THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D.2009

Claim No: SKBHCV2009/0159

In the Matter of Sections 49 and 50 of the Constitution of St. Christopher and Nevis.

And in the Matter of an Application for Declaratory, Injunctive and Other Relief by the Hon. Shawn K. Richards the Member of Parliament for St. Christopher 5 pursuant to Section 96 of the Constitution of St. Christopher and Nevis.

BETWEEN:

HON. SHAWN K. RICHARDS

Claimant

AND

THE CONSTITUENCY BOUNDARIES COMMISSION

1st Defendant

AND

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

2nd Defendant

CONSOLIDATED WITH

Claim No. SKBHCV2009/0179

In the Matter of a Claim by the Hon. Shawn K. Richards and Lindsay F.P. Grant for Judicial Review (Eastern Caribbean Supreme Court Civil Procedure Rules 2000, Part 17 and 56)

BETWEEN:

HON. SHAWN K.RICHARDS — 1st Claimant

AND

LINDSAY F.P.GRANT — 2nd Claimant

AND

THE CONSTITUENCY BOUNDARIES COMMISSION

1st Respondent

AND

THE ELECTORAL COMMISSION

2nd Respondent

AND

THE SUPERVISOR OF ELECTIONS

3rd Respondent

AND

THE GOVERNOR GENERAL

4th Respondent

AND

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

5th Respondent

Appearances

Ms. Mia Motley, Q.C. and with her, Mrs. Kamla Persad-Bissessar, Ms. Constance Mitcham, Mrs. Marguerite A. Foreman, Mr. Vincent Byron Jr., Mr. De Lara MacClure Taylor and Mr. Dustin Delany for the Claimants.

Mr. Anthony Astaphan, S.C. and with him, Dr. Henry Brown, Mr. A. Anthony, Mr. Arundranauth Gossai and Mr. Hal Gollop for the Respondents.

2009: August 17th, 18th, 19th, 20th, 21st

2009: October 19th

2009: October 29[1] (Re-issued)

Background

[1] Thomas J (Ag.): These proceedings have their origin in a decision of the Government of the Federation of St. Christopher and Nevis to embark on a recommended program of electoral reform which touched and concerned certain provisions of the Constitution of the Federation of St. Kitts and Nevis ("the Constitution") relating to the review of constituency boundaries.

[1] The re-issue of this judgment comes as a result of the correction of clerical mistakes pursuant to Part 42.10 (1) of CPR 2000.

[2] Both actions namely, an originating motion and the claim for judicial review, were initiated by two persons who are members of one of the political parties engaged in the politics of the Federation of St. Christopher and Nevis ("the Federation"). They are the Hon. Shawn K. Richards, an elected member of the National Assembly and Mr. Lindsay F. P. Grant, the Leader of the People's Action Movement (PAM).

Originating motion

[3] The originating motion was filed on 1st July, 2009. An amended originating motion was filed on 7th July, 2009, and a further amended motion was filed on 8th July, 2009.

[4] The relief sought by the Claimant pursuant to Section 96 of the Constitution of St. Christopher and Nevis is as follows:

> "1. A Declaration that the Constituency Boundaries Commission is an institution established in 1983 by Section 49(1) of the Constitution and as such continues as an institution, notwithstanding any changes in its membership.
>
> 2. A Declaration that Section 50(2) of the Constitution is mandatory.
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> 3. A Declaration that the Constitution provisions of Section 50(2) of the Constitution of St. Christopher and Nevis, being mandatory, any submission of a Report to the Governor General purportedly pursuant to Section 50(1) and subsequently to the National Assembly is inconsistent with and in contravention of and in breach of the provisions of Section 50(2) and is null, void and of no effect.
>
> 4. A Declaration that the Constituency Boundaries Commission has no jurisdiction to submit a Report to the Governor General pursuant to Section 50(1) of the constitution.
>
> 5. Further or in the alternative, a Declaration that any submission of a Report by the Constituency Boundaries Commission pursuant to Section 50(1) (a) of the Constitution, at this time, would be against the rules of natural justice in that there has been failure of consultation with the Applicant personally or with the political party of which he is a member, the People's Action Movement (PAM), both of whom had a legitimate expectation regarding the preparation and/or any proposed changes to the constituency boundaries that may affect the boundaries of St. Christopher 5 Constituency which the Applicant represents and further all other Constituencies in the Federation of St. Kitts and Nevis.
>
> 6. Further or in the alternative, a Declaration that any submission of a Report by the Constituency Boundaries Commission pursuant to Section 50(1) (a) of the Constitution, at this time, would leave no reasonable time for public discussion or education with the constituents of St. Christopher 5 Constituency nor any other Constituents from all other Constituencies in the Federation of St. Kitts and Nevis who have not been consulted and would therefore be against the rules of natural justice and the concept of true democracy with free and fair elections as envisaged by preamble (c) of the Constitution.

7. Further or in the alternative, a Declaration that the act of preparing any Report by the Constituency Boundaries Commission pursuant to Section 50(1)(a) of the Constitution in the absence of consultation with the Applicant constitutes bad faith and/or improper purposes, and/or conflicts with the policy of the legislation, and/or is contrary to law.

