

appellant which amounted to an immediate right to have the costs of his representation before the inquiry as soon as he became a subject of the inquiry.

[38] In my view section 18 of the 1993 amending Act conferred upon the appellant an entitlement to legal representation and to his costs for that representation "at the whole of the inquiry" when his conduct became a subject of the inquiry in August, and at the latest, in November 2003. Section 18(1)(b) requires the Registrar to quantify those costs. The Registrar's quantification could only meaningfully and practicably be done after the appellant completes his participation in the inquiry. If the appellant is aggrieved by the quantum which the Registrar awards he may then challenge the decision. However, I think that the intention of section 18(1)(b) would only be realized by a quantification carried out with dispatch after solicitors for the appellant apply to have the costs quantified.

[39] Section 18 conferred no discretion upon the commission or the Registrar to determine whether a person in the position of the appellant is to be represented at the inquiry or to have the costs met. The proviso to the section conferred discretion upon the commission only to determine whether to grant leave to "**any other person** who may consider it desirable to be represented" at the inquiry.

[40] A provision which conferred an entitlement could not have intended the beneficiary of the entitlement to meet those costs, but section 18 does not state who should meet the appellant's costs. It does not clothe the commission with any obligation to award costs. Indeed the commission has no resources to do so. It is my view that it is the government who instituted the inquiry, with the Attorney General as the representative litigant in these proceedings, that has the resources to meet the appellant's costs in the inquiry. It is my view, however, that for the purposes of justice and the good administration of the inquiry the commission had a duty to inform the appellant of his entitlement under section 18 at least in its letter of 13th November 2003 when the commission invited him to attend to be interviewed by the Scotland Yard detective. Inasmuch, however, as the commission had no statutory obligation to award costs under section 18, my view is that its letter of 20th

August 2007 in which it indicated that it was in no position to give the commitment that the appellant's costs would be met is of no moment for the purpose of review.

**A violation of sections 6(8) or 8(8) of the Constitution**?

[41] I agree with the judge's finding that the 2007 amending Act does not violate either section 6(8) or 8(8) of the Constitution in relation to the appellant. In the first place, on the authority of **Sonia Williams and Others v The Attorney General of the Commonwealth of Dominica**,[23] the appellant's right or interest in property under section 6(8) of the Constitution would crystallize only when the quantification is done by the Registrar. The Registrar, within whose discretion the quantification lies, has made no decision that is challengeable for infringement of the Constitution. More essentially, however, since the 2007 amending Act did not extinguish the appellant's vested right to have his costs in the inquiry under the 1993 amending Act, it would be anomalous to hold that the 2007 amending Act has violated his rights under either section 6(8) or 8(8) of the Constitution. Mr. Maharaj urged this court to draw upon the decision of the Grand Chamber of the European Court of Human Rights in **Kopecki v Slovakia**[24] to construe "property" under section 6(8) of the Constitution widely enough to include a legitimate expectation of obtaining effective enjoyment of a property right. However, this does not arise since the 2007 amending Act does not apply to the appellant.

[42] In the foregoing premises, I would uphold the judge's decision that the appellant has a vested right under section 18 of the 1993 amending Act to his costs. I would dismiss the appeal against the judge's decision that the appellant's right to property and right of access to an authority prescribed by law pursuant to sections 6(8) and 8(8) of the Constitution have not been violated. I have suggested how the vested right could be realized.

[23] Dominica Civil Appeal No. 29 of 2004, 19th June 2006.
[24] Judgment 28 of 2004.

**The Judicial Review Aspect of the Appeal**

[43] I shall consider the principles for leave to apply for judicial review including the test for leave. First, however, I shall reiterate the basic principles by which this court is guided when faced with an appeal from a discretionary decision of a judge on a leave application.

**Discretion and the appellate purview**

[44] The purview of this court in an appeal against the exercise of discretion by a judge is to determine whether there is any basis for interfering with the judge's decision. As Gordon JA stated in **IPOC International Growth Fund Limited v LV Finance Group Limited and Others**,[25] the function of an appellate court in such cases is not to exercise an independent discretion of its own or to interfere with the judge's decision merely because the members of this court would have exercised the discretion differently. This court would defer to the judge's decision unless the judge exceeded the generous ambit within which reasonable disagreement is possible. This court would only intervene where the judge did not properly exercise the discretion by error of law or misapprehension of the facts.

**The standard required for leave**

[45] The learned judge noted[26] that the appellant's case for leave alleged bias or the likelihood of it. The appellant also alleged breaches of procedural fairness. The judge accepted[27] the submissions by Mr. Maharaj that the court would grant leave to apply for judicial review if it finds that the appellant has an arguable case that there was apparent bias on the part of the commission. However, whether there was apparent or "unconscious" bias or procedural unfairness was not for determination at the leave stage.

[46] An applicant for leave is required to show that there is an arguable case, one that is not frivolous. This is to prevent busy-bodies from wasting the court's time with misguided or

[25] British Virgin Islands Court of Appeal Nos. 20 of 2003 and 1 of 2004.
[26] At paragraphs 22 of the judgment.
[27] At paragraphs 23 of the judgment.

trivial complaints. Thus in **Inland Revenue Commissioners v National Federation of Self- Employed and Small Business Limited**[28] Lord Diplock stated as follows:[29]

> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all of the evidence is in and the matter has been fully argued at the hearing of the application."