8. Further or in the alternative, a Declaration that the Boundaries Technical Committee established by the Parliamentary Constitutional and Electoral Reform and Boundaries Committee had no jurisdiction to make any recommendations to the First Defendant which under Section 49(3) of the Constitution is the only entity empowered to confer powers, and/or impose duties on any public officer or authority of the Government for the purpose of reviewing the number and the boundaries of constituencies, and/or further that the boundaries Technical Committee was appointed and functioned prior to the members of the Constituency Boundaries Commission being appointed on September 24th,2008 and hence any Report produced by the Boundaries Technical Committee is null, void and of no effect.

9. An Order for *certiorari* quashing the act of the First Defendant in submitting the Report pursuant to Section 50(1) (a) and a Declaration that any such Report submitted to the Governor General is null and void.

10. An Order restraining the defendants by themselves, their servants, and/or agents or persons subject to their control, authority or direction, or any other person with a right to receive the Report howsoever otherwise from submitting to the Governor General, or making use of howsoever and wheresoever, any Report purportedly pursuant to Section 50(1) (a) until the hearing of this action or until further order.

11. An Order restraining the Defendants by themselves, their servants, and/or agents or persons subject to their control, authority or direction or any other person with a right to receive the Report howsoever of making use of howsoever and wheresoever, of any Report purportedly pursuant to Section 50(1) (a) until the hearing of this action or until further order.

12. Such further or other relief as may be just.

13. Costs."

[5] The grounds on which the Claimant makes this claim are:

"1. The Claimant is a citizen of the Federation of St. Kitts and Nevis and since the 25th day of October, 2004, the elected Member of Parliament for the Constituency of St. Christopher 5 Constituency which comprises the town of Sandy Point and Fig Tree, both in the Parish of St. Ann.

2. On Saturday the 27th day of June, 2009, on the Inside the News program on WINN FM Radio, the Hon. Nigel Carty, Minister of Information in the Government of St. Christopher and Nevis, in response to a question about changes to the constituency boundaries, stated that he was aware that plans were afoot to pass a resolution in Parliament to change the boundaries "in the not too distant future".

3. The Claimant has received a Notice from the Clerk of Parliament summoning a meeting of the National Assembly for Friday the 3rd day of July, 2009, and verily believes that this is the meeting to which the said Minister of Information referred, when the resolution

approving the draft proclamation provided for in Section 50(6) to change the constituency boundaries will be passed. The said notice did not include the Order Paper stating the agenda for the said meeting.

4. By virtue of Section 50(3) of the Constitution, the Prime Minister is vested with the power to submit a draft proclamation by the Governor General to the National Assembly for giving effect to the recommendations contained in the Report of the Constituency Boundaries Commission.

5. By virtue of Section 50 (7) of the said Constitution the validity of any proclamation by the Governor General purporting to be made under Subsection 96 and reciting that a draft thereof has been approved by resolution of the National Assembly, shall not be enquired into in any court of law except upon the ground that the proclamation does not give effect to rule 1 in Schedule 2.

6. Since the last General Election was held on the 25th day of October, 2004, it is clear that we are on the eve of the next General Election, and the circulation of the said notice of meeting at this time, without the Order Paper, leaves the real purpose of the said meeting open to speculation and surprise.

7. The Claimant can and may be adversely affected by the submission and/or use of the Report of the Commission as he is a Representative in Parliament of a minority party with no representation on the Constituency Boundaries Commission, and there is a real danger that his constituency and his candidacy may be altered to his disadvantage.

8. If a proclamation is made by the Governor General pursuant to Section 50(6) of the Constitution, there will be no jurisdiction in the Court to enquire into the matter and grant relief – Section 50 (7) of the Constitution refers. Without this jurisdiction to grant relief before the proclamation is made, the Applicant, who is intended to be protected, would be deprived of any remedy. The Applicant fears that, unless restrained, the Defendants will deprive him of his right to be heard.

9. The Claimant is bringing this matter pursuant to Section 96 of the Constitution and the general law."

Claim for Judicial Review

[6] On 13th July, 2009, the Claimants filed an amended fixed date claim in which the following remedies are sought:

"1. An Order to quash the Report on the 1st Respondent submitted to the Governor General (4th Respondent) pursuant to Section 50 (1) of the Constitution and subsequently laid in the National Assembly by the Prime Minister.

2. An Order to quash the Report of the Technical Boundaries Committee which was considered and/or acted upon by the 1st Respondent in the conclusion of the Report of the 1st Respondents which was submitted to the Governor General pursuant to Section 50 (1) of the Constitution and subsequently laid in the National Assembly by the Prime Minister.

3. An Order to quash the Draft Proclamation, and/or any Proclamation relating to, and/or giving effect to the above-mentioned Report of the 1st Respondent, the Draft Proclamation

having been submitted to the National Assembly by the Prime Minister on 8th July, 2009, with an accompanying Resolution.

4. An Order restraining the 4th and the 5th Respondents from in any way acting upon, and/or signing, and/or making use of in any way howsoever, wheresoever, the above-mentioned Draft Proclamation, Proclamation and/or above-mentioned Report of the 1st Respondent.

5. An Order restraining the 2nd and the 3rd Respondents from in any way acting upon, and/or making use of in any way howsoever, wheresoever, and/or conducting, and/or supervising any Election or General Election on the basis of any new boundary changes to the Constituencies in the Federation of St. Kitts and Nevis, and/or any recommendations, and/or Orders, and/or Legal Instruments based on the above-mentioned Draft Proclamation based on the above-mentioned Report of the 1st Respondent with or without modifications, and/or any Proclamation based on the Draft Proclamation, and/or Report referred to herein.

6. A Declaration that the Proclamation signed by the Governor General on 9th July, 2009, is null and void and of no effect.

7. An Order of Mandamus suspending the Proclamation signed by the Governor General on 9th July, 2009, until such time as this matter is heard or further order.

8. An Order of Mandamus requiring the 1st, 2nd, 3rd, 4th and the 5th Respondents to conduct and/or supervise any Election or General Election which is constitutionally due within 90 days of the dissolution of the Parliament which will dissolve at the latest 5 years after the first sitting of the National Assembly (which in this instance was December 2004) on the basis of the existing constituency boundaries in the Federation of St. Kitts and Nevis as described in Statutory Rules and Orders No. 25 of 1983."

[7] The grounds upon which the claim is made are somewhat prolix and to avoid duplication, they are fully set out at paragraph [288], infra. In brief, however, the grounds centre on the Commission, its Report and its preparation, the Draft Proclamation, abdication by the Commission, the action of the Prime Minister in laying the Report in Parliament and the sequel thereto, the Emergency session of the National Assembly on 8th July, 2009, and the proposed alteration of constituencies boundaries and the implications for the Claimants.

The Evidence

Shawn K. Richards

[8] The Claimant, Mr. Shawn K Richards, in his affidavit in support filed on 1st July, 2009, deposes that he is a citizen of the Federation of St. Kitts and Nevis and an elected Member of Parliament for St. Christopher 5 Constitution which comprises the town of Sandy Point and Fig Tree, both in the Parish of St. Ann. He says further that he was elected on 25th October, 2004, as the only elected candidate for the People's Action Movement.

[9] At paragraph 3 of his said affidavit, Mr. Richards outlines the constitutional basis of the 11 seats in Parliament and a breakdown of the representation in terms of the political parties being: St. Kitts – Nevis Labour Party (Labour) -7 seats; Concerned Citizen Movement (CCM) -2 seats; the Nevis Reformation Party (NRP) – 1 seat and [the Peoples Action Movement (PAM) – 1 seat].

[10] The matter of the establishment and duties of the Constituency Boundaries Commission are addressed at paragraphs 4 and 6 wherein the constitutional locus is identified as well as the constitutional prescription for the appointment of its members.

[11] In terms of the membership of the Constituency Boundaries Commission the following is deposed:

> "5. Presently, constituted, the Constituency Boundaries Commission consists of members appointed by His Excellency the Governor General on 24th September, 2008 in the persons of Mr. Anthony Johnson as Chairman; the Honourable Asim Martin member for Constituency St. Christopher 1 and Honourable Cedric Liburd member for St. Christopher 8 appointed on the advice of the Prime Minister pursuant to Section 49(1)(b); and Honourable Vance Amory member for Nevis 10 and Senator Michael Perkins appointed on the advice of the Leader of the Opposition pursuant to Section 49(1)(c) of the Constitution. The said appointments are noted in the Official Gazette of St. Christopher and Nevis dated 23rd October 2008."

[12] It is Mr. Richards' contention that given the majority position of the Nevis Reformation Party in the Nevis Island Assembly and the fact that the member for the Constituency for Nevis II in the National Assembly is the Legal Adviser to the Nevis Island Administration, it is likely that he is the only member of Parliament who has no input into or knowledge of the decisions of the Constituency Boundaries Commission.

[13] According to the deponent, on 27th June, 2009, he heard the Minister of Information, the Hon. Nigel Carty say on a radio program that he was aware that plans were in motion to pass a resolution in Parliament to change the boundaries in the not too distant future.

[14] The implication concerning Minister Carty's statement is further addressed at paragraphs 11-16 of Mr. Richards' affidavit:

> "11. I have received a Notice from the Clerk of Parliament summoning a meeting of the National Assembly for Friday the 3rd day of July, 2009, and verily believes that this is the meeting to which the said Minister of Information referred, when the resolution approving the draft proclamation provided for in Section 50(6) to change the constituency boundaries will be passed. The said Notice did not include the Order Paper stating the agenda for the said meeting.

12. By virtue of Section 50(3) of the Constitution, the Prime Minister is vested with the power to submit a draft proclamation by the Governor General to the National Assembly for giving effect to the recommendations contained in the Report of the Constituency Boundaries Commission.

13. By virtue of Section 50 (7) of the said Constitution the validity of any proclamation by the Governor General purporting to be made under subsection (6) and reciting that a draft thereof has been approved by resolution of the National Assembly, shall not be enquired into any Court of law except upon the ground that the proclamation does not give effect to rule 1 in schedule 2.