[47] In **The Honourable Satnarine Sharma v Carla Browne-Antoine and Others**,[30] the appellant, the then Chief Justice of Trinidad and Tobago, allegedly attempted to influence the course of a trial conducted by the Chief Magistrate. The Chief Justice denied the allegations and maintained that proceedings against him were influenced by political pressure. He applied for judicial review of the decision to prosecute him, and for a stay of the criminal proceedings against him pending the determination of the application. The judge granted leave and stayed the proceedings. In affirming the decision by the Court of Appeal to set aside the judge's order, the Privy Council held that the challenge to the decision to prosecute was in principle susceptible to judicial review but in extremely rare cases. Their Lordships were satisfied that the judge had failed, *inter alia*, to look at the evidence overall and to identify the grounds on which the appellant's challenge was arguable. Their Lordships therefore held that the Court of Appeal was justified in making its own analysis of the facts and circumstances.

[48] In arriving at its decision in **Sharma**, Lords Bingham and Walker elucidated the test for the grant of leave in the following terms:

> "15. The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is **an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy**: … But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test

[28] [1982] A.C. 617, at page
[29] From page 643H – 644B.
[30] [2006] UKPC 57; [2007] 1 WLR 780. See also R v Panel on Take-overs and Mergers, ex parte Fayad and others [1992] BCLC 938

which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R(N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605, [2006] QB 468, para 62, in a passage applicable mutatis mutandis to arguability:

> '… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. **Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities**.' [Emphases added]

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen': *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 733."

[49] In my view this statement did not change the "arguable case" standard for leave laid down in **Inland Revenue Commissioners**. It merely qualifies arguable to require a greater degree of arguability. The quotation from **R(N) v Mental Health Review Tribunal** seems merely to suggest that arguability cannot be supported on a speculative basis from evidence that may emerge during the course of the interlocutory process. It is also indicating that the nature and gravity of the issues must be taken into consideration in determining the sufficiency and cogency of the evidence which will be taken into consideration to justify the grant of leave. Thus the court must bear in mind that 'a more serious allegation has to be proved to a higher degree of probability'. While the 'balance of probability' remains the test, 'the strength and quality of the evidence' required to prove a serious allegation on the balance of probability will, 'in practice', be higher than that required to prove an allegation of a trivial nature. This explains the statement 'thus the flexibility of the standard lies not in any adjustment to the degree of probability … but in the strength or quality of the evidence'. It is on this basis that I do not agree with Mr. Astaphan's contention, for which he cited **Mass Energy Limited** v **Birmingham City Council**,[31] **The Queen on the Application of the Noble Organization Limited** v **Thanet**

[31] (1993) Env. L.R. 298.

**District Council and others**[32] and **Tanfern Ltd.** v **Cameron-MacDonald**[33] as authority, that there are special circumstances in the present case, which require the standard of proof on this application for leave to be more than just an arguable case.

[50] In **Tanfern**, Mr. Astaphan relied on the statement by Brooke LJ that permission to appeal will only be granted where the court considers that the appeal would have a real prospect of success or where there is some other compelling reason why the appeal should be heard.[34] However, that the central issue in **Tanfern** was whether an appeal against a decision of a District Court Judge should be lodged as an appeal to a Circuit Court Judge or to the Court of Appeal. **Tanfern** is unhelpful in these proceedings.

[51] **Mass Energy Limited** was concerned with an application for leave to apply to review 2 decisions of a City Council. The litigation arose on a dispute between successful and unsuccessful tenderers for contracts. Evans LJ concluded that the applicants had an arguable case.[35] Glidewell LJ stated that in deciding whether to grant leave to apply for judicial review, it was necessary to take into account the nature of the contractual and construction processes and the very tight schedules for their provision. He stated that it was also necessary to take into account that the leave application had the benefit of detailed *inter partes* arguments and most of the documents. He stated that this put the court hearing the leave application in as good a position as the court that would hear the substantive case. Evans LJ also noted that the grant of leave could lead to protracted litigation that would occasion expense and delay the provision of the works, as well as cause considerable public disadvantage.[36] In those circumstances he concluded that the court needed to be satisfied that the applicant's case "is not merely arguable but is strong; that is to say, is likely to succeed". In my view, however, neither the circumstances in **Mass Energy** nor those in **Noble Organization** commend these cases as authorities for applying a standard of proof other than an arguable case in the present leave proceedings.

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[32] [2005] EWCA Civ. 782.
[33] [2000] 1 W.L.R.1311 at paragraphs [21] and [22], page 1316.
[34] At paragraph 21 of the judgment.
[35] See page 318 of the Report.
[36] See page 307.