14. In a Press Release on the Prime Minister's official website www.CUOPM.com, dated the 17th June 2009, it is Reported that the Prime Minister disclosed that the Electoral Boundaries Commission was doing its work and that "It had had several meetings". He further stated that "I understand that the Parliament is now waiting on the Commission's Report. I believe that the Report is on its way and as soon as it is within our sites, it will be determined and we shall proceed.

15. To date there has been no consultation either with me as the Representative for St.Christopher 5 or with the inhabitants of my constituency or for that matter no public consultations anywhere in the Federation with respect to the recommendations of Constituency Boundaries Commission.

16. Since the last General Election was held on the 25th day of October, 2004, it is clear that we are on the eve of the next General Election, and the circulation of the said notice of meeting at this time, without the Order Paper, leaves the real purpose of the said meeting open to speculation and surprise."

[15] It is Mr. Richards' further contention at paragraph 17, that he may be adversely affected by the use of the Report of the Commission given the fact that he represents a minority party in Parliament and there is a real danger that his constituency and his candidacy may be altered to his disadvantage. In this regard, the affidavit at paragraph 18 also makes mention of the playing of the Labour Party theme song: 'All 8 again' at a function and his understanding of same in terms the constituency which he represents in Parliament. Further, he refers to a certain statement made by the Deputy Prime Minister on the morning following the election of 28th October, 2004, at which time he made mention of changes to the boundaries of St. Christopher 5.

[16] In the circumstances at paragraph 20 of his affidavit, Mr. Shawn K. Richards expresses certain fears about constituency boundaries being changed in a single sitting of the National Assembly the use of the Report submitted to the Governor General would be contrary to Section 50(2) of the Constitution, the constituency boundaries will be changed without consultation, the hurried and summary alteration of the constituency boundaries motivated by bias and/or some other improper purpose on the part of members, will create confusion in the minds of the electorate and the candidates and will deny the residents of his constituency adequate and sufficient time to assimilate the effects of any constituency boundary changes.

[17] Finally, the deponent contends that if the defendants are not restrained from violating the Constitution or continuing the violation of the Constitution on the rules of natural justice, the

electoral process democracy may be irreparably harmed. Further, if a proclamation is made by the Governor General pursuant to Section 50(6) of the Constitution, there will be no jurisdiction in the Court to enquire into the matter and to grant relief.

[18] In a supplemental affidavit in support for originating motion filed on 8th July, 2009, Mr. Shawn K. Richards deposes that on 2nd July, 2009, at about 5:00 p.m., he was served with a copy of the National Assembly Order Paper for the meeting of the National Assembly which was to be held on the 3rd July, 2009. He says further that despite the fact that under the Heading "Motions" was listed the interim Draft Proclamation, a copy of that document was not included in the document handed to him.

[19] At paragraph 4 of his said Affidavit the deponent gives details of certain statements made by the Prime Minister at the meeting of the National Assembly on 3rd July 2009, concerning the Constituency Boundaries Report that was handed to him on the previous day at 1:00 p.m.

[20] The matter of PAM's position on Electoral Reform is detailed at paragraph 6 by way of correspondence between his party and the Cabinet Secretary. In this regard, Mr. Richards contends that certain clarifications were sought; but to date, PAM had not received any satisfactory response.

[21] With respect to the Parliamentary Constitutional and Electoral Reform and Boundaries Committee, it is deposed, with respect to the said Committee, as far as he could recall, that the Committee did not hold any widespread nor any public consultation at any time.

[22] On 11th July, 2009, Mr. Shawn K. Richards filed an affidavit in support of a claim for financial review.

[23] At paragraph 4 of the affidavit, the deponent addresses his party's concern about "widespread voter irregularities" over the past two elections since 2000 and the calls for Electoral Reform. In this context also, Mr. Richards also deposes as to certain statements made by the Deputy Prime Minister concerning boundary changes on the day following the General Elections in 2004.

[24] At paragraphs 6-8, Mr. Richards outlined the events leading to the Government's White Paper on Electoral Reform the passing of a Resolution in the National Assembly on 1st August, 2006, in this

regard, the setting up of a number of Committees for this purpose and his party's position on the entire exercise.

[25] Based on the fact that the Constituency Boundaries Commission submitted its Report to His Excellency the Governor General at 2:15 p.m., on the 2nd July, 2009, the affidavit raises the following legal issues: 1. The Commission had no jurisdiction to submit any such Report to the Governor General pursuant to Section 50(1) of the Constitution; 2. The preparation of the Report by the Commission without Consultation with the Appeal and the Constituents throughout the Federation of St. Kitts and Nevis was procedurally improper and/or constitutes bad faith, and/or improper purposes, and/or conflicts with the policy of the legislation, and/or is contrary to law; 3. The Report of the Commission fails to give any or any proper reasons for the changes proposed and as such is a breach of Schedule 2, Rule 2 of the Constitution and/or conflicts with the policy of the Legislation and/or is contrary to law; 4. The Report is biased; 5. The act of the Commission in considering and/or agreeing, and/or appending the Report of the Boundaries Technical Committee is improper, and/or in excess of its jurisdiction as the Boundaries Technical Committee is neither established by the Commission nor the Constitution; 6. The act of the Prime Minister of laying the Report of the Commission pursuant to Section 50(1) (a) of the Constitution and the Draft Proclamation with an accompanying Resolution is in breach of the injunction given by the Court in the matter on 2nd July, 2009, and reconfirmed and extended on 8th July, 2009.

[26] The deponent further deposes as follows at paragraphs 20-25:

> "20. The Report of the Constituency Boundaries Commission proposes to alter all constituencies in the Federation of St. Kitts and Nevis with the exception of Constituency St. Christopher No. 6.
> 21. I am a member of Parliament in the National Assembly for Constituency St. Christopher 5 and therefore stands to be directly affected and/or prejudiced by any changes to the existing boundaries as a result of the Report of the Constituency Boundaries Commission, the Draft Proclamation and any modifications thereto submitted by the Prime Minister and/or approved by the National Assembly.
> 22. Since the last General Election was held on the 25th day of October, 2004, it is clear that we are on the eve of the next General Election and hence the urgency of these matters.
> 23. I can and may be adversely affected by the submission and/or use of the Report of the Commission and/or the Draft Proclamation with or without modification as I will be contesting the elections on behalf of a minority party with no representation of the Constituency Boundaries Commission, and there is a real danger that my constituency and my candidacy may be altered to my disadvantage.
> 24. I also caused to be issued in this Court an Originating Motion pursuant to Section 96 of the Constitution and the general law as Suit No. SKBHCV 2009/0159.
> 25. If a proclamation is signed and/or made by the Governor General pursuant to Section 50(6) of the Constitution, there will be no jurisdiction in the Court to enquire into the matter and to grant relief – Section 50 (7) of the Constitution refers. Without this jurisdiction to grant relief before the proclamation is made the Applicants, who are intended to be protected, would be deprived of any

remedy. The applicants fear that, unless restrained, the Respondents will deprive him of his right to be heard."

[27] In a supplemental affidavit in support of a claim for judicial review, filed on 24th July, 2009, Mr. Shawn K. Richards further deposes, *inter-alia* that: "3. On Wednesday the 8th of July, 2009, at the meeting of the National Assembly the Prime Minister laid in the National Assembly a copy of the 'Report of the Constituency Boundaries Commission' dated 29th June, 2009 submitted by the Chairman of the Constituency Boundaries Commission".

[28] In a further supplemental affidavit in support of a claim of judicial review Mr. Shawn K. Richards again deposes as to his political party's position regarding Electoral Reform in the context of the Recommendations of the Commonwealth Assessment Mission. He however deposes that his party required certain clarification with respect to the several Committees that were being named by the Government.

[29] It is Mr. Richards' evidence that he did not participate in the Electoral Reform Process. He deposes further at paragraphs 10-15 as follows:

> "10. Notwithstanding the PAM's objection to the composition and direction of the several committees, and its principled position of not naming a representative to be on any of the Committees, the PAM actively participated in the Electoral Reform Debate. I was present on the occasions when PAM participated. The PAM after extensive discussions with its members produced a comprehensive Report which was presented to Nationals of the Federation of St. Kitts and Nevis by the PAM Political Leader, Mr. Lindsey Grant, entitled "Electoral Reform a Guarantee for Better Governance in the Federation of St. Kitts and Nevis dated August 18 2006." This Report is exhibited to the Affidavit of Lindsay F. P. Grant in support of the Constitutional Motion and Application for Judicial Review and marked **"LFPG 1**".
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> 11. On August 23, 2006 I attended the launch of the Electoral Process at the Marriott Resort where the PAM Political Leader Mr. Lindsey Grant made a presentation to those present, and called for the removal of the Hon. Sam Condor as the Chairman of the Deputy Prime Minister's Committee.
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> 12. As stated earlier, the PAM participated in the consultative process on Electoral Reform. At the Sandy Point consultations held by the Newton Committee participated and made a presentation on behalf of the People's Action Movement and the Newton Committee understood my presentation to be and accepted it as done by me on behalf of the PAM. I also presented a copy of the PAM's Report exhibited to the Affidavit of Lindsey F. P. Grant in support of the Constitutional Motion and Application for Judicial Review and marked **"LFPG 1"** to the Newton Committee expressly relayed to me and those present at the consultation, including the Prime Minister who was present, that they would characterize my presentation as an official presentation from the PAM Party, and it would be given equal value with the presentations of the other parliamentary political parties.
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> 13. At the same function, Prime Minister the Honourable Dr. Denzil L. Douglas in his capacity as Leader of the St. Kitts and Nevis Labour Party made a detailed and extended presentation on behalf of the St. Kitts Labour Party setting out the vision of the Party with regards to Electoral Reform. The

fact that I made a presentation and that the Prime Minister as Leader of the Labour Party made a presentation was reported in a press release from the Newton Committee posted on their website and the document can be found at http://www.newelectoralframework.gov.kn/releases.asp?PID=25. This release and other releases from the Electoral Reform process were and still are (as of the date of the swearing of this affidavit) linked to and can be accessed from the Prime Minister's Website www.CUOPM.com or www.CUOPM.org. A copy of the press release extracted from the website on the 11th August 2009 is now shown to me and exhibited hereto and marked **"SKR 2**".