[52] The authorities show that the court is usually reluctant to grant applications to review the decisions of commissions of inquiry which are investigative bodies, particularly where application is made prior to the completion of their final Report. This is because such commissions are not adjudicative bodies which are empowered to determine liability or to impose penalties. This is exemplified in the judgment of the Supreme Court of Canada in **Canada (Attorney General)** v **Canada (Commission of Inquiry on the Blood System)**[37] and by the Court of Appeal of Barbados in **Chesterfield Montgomery Thompson and others** v **Rawle Branker and others**.[38] In **Chesterfield Thompson**, for example, relying on the **Blood System** case, the court stated[39] that a person would only be permitted to make an application for judicial review during the course of an inquiry in exceptional circumstances, because an application could delay and destabilize the work of a commission. This approach is also exemplified in **Beno v Canada**,[40] **Attorney General of Canada v Canada (Krever Commission of Inquiry)**,[41] **Small and Others v Elliot Fitzroy Belgrave**,[42] **Allan Joseph v Sir Allister McIntyre and Others**,[43] and **Richard Joachim v The Attorney General of St. Vincent and the Grenadines**.[44] In these cases challenges by way of applications for judicial review on the grounds of apparent bias in relation to statements contained in Salmon Letters failed.

[53] It is noteworthy, however, that the challenge succeeded in **Simmonds and Others v Williams and Others (No. 2)**.[45] In granting the first appellant's appeal in part, Georges JA (Ag) held, *inter alia*, that the trial judge erred when he failed to quash an inquiry against the appellant on the ground of bias in the counsel and legal advisors to the commission. The challenge also succeed in this court by a majority (Redhead and Singh JJ.A., Sir Dennis

[37] Court File No. 25810 – 151 D.L.R (4th) 1. Reported sub nom Re Canadian Red Cross Society et al. and Krever; Canadian Hemophilia Society et al. Interveners.
[38] Barbados Civil Appeal No. 24 of 2001 (5 October 2004.)
[39] In paragraph 54 of the judgment.
[40] (1997) F.C. 5278.
[41] 3 S.C.R. 440.
[42] Barbados High Court Suit No. 23 of 2000.
[43] Antigua and Barbuda High Court Claim No. ANUHCV 2002/0078.
[44] St. Vincent and the Grenadines Claim No. SVGHCV 2004/0241 (24th May 2004).
[45] (1999) 57 WIR 95.

Byron, CJ dissenting) in **Dr. Vaughn Lewis** v **The Attorney General of St. Lucia and Another**,[46] notwithstanding that the commissioner made no impugned statements.

[54] In my view the learned judge did not err when he stated that the appellant had to show that he has an arguable ground in order to be granted leave. In my view, the test stated by the Privy Council in **Sharma** is applicable. The appellant must show that he has an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.

[55] The question, therefore, is whether the judge wrongly exercised his discretion by refusing to grant leave.

**Leave to Apply for Judicial Review**

[56] There was no delay in bringing the application. The appellant challenges the judge's refusal to grant leave to review the decision of the commission "to deny him payment of his reasonable costs of legal representation at the inquiry". I found that the commission did not deny the appellant the payment of his costs by the letter of 3rd September 2007. The letter contains no words that are capable of raising the issue of bias, abuse of process or procedural unfairness. The question whether the judge erred in failing to grant leave on the ground of apparent bias or procedural unfairness therefore hinges upon the statements contained in the Report and the Salmon Letter.

[57] There was no cross-appeal on the issue whether the appellant should have pursued an alternative remedy. Yet, even in the absence of a cross-appeal, if this court were to find that the judge improperly exercised his discretion, this court would consider the alternative remedy question in order to determine whether leave should be granted.

[46] St. Lucia Civil Appeal No. 12 of 1997 (9 February 1998).

**The judge's findings**

[58] In his judgment,[47] the learned judge considered the aspects of the Salmon Letter which the appellant complained of, in light of the principles enunciated by the Rt. Hon. Lord Justice Salmon in his report under the Royal Commission on Tribunals of Inquiry.[48] The judge held[49] that the commission conformed strictly to the dictates of the Salmon principles in the Salmon Letter, specifically with the second principle. This principle states that before a person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence that supports the allegations. The judge said that the commission complied with this requirement because it had fully set out the allegations that were made against the appellant at the inquiry and thereby made him fully aware of them. The judge stated that by complaining of certain aspects of the Letter, the appellant had simply raised portions of it, which, taken out of context, would make a fair minded observer conclude that there is a real possibility that the tribunal was biased.

[59] The judge further stated[50] that when the Letter as a whole is read in context, it is clear that the impugned statements were taken from the evidence given by witnesses up to the time when the Letter was issued. He noted that the Letter ended by asking the appellant to come prepared in the course of his testimony to show cause why the commission should not report adversely against him for the reasons set out therein. This, according to the judge, indicated that the allegations in the Letter were provisional criticisms based on the evidence touching upon the appellant with an opportunity for him to respond to the allegations and was in keeping with Salmon principles. The judge made the same findings in relation to the Interim Report.[51]

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[47] At paragraph 24 of the judgment.
[48] This Report was presented to Parliament in England by command of Her Majesty in November 1966.
[49] At paragraph 25 of the judgment.
[50] At paragraph 26 and 27 of the judgment.
[51] At paragraph 29 of the judgment.

[60] The judge further stated[52] that contrary to what obtains in a criminal trial, there is no prosecution or defendant in an inquiry. A witness in an inquiry is to assist the inquiry to find the facts in accordance with the commission's mandate. The judge noted that at the end of the inquiry the commission may uphold or dismiss the "provisional criticisms" communicated in the Salmon Letter and in the Interim Report based on the totality of the evidence. He concluded as follows in paragraph 30 of the judgment:

> "[30] This application, in my view should have been contemplated at the end of the whole inquiry rather than at this stage, when the Commission would have made its final findings. I see no apparent bias or a real likelihood of bias in any of the documents of 18th November 2005 and 20th August 2007."

[61] In the grounds of appeal, the appellant complained, *inter alia*, that the judge wrongly proceeded to determine the issues which were required in law to be determined at the substantive hearing after full arguments from the parties. Whether the appellant is correct will be determined from the applicable principles and the impugned statements.

**The principles**

[62] Although it is not within the purview of this court to consider whether there is bias or procedural unfairness, it is necessary to keep the governing principles of these in mind, as well as the context from the facts on which the appellant premises these allegations, in order to determine whether the appellant has an arguable case on these grounds.

[63] Procedural fairness requires a tribunal to ensure that a person is heard before findings, as opposed to allegations, are made against the person, particularly where those findings are adverse and may as such affect the person. It is trite principle that the right to a fair hearing or natural justice requires that before a court or tribunal makes adverse findings or statements against a person it must at least to inform the person of the allegations that are made against him or her. The court or tribunal must also permit the person a reasonable time within which to meet the allegations and, by way of cross-examination, to challenge the persons on whose evidence the allegations arise.

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[52] At paragraph 28 of the judgment.

[64] In **Porter** v **Magill** Lord Hope of Craighead elucidated the basic principle on apparent bias as follows:[53]

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

Lord Hope repeated that test in **Meerabux** v **The Attorney General of Belize**[54] and helpful elaborations of the test are afforded by Lord Phillips in **Re Medicaments and Related Classes of Goods (No. 2)**[55] and by Lord Justice Scott Baker in **Flaherty** v **National Greyhound Racing Club**.[56]

[65] In **Re Medicaments** Lord Phillips stated:

> "Bias is an attitude of the mind which prevents the judge from making an objective determination of the issues he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or the issues before him."

[66] In **Flaherty**, Lord Justice Scott Baker stated, *inter alia*, that the test for apparent bias involves a two stage process. In the first place the court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. In the second place it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased. He noted that the tribunal in that case was exercising a domestic jurisdiction that involved a contractual relationship between the parties. He said that in those circumstances an observer would bear in mind the nature, function and composition of the tribunal; the particular character of the tribunal's proceedings; the rules under which the proceedings

[53] [2002] 2 W.L.R. 37, at paragraph 103.
[54] [2005] UKPC 12.
[55] [2001] 1 WLR 700, at paragraph 37.
[56] [2005] EWCA Civ 1117, at paragraphs 27 to 30.

are regulated; the nature of the inquiry and the particular subject with which the decision is concerned. The cases indicate that these considerations should be borne in mind whether an application is based on bias or procedural unfairness, as in **Flaherty** and **Chesterfield Thompson**, or excess of jurisdiction, as in **Blood System**. Since the issues of apparent bias and procedural unfairness arise in the present case in the context of statements contained in a Salmon Letter and a Report, this context and the relevant principles should also be borne in mind.

[67] In **Blood System**[57] the commission was appointed to examine the safety of the blood system of Canada after many persons were infected with tainted blood. The court stated[58] that in order for a commission to make findings of misconduct against a person it must have the necessary authority to set out in notices to witnesses the facts upon which the finding of misconduct is based, even if those facts reflect adversely on the person. Otherwise, said the court, the inquiry process would be pointless and a commissioner would not be able to find facts from which recommendations would eventually be made in carrying out its mandate. The court further stated that although such fact finding may affect reputations, damaged reputations may be the price that is paid to prevent a recurrence of the circumstances which led to the investigation.[59] The court also stated that the rule that an inquiry cannot make findings of fact, which appear to the public to be determinations of legal liability, only applies to inquiries investigating particular crimes and not to those engaged in a wider investigation. I do not think, however, that this means that a commission should make recommendations that are adverse to a person who has not been afforded the opportunity to respond to the facts and the possible conclusions that are to be made from those facts.

[68] In **Blood System** the court further held that since procedural fairness is essential where findings may damage the reputation of a witness, notices of potential findings of misconduct should be as detailed as possible and confidential. The court also stated that while an inquiry should not exceed its jurisdiction in its report, some of the content of its

[57] In paragraph 32 of the judgment.
[58] In paragraph 38 of the judgment.
[59] See paragraph 39 of the judgment.

notices to witnesses may appear to do so. Accordingly, the court held that the contents of the notices in that case did not exceed the inquiry's jurisdiction, although some statements in them seemed to have implied civil liability. The Federal Court[60] and the Supreme Court of Canada reiterated the general principle that jurisdictional challenges should usually be brought after the publication of the inquiry's report. This, they said, was because at stages prior to the publication of the final report fairness is usually served because persons who receive notices have a wide range of procedural protections, including the right to cross-examine witnesses and to receive copies of all documents entered into evidence.