14. For the avoidance of doubt, neither I nor the PAM boycotted the Electoral Reform process. We were completely involved in the consultative process conducted by the Newton Committee and were in agreement with most if not all of the recommendations of the Newton Committee most of which, if not all, the government failed to implement. These included (at pg 28 of the Report): (a) the use of fingerprint as a security feature on a Voter ID Card, a recommendation supported by 60% of respondents; and (at pg 30) (b) an enumeration exercise to clean up the Voters List and to gather additional information for the proposed Voter ID Card and to monitor the qualifying residency or address of voters on the registry of voters. The Affidavit of the Honourable Attorney General filed on the 7th August 2009 exhibits the Reports of the Newton Committee and the Archibald Committee and marked as **"DM 11"** and **"DM 13"** respectively.

15. The Government has substantially ignored the recommendations of the Newton Committee and the Archibald Committee and has not to date implemented most of the recommendations made by these Committees. The Government chose to introduce a National Identification card without the recommended fingerprint, supported by PAM and the consultative process which is now not mandatory for use on Election Day at the polls."

[30] At paragraphs 16 to 18, Mr. Richards details certain activities in relation to the Electoral Reform Process by him and his party, both in and out of the House of Assembly. These include a demonstration with respect to Voter ID Cards and his presentation in Parliament on the Bill for the National Assembly Elections (Amendment) Act 2007.

[31] With respect to the Constituency Boundaries Commission and the Electoral Commission, Mr. Richards contends that neither of these two "constitutionally mandated bodies with all their experience either participate in, or contributors to, and definitely not involved in contributing to the Reform process".

[32] The affidavit ends thus:

"21. I have read the Affidavits of Hon. Dennis Merchant, Hon. Sam Condor, and Beverly Harris in answer to the Claim for Judicial Review. Some were expressly stated to the contrary, I deny each and every allegation contained in these affidavits.

22. In relation to the Affidavit of Dennis Merchant, paragraphs 1-6, are neither admitted nor denied. Paragraphs 11 and 12 [are] admitted. Paragraph[s] 18 and 19 are neither admitted nor denied. Paragraph 21 is neither admitted nor denied.

23. In relation to the Affidavit of Sam Condor, paragraphs 1-6 are neither admitted nor denied. Paragraph 7 is admitted. Paragraphs 8-11, 12 are neither admitted nor denied.

24. In relation to the Affidavit of Beverly Harris, I neither admit nor deny any paragraph contained therein."

[33] In cross-examination, Mr. Richards testified that he has been in politics for eight years. He also said that he never studied the subject of politics formally but learned about it by being around politicians and reading books.

[34] It is Mr. Richards' further testimony that he swore a number of affidavits which would have been drafted based on information supplied by him and that he is satisfied that they represent what he wanted to say.

[35] According to Mr. Richards, he represents Constituency No.5 which is bounded on the North by the sea; to the South by a mountain; to the East by Constituency No. 4; and to the west by the Prime Minister's Constituency. He added that Newton Ground is part of the Prime Minister's in which his party received 17 votes in 2004; but although he is aware that the Prime Minister won the seat, he was not aware of the margin.

[36] With respect to the Half Way Tree, Mr. Richards said that it is part of a larger polling division which his party won; but it was not moved into his constituency. According to him, if this were done, he would be at a disadvantage.

[37] As far as the matter of boundaries are concerned, Mr. Richards says that they were changed 1988 and that he has been an elected member of Parliament from 2004 at which time the leader of his party (PAM) was Malcolm Gishard.

[38] In continuing his cross-examination, Mr. Richards testified that he was familiar with the Electoral Commission but that there are no PAM members on that body. He said he was also familiar with the Commonwealth Report which recommended changes to the electoral system including the constituency boundaries. He said further that he agreed that there ought to be changes to the boundaries.

[39] As far as the Governments White Paper on Electoral Reform is concerned, Mr. Richards testified that he was familiar with it as he had seen a copy. He added that it was possible that a copy would have been delivered to the party's executive.

[40] On the matter of the last census in St. Kitts and Nevis, Mr. Richards said that this was in 2001. He however disagreed that his constituency was losing electors.

[41] In terms of the Boundaries Technical Committee ("BTC"), it is Mr. Richards' testimony that he was appointed to that Committee by virtue of SRO18/2006. He said, however, that he did not attend any of the meetings, but that he did attend a town hall meeting which the matter of electoral reform was addressed. He said further that he was aware that the BTC held meetings in his constituency which he attended with Mr. Chesley Hamilton. He added that the political leader of his party did not attend the meeting and he could not recall the executive of his party even discussing the Committee. Nor did he discuss the meeting of the BTC which he attended with the political leader and chairman of his party.

[42] It is Mr. Richards' further testimony that he was instructed by the party to deliver PAM's policy paper to the BTC which was the party's only policy paper. He went on to testify that PAM held meetings in his constituency in New York, in England and other places.

[43] On being cross-examined on the matter of the Constituency Boundaries Commission, Mr. Richards testified that the appointments to this body were made in 2008 but that he did not receive the gazette showing the appointments. He also said that he could not say that the executive of his party discussed the appointments to the Commission.