[69] In **Blood System** Decary J.A. of the Federal Court stated as follows:[61]

> "… the courts must show extreme restraint before intervening at this stage. The notices in no way state the Commissioner's opinion; they merely state the possibility that the Commissioner may state the opinion that there has been misconduct. The allegations are not (or should not be) stated in legal language and must not be held under a magnifying glass. When a commissioner decides to include a number of allegations in a single notice, the notice may seem more overwhelming than the final report, in which the findings of misconduct, if such there be, will probably be spread out. Since a notice, by definition, states possible allegations of misconduct, it is inevitable that it will depict the conduct of its recipient unfavourably, and that the recipient will believe that its reputation is tarnished solely because a notice has been sent to it. Thus there are many reasons why the Court should view the notice in context, and not dramatize its implications. The courts should intervene only when the content of the notice implies an obvious excess of jurisdiction, or discloses a flagrant breach of the rules of natural justice. This need for caution may be easily explained. Commissions of inquiry have become an integral part of our democratic culture".

Decary J.A. went on to agree that the court should not encourage applications which could have the effect of fragmenting and protracting the proceedings except in the clearest of cases.

[70] In the judgment of the Supreme Court, Mr. Justice Cory stated as follows:[62]

> "[56] That same principle of fairness must be extended to the notices pertaining to misconduct required by s. 13 of the Inquiries Act. A commission is required to give parties a notice warning of potential findings of misconduct which may be made against them in the final report. As long as the notices are issued in confidence to

[60] Court File No. A-600-96 – 142 D.L.R (4th) 237.
[61] At pages 250 and 251.
[62] At paragraph 56 of the judgment.

the party receiving them, they should not be subject to as strict a degree of scrutiny as the formal findings. This is because the purpose of issuing notices is to allow parties to prepare for or respond to any possible findings of misconduct which may be made against them. The more detail included in the notice, the greater the assistance it will be to the party. In addition, the only harm which could be caused by the issuing of detailed notices would be to a party's reputation. But so long as notices are released only to the party against whom the finding may be made, this cannot be an issue. The only way the public could find out about the alleged misconduct is if the party receiving the notice chose to make it public, and thus any harm to reputation would be of its own doing. … Even if the content of the notice appears to amount to a finding that would exceed the jurisdiction of the commissioner, that does not mean that the final, publicized findings will do so. It must be assumed, unless the final report demonstrates otherwise, that commissioners will not exceed their jurisdiction".

[71] In **Blood System**, in applying the general principles to the case, Justice Cory stated:[63]

> "59] The question then is whether the Commissioner exceeded his jurisdiction in the notices delivered to the appellants; I think not. The potential findings of misconduct cover areas that were within the Commissioner's responsibility to investigate. The mandate of the Inquiry was extremely broad, requiring the Commissioner to review and report on 'the events surrounding the contamination of the blood system in Canada … by examining . . . the organization and effectiveness of past and current systems designed to supply blood and blood products in Canada'. This must encompass a review of the conduct and practices of the institutions and persons responsible for the blood system. **The content of the notices does not indicate that the Commissioner investigated or contemplated reporting on areas that were outside his mandate. [60] If the Commissioner's report had made findings worded in the same manner as the notices, then further consideration might have been warranted. However, the appellants launched this application before the Commissioner's findings had been released. Therefore, it is impossible to say what findings he will make or how they will be framed. Quite simply the appellants have launched their challenge prematurely. As a general rule, a challenge such as this should not be brought before the publication of the report, unless there are reasonable grounds to believe that the Commissioner is likely to exceed his or her jurisdiction. [61] Even if it could be said that the challenge was not premature, the notices are not objectionable. They indicated that there was a possibility that the Commissioner would make certain findings of fact which might amount to misconduct** …" [Emphasis added]

[63] At paragraph 59-61 of the judgment.

**The Salmon Letter**

[72] It was my initial intention to reproduce the contents both of the Salmon Letter and of the Report fully. In the end, however, I thought that the possible prejudicial effect of that course does not warrant it in the present proceedings. It suffices to state that the Letter indicates, in paragraph 12, that one of the issues which arises on the evidence thus far is the "palpable absence of proper checks and balances" to protect the interest of the government and people in relation to the Ottley Hall project. According to paragraph 13 of the Letter, another issue is the "naked deceit" displayed by the appellant and others when, by way of the media, the people were led to believe that the government was not the primary obligor of a loan for which the government had provided a guarantee as a prerequisite for the loan.

[73] In the concluding paragraph, the Letter states that it was clear from the allegations set out in the Letter, that the compelling inference to be drawn is that the appellant misused his office and was in breach of his fiduciary duty to protect the interest of the government and people. The Letter further stated that in so doing the evidence strongly suggested that the appellant was undoubtedly an integral part of complicity and duplicity in at least some of the dealings in relation to the projects. It also stated that the evidence is replete with instances of a singular lack of good governance, due diligence, proper judgment as well as accountability by the appellant and evidence of conspiracy.

[74] The appellant complains, *inter alia*, that these are conclusionary statements of opinion and that the language is intemperate and immoderate giving rise to an arguable case of apparent bias. This, he said, is particularly because of the nature and the gravity of the allegations contained in them. Mr. Maharaj contended that the Letter should have been sent to the appellant before oral hearings commenced on 17th November 2003 rather then in August 2007.

[75] In response Mr. Astaphan asked this court to note that the commissioner sought the cooperation of the appellant in the inquiry from as early as 2003. He also asked the court

to note that the Letter was issued to the appellant in strict confidence. He further submitted that the commissioner showed his mind was not closed when he gave the appellant the opportunity to come to the inquiry to show cause why an adverse report should not be made against him. He further asked the court to note that the Letter set out the allegations made against the appellant, as well as the substance of the evidence adduced to support the allegations.

[76] Mr. Maharaj insisted that the commission should have formally made the appellant aware of the potential criticisms arising from the lengthy investigations; invited the appellant to attend the whole of the inquiry; informed him of his right to legal representation and his costs in the inquiry. He also insisted that the commission should have formally granted the appellant the opportunity to test the evidence of witnesses during oral hearings.

[77] Mr. Astaphan submitted that in considering the context and facts and before deciding whether there is an arguable case of apparent bias, this court should note that the application concerns a commission of inquiry with wide ranging powers and not a court or judicial tribunal. He requested us to note also that the commissioner is a retired judge with extensive experience, who had not done or stated anything to indicate that he has closed his mind to the issues under inquiry. He said that the commissioner, who is obliged to act in accordance with his terms of reference, facilitated the appellant by adjourning the inquiry and provided him with all material and transcripts required by him. Mr. Astaphan further submitted that it is part of a commissioner's function to form provisional views on the evidence; make provisional findings, and give a person the opportunity to be heard on his views and provisional findings before making final findings and completing the inquiry.

**Findings**

[78] The appellant would perhaps have had an arguable case if the statements which the appellant complains of were contained in a final report by an inquiry. It is perhaps unfortunate that on its wording the Letter tended to overstate the case in some respects in that in the few aspects of the Letter, which the appellant complained of the language could

perhaps have been more restrained. Yet they do not amount, in my view, to firm findings and consequences that would invalidate the inquiry as against the appellant on the grounds of apparent bias or procedural unfairness. This is particularly because it is not a final report and the appellant has been afforded the opportunity to respond to the allegations, and to explain, if he can, why the possible conclusions indicated in the Letter should not be affirmed in the final report.

[79] It is my view that, in the end, the Letter was in keeping with the 6 cardinal principles that relate to Salmon Letters, which principles are intended to ensure fair procedure or natural justice. The first principle states that before a person against whom there is adverse evidence is invited to give evidence at an inquiry, the commission must be satisfied that there are circumstances affecting the person which the commission proposes to investigate. This principle is satisfied in the present case. It is significant that the appellant was warned that his conduct was a subject of the inquiry from the outset and that he was given the opportunity to participate. The second principle requires the commission to inform the person of the allegations against him and the substance of the evidence that supports those allegations. This was also satisfied in the Letter. The appellant is not being called as a defendant in a trial. He is being called as a witness in the inquiry. The Letter has given the details of the allegations against him. It has also given him the opportunity to appear before the commission to show cause why an adverse report should not be made in relation to him in light of the allegations. The Letter was confidential, and, as indicated in **Blood System**, the court would not subject it to as strict a standard as the final findings.

[80] The third principle requires a commission to afford to a person to whom a Salmon Letter is directed an adequate opportunity to prepare his case assisted by his legal counsel. This goes to the issue of procedural fairness. Contrary to the submission by Mr. Maharaj, this principle did not require the commission to issue a Salmon Letter to the appellant before the commencement of the oral hearings. The commission would not at that time have taken the evidence on which the allegations that are set out in the Letter are based. The appellant is being called as a witness, not as a defendant. If the appellant thought that he

did not have adequate time to prepare, it was open to counsel to raise this on his behalf with the commissioner with a request for an extension of time. In **Blood System**, the Supreme Court of Canada held that there is no obligation that a notice to a witness in the position of the appellant should be given as soon as possible. Notice is adequate as long as a recipient is given adequate time to present his case, call evidence and make submissions before the commission. The commission also provided the appellant with transcripts of the evidence taken at the inquiry.

[81] The fourth principle requires the commission to permit a person to whom a Salmon Letter is directed to state his case openly in public to the inquiry. The commission sought to fulfill this requirement by summoning the appellant. The fifth principle requires a commission to permit the person to call any material witnesses he wishes to call, who would be heard if it is reasonably practicable. There is no indication that the commission has denied the appellant this facility or that provided in the sixth cardinal principle. This latter principle requires the commission to afford the appellant the opportunity to test any evidence which may affect him by cross-examination conducted by his own solicitor or counsel.

[82] In the foregoing premises, it is my view that the contents of the Salmon Letter do not present evidence upon which the learned judge could have found an arguable case of apparent bias or procedural irregularity. He did not therefore misapprehend the facts to impair the exercise of his discretion. I would therefore dismiss the appeal to this extent.