[44] In so far as correspondence with the Commission is concerned, Mr. Richards' testimony is that the Executive of his party of which he is a member did not write to the Commission and that he did not think he had the right so to do. And as far as he was concerned, the Commission has the power to request proposals.

[45] In re-examination, Mr. Richards testified that he never wrote to the Committee since he was never informed of any of the meetings in what was to be discussed; he was never invited to rebut any proposals on behalf of PAM, himself or his constituents. Additionally, he said that, since Senator Carty would have made a statement indicating what he believed was the purpose of the meeting of the House of Assembly.

[46] In further re-examination, Mr. Richards gave another reason for his failure to attend the Parliamentary Committee Meeting. And it is that on 26th October, 2004, the day after the General Election, he (Condor) stated that there was a possibility that the constituency boundaries would be

changed so that his (Richards') constituency would be changed so as to ensure that he was not re-elected to Parliament.

[47] In terms of small constituencies, Mr. Richards said that he was aware that there were other small constituencies such as No.5, No.3, No.4, as well as No.6 and No.7, plus two in Nevis.

[48] With respect to the matter of the failure of the Commission to contact him, Mr. Richards gave reasons as to why this should have been done. These included; being the representative for Constituency No.5, being a member of PAM, being a registered voter, his view on the impact of boundary changes were necessary in the context of free and fair elections as contained in the Constitution of St. Kitts and Nevis and the impact of work a candidate would have to do with the changes in boundaries.

[49] Finally, Mr. Richards testified that the mere fact he did not have an opinion on changes to the constituency boundaries would not have affected his ability to respond once given the information.

Lindsay F. P. Grant

[50] Mr. Lindsay in his affidavit filed on 14th August, 2009, in support of the constitutional motion says that he is the political leader of the Peoples Action Movement.

[51] In his contention that there were "gross irregularities" conducted during the 2004 Election as result of which actions were filed in the High Court. In this context, Mr. Grant deposes that PAM welcomed the Commonwealth Assessment Mission which visited St. Kitts and Nevis supported in principle the recommendation made by that body.

[52] It is the evidence of Mr. Grant that from the inception PAM objected to the manner in which electoral reform was being "stage-managed by the St. Kitts Labour Party and Nevis Labour Party Administration to produce a predetermined result as was publicly stated in the statements of the Prime Minister and Deputy Prime Minister".

[53] At paragraphs 9 to 12, Mr. Grant details PAM's position on electoral reform and its participation in the process even in those circumstances. Such participation includes attendance at the launch of the Electoral Process on 23rd August, 2006. At the same time at paragraph 13, Mr. Grant seeks to remove doubt that there was no boycotting of the process by him or PAM. Rather, there was

complete involvement in the consultative process conducted by the Newton Committee and the recommendations resulting therefrom. One such recommendation being, the use of fingerprints as a security feature on a Voter ID Card. According to Mr. Grant, the Government "has substantially ignored the recommendations of the Newton Committee and Archibald Committee and has not to date implemented most of the recommendations made by these Committees."

[54] The affidavit in support of a claim for judicial review filed by Mr. Grant on 10th July, 2009, except for obvious issues relating to identity and political status is substantially similar to the affidavit filed by Mr. Shawn K. Richards on the same date.

[55] On 24th July 2009, Mr. Grant filed a supplemental affidavit[2] in support of a claim for judicial review. In essence, the affidavit concerns the Report of the Constituency Boundary Commission. Therefore at paragraphs 4 to 7, the following is deposed:

> "4. The Report does not contain or include any review of the Constituency Boundaries as mandated by Section 50(1) of the Constitution. I have been advised by my Attorneys-at-Law and verily believe that the Constituency Boundaries Commission, by adopting wholesale in its Report the Report of a committee that is a stranger to the Constitution abdicated it constitutional function.
> 5. I have not seen any factual evidence or anything contained in the Report to support or substantiate the recommendations of the Commission. In my opinion the Report is baseless and devoid of serious analysis, of a review of the changes in the demographics or any explanation for its recommendation other than to adopt Boundaries Technical Committee Report.
> 6. The Boundaries Technical Committee, which was established as set out in the 'White Paper'', based their Boundaries Report on an outdated 2001 Census Statistics which did not account for the many changes in growth and distribution of the population in the Federation.
> 7. The Parliamentary Committee that named the Boundaries Technical Committee on or about the 18th April 2007, was chaired by the Honourable Deputy Prime Minister, Sam Condor who on 25th October, 2004, almost three years before the Boundaries Technical Committee was appointed, predicted that the boundaries would change and that in so doing, neither I, nor any candidate of the Peoples Action Movement, could ever be able to be returned as the representative for a constituency."

[56] At paragraphs 9 and 10 of his said affidavit, Mr. Grant says over the years his party has had to challenge the list of voters and instituted legal proceedings in this connection. That apart, he also contends that the development of residential housing projects since 2001 has led to considerable "internal migration that would not have been reflected in the 2001 census statistics without appropriate adjustments."

[2] Filed 24th July, 2009, and is contained in the Trial Bundle at Tab 33.

[57] It is Mr. Grant's further contention that the changes to the boundaries as stated by the Honourable Prime Minister and which are reflected in the Boundaries Technical Committee Report and later modified by the National Assembly "as it relates to Nevis only do not lead to equal numbers in the various constituencies as required by Rule 2, Schedule 2 of the Constitution."