**The Report**

[83] Mr. Astaphan stated that the Report was a privileged document. The question whether it was open to the commissioner to object to the production of the Report and for the appellant to rely on it in these proceedings has occurred to me. However, there was no application before the court for its exclusion and it is therefore inappropriate for me to venture any further than the thought.

[84] The Report is under the heading "Ottley Hall and Union Island Resorts Limited Projects; Report of Possible Criminal Acts or Offences by Certain Individuals". Although it has been referred to as an "Interim Report", it was expressly made pursuant to paragraph 13 of the commission's terms of reference, which required the commission to report immediately in writing to the Governor General and DPP any facts, circumstances or evidence which in the opinion of the commission may give rise to show or establish that any person committed or conspired to commit a criminal act, obtained an unlawful benefit or whether there was any improper, corrupt or fraudulent relationship with respect to the projects.

[85] In his judgment the learned judge did not go into a separate analysis of the Report. He applied the conclusions that he made in respect to that Letter to the Report and found that the Report was similarly not objectionable. This, he said, was because the commission had not yet made its final findings so that the appellant still had the opportunity to convince it that the allegations against him were untrue. He therefore concluded that the application for judicial review in relation to the Report was also premature and presented no ground upon which leave should be granted.[64]

[86] In my view the Report called for considerations that were different from those that were applicable to the assessment of the Salmon Letter. It is unfortunate that the learned judge did not have the benefit of the input of counsel for the parties to highlight the differences between the Salmon Letter and the Report which dictated the need for the different analysis. The result of not applying a separate analysis to the Report, in my view, meant that the judge did not properly exercise his discretion in relation to the contents of the Report in order to determine whether statements contained therein presented an arguable case for judicial review. I therefore think that this court should interfere with the exercise of discretion in relation to the Report and determine whether an arguable case arises from its contents.

[64] See paragraphs 29 and 30 of the judgment.

**Considering the Report**

[87] Although the Report is referred to an "Interim Report" it was not issued under the same conditions and for the same purpose as the Salmon Letter. A reading of the Report indicates that its nature and contents are different from the Salmon Letter. For example, while the Letter was issued to the appellant stating the allegations that arose on the evidence and affording him the opportunity to attend to test them, the Report was issued to the Governor General and the DPP, but not to the appellant against whom there are adverse findings in the report.

[88] In the second place, it may be argued that the Report was not of a preliminary in nature. The Report stated, *inter alia*, that the evidence taken to date discloses certain offences contrary to provisions of the Criminal Code may have been committed.[65] Paragraph 22 of the Report is arguably a direct indictment of the appellant. It states, *inter alia*, that certain actions on his part, which the evidence discloses, are tantamount to misbehaviour in public office. Paragraph 27 of the Report may also be argued to be a direct indictment of the appellant and be argued to conclude that the evidence with respect to the allegations was "pellucid and confirmed by the Chartered Accountants who gave evidence". Paragraph 45 summarizes the evidence of the appellant's alleged misbehaviour in some detail. Notwithstanding their potential consequences for the appellant they were not brought to his attention as was done in relation to the allegations contained in the Salmon Letter. In paragraph 48 of the Report, the commissioner recommended, on the basis of his "firm belief" that the Attorney General and/or the National Commercial Bank should retain counsel to determine whether civil proceedings should be instituted against the appellant because it seemed to him (the commissioner) that the appellant is civilly liable.

[89] Mr. Maharaj repeated his submission that the "intemperate" and conclusionary language used in the Report gives rise to an arguable case of apparent bias and procedural unfairness. This, he said, was particularly because of the obvious purpose for which the Report was sent to the DPP; the fact that it was sent at a time when the commission was

[65] See paragraphs 10 to 20, 33, 35, 43 and 44 of the Report.

stayed and during elections; the public importance of the issues at stake and the critical need to maintain public confidence in the administration of justice in a democratic society. Mr. Maharaj further contended that statements contained in the Report are objectionable because they are couched in the language of a legal opinion, and they state that the appellant is guilty of wrongdoing, and, on that basis, recommended that the appellant should be subjected to the legal process. He insisted that the statements and findings, having been made without having heard the appellant or having allowed him to test the evidence upon which they were based evince apparent bias and procedural unfairness. He also insisted that the effect of the statements is that the appellant is now being asked to attend before a commissioner who has already stated that he is guilty and recommended legal action against him. Mr. Maharaj submitted that these circumstances indicate a predisposition by the commissioner before the appellant is heard. He submitted that the commissioner breached the requirements of procedural fairness by adopting an illegitimate prior stance in relation to the appellant before completing the inquiry.

[90] Mr. Astaphan contended, on the other hand, that it did not matter that the title to the Report uses the words "Report of Possible Criminal Acts or Offences by Certain Individuals"; this does not mean that bias or procedural unfairness arise. He submitted that although the commissioner submitted the Report to the Governor General and DPP, he clearly indicated that the appellant had not yet given evidence. He asked the court to note that the Report was confidential and the DPP has not acted on it. He contended that an informed observer would not expect the DPP to act on the Interim Report unless and until the Applicant is heard and/or the inquiry is completed. He indicated that the appellant has unfettered access to the court to challenge any unfair or unreasonable finding by the commission or decision by the DPP since the inquiry is not completed and the commissioner has not made any final findings.

[91] It is noteworthy that the Federal Court of Appeal of Canada stated in **Beno v Canada**,[66] that the principles which dictate that a court should not easily entertain an application to review statements made by a commission before the publication of the final report does

[66] At page 717.

not mean that the impartiality of a commission, in the light of the special nature of their functions, should always be judged by applying the "closed mind" rather than the real danger of bias test. Rather, the test is whether given the special nature of the functions of the commission, the impugned statements evince a real danger of bias or whether they point to procedural unfairness.

[92] The court should not easily entertain an application challenging statements made by a commission prior to the issue of the final report because they are provisional findings, which the commission may change in the final report, if so persuaded. However, to the extent that statements contained in the Report may be argued to be conclusionary and adverse to the appellant, I think that they present at least an arguable case, which requires that leave to apply for judicial review should be granted if an alternative remedy is not available to the appellant.

**Alternative remedy**

[93] This issue is encompassed in Mr. Astaphan's submission that the appellant, as a person who is summoned to give evidence or to show cause, should, as a matter of law, first present his objections to the commission by application before he is allowed to apply for judicial review. Mr. Astaphan contended that, in any event, a letter making an inquiry or demand of the commissioner is no substitute for a formal application and submissions to the commissioner. He noted that where a person alleges that a judge evinces apparent bias the procedure is usually to make the first application directly to the judge. In the event that the judge does not grant the application the person then appeals or applies for judicial review. He submitted that the same principle applies to a commission of inquiry and cited as authority the **Vaughn Lewis** and **Chesterfield Thompson** cases.

[94] I do not think that this procedure presents an alternative remedy to an application for judicial review. However, in **Vaughn Lewis** the applicant first applied to the commissioner to disqualify herself on the ground of bias and this court quashed the commissioner's decision. The grant of leave was not challenged in that case. In **Chesterfield Thompson**,

the court stated[67] that it would generally be appropriate to contest notices before the commission prior to an application for judicial review. Accordingly, it would have been more appropriate for an appellant to have challenged the commission on the ground of bias by appearing before it as was done in the **Vaughn Lewis** case. However, I do not think that there is any practical advantage in asking the appellant to return to the commission for this purpose particularly because he is challenging the very jurisdiction of the commission to continue to hear the inquiry as against him.

[95] In the foregoing premises, the appellant is granted leave to apply for judicial review in relation to the statements contained in the Report dated 18th November 2005. The question whether those statements are actually impeached on the grounds of apparent bias or procedural unfairness would be for the High Court to determine. I would accordingly remit the case to the High Court for that determination to be made.

**The stay**

[96] This court stayed the proceedings of the commission on 5th October 2007 pending the appeal or until further order. By an Order dated 3rd March 2008 the stay was lifted because the court decided that it was then satisfied that the inquiry could proceed in accordance with its terms of reference, except as against the appellant, pending the delivery of the judgment. Given the decision of this court set out in the foregoing paragraph of this judgment, that stay order as against the appellant shall continue pending the determination of the High Court on the judicial review application or until further order.

**Costs**

[97] The High Court made no order as to costs. Rule 56.13(4) of CPR 2000 permits the court to make any order as to costs as appears just. Rule 56.13(6) states that no order as to costs may be made against an applicant unless the Court thinks that the applicant acted unreasonably in making the application or in the conduct of the proceedings. The High

[67] In paragraph 54 of the judgment.

Court made no order as to costs because although the appellant failed the court did not think that he had acted unreasonably. However, as the Privy Council reminded us recently,[68] a respondent who does not prevail in an administrative law application is not accorded the same facility. There are no circumstances that indicate that the appellant should not have some costs in these proceedings. Accordingly, inasmuch as the appellant prevailed in part in the proceedings before this court, I would order the respondents to meet one half of the appellant's costs in these appeal proceedings to be assessed on the basis of rule 65.11 of CPR 2000 and rule 65.13(b) of CPR 2000.

**Order**

[98] In the foregoing premises, I would allow the appeal and set aside the Order of the High Court to the extent that the appellant is granted leave to apply for judicial review in relation to the statements contained in the Report which the commission sent to the Governor General and the DPP in November 2005. The stay of the proceedings of the commission in relation to the appellant shall continue pending the determination of the application for judicial review or until further order. The respondent shall meet one half of the appellant's costs in these appeal proceedings to be assessed on the basis of rule 65.11 of CPR 2000 and rule 65.13(b) of CPR 2000.

**Hugh A. Rawlins**
Justice of Appeal

I concur

**Brian Alleyne, SC**
Chief Justice (Ag)

I concur

**Ola Mae Edwards**
Justice of Appeal (Ag.)

[68] In Randolph Toussaint v The Attorney General of St. Vincent and the Grenadines [2007] UKPC 48; Privy Council Appeal No. 28 of 2006 (16th July 2007).