[58] The remainder of Mr. Grant's evidence in this regard at paragraph 15 reads thus:

> "The Registered Voters per constituency after the Boundary Changes being proposed in the Proclamation signed by His Excellency the Governor General as a result of the Resolution approved by the National Assembly on 9th July, 2009 are from the Peoples Action Movement's compilation of the Official Master List and the monthly listing are as follows:

CONSTITUENCY	NO OF REGISTERED VOTERS
St. Christopher 1	3451
St. Christopher 2	3792
St. Christopher 3	1998
St. Christopher 4	2462
St. Christopher 5	2818
St. Christopher 6	2139
St. Christopher 7	3162
St. Christopher 8	3421
Nevis 9	3906
Nevis 10	1025
Nevis 11	1907

[59] At paragraphs 17 to 21, Mr. Grant examines the margins of the candidates at various General Elections in certain constituencies. And against the backdrop of the foregoing, the following is deposed by Mr. Grant at paragraphs 21 to 25:

> "21. Although the PAM candidates have not won the votes in Polling Division 1 as is shown above. The proposal of the Constituency Boundaries Commission is to remove this Polling Division from St. Christopher 8 and absorb it in St. Christopher 7 where the majority enjoyed by the candidate for the Labour Party, has shown in paragraph 20 herein, can comfortably withstand the transfer of Polling Division 1.
>
> 22. The deliberate attempt at reducing the Labour Party Candidate's majority in one constituency in order to defeat a PAM candidate in another constituency appears to be the objective of the Constituency Boundaries Commission and the Boundaries Technical Committee which dictates the Boundaries Commission follows rather than and contrary and opposed to complying to the rules set out in Schedule 2 of the Constitution.
>
> 23. The effect of the shifting of these particular polling divisions is to weaken those candidates from PAM who were narrowly defeated in the last election and who are the main seats upon which the

party will rely. This is achieved as the system on which a person is returned to the National Assembly is based on what is referred to as the "First past the Post" system where the candidate attaining the most votes in a particular constituency is returned as the representative. If the election was dependent on proportional representation nationally, the boundary changes would have less capacity to impact on the results of who are elected to the National Assembly as it would not matter how the boundaries are drawn.

24. It is against this background that we maintain that there must be strict compliance with the constitutional requirements as to the criteria to be used by the Constituency Boundaries Commission in executing their Constitutional responsibilities.

25. The Honourable Prime Minister in a Press Conference held on Friday 10th July 2009 in an answer to a question asked by the press stated:

> "That is a very good question because twice in Parliament I failed to make that point. What is so beautiful about the work of the Boundaries Technical Committee is that they made that very observation themselves. They said very clearly we do not wish to be disruptive at this time and so the changes that were recommended many of which were endorsed by the Constituency Boundaries Commission are changes along Polling Division lines. So everyone that was in a particular Polling Division and accustomed to voting in a spot will continue to vote in that same very spot. The only difference is that instead of voting for one member of Parliament or Candidate they will be voting for another candidate but there is no disruption at all; no physical disruption. By the click of a button on a computer those who were in polling division lets say number 6 of constituency 3 will automatically by the click of a button now become same polling division number 1 of constituency number 4."

[60] Finally, Mr. Grant advances the following contentions:

1. At Paragraph 28, the change in constituency boundaries at this very late time will affect the holding of free and fair elections and will confuse many of the constituents in those polling districts that have been recommended to be moved.

2. At paragraph 29, the "belief" that the recommendations of the Boundaries Technical Committee were activated by bias, bad faith and a wish to prevent the People's Action Movement candidate from being returned as representatives in the respective constituencies in the National Assembly.

3. And at paragraph 30, "I verily believe that the redrawing of the boundaries is a veiled attempt gerrymander the Constituencies so as to give the St. Kitts Labour Party a competitive advantage given the 'First Past the Post' system under which we operate.

[61] In cross-examination, Mr. Grant testified that he is the political leader of PAM since 2000 and that the policy followed by the party depends on the circumstances and the nature thereof. He said that policy decision delivered at Sandy Point was developed after wide consultation in town hall meetings in St. Kitts, New York, London, United States, Virgin Islands, Anguilla and St. Maarten with the diaspora. He went on to say that Mr. Richards, the deputy leader of PAM was part of the discussion on the policy.

[62] Regarding his style of leadership, Mr. Grant said that he was not aware that he is an aggressive leader but he defends democracy vigorously. Mr. Grant added that he went before the 2004 election he agitated for electoral reform. And regarding boundary changes, it is his testimony that he was not averse to this; but in order for it be relevant, there was a need for an enumeration exercise to determine the real numbers on the ground because there has been significant controversy in this regard.

[63] Concerning the Newton Committee, this is Mr. Grant's testimony: "What I would accept is that the Newton Committee has absolutely nothing to do with boundaries so in the context of this matter they would not have been discussing boundaries in the context of the Constitution and this matter."

Chesley D. Hamilton

[64] Mr. Chesley D. Hamilton in his affidavit in support of the Originating Motion filed on 13th July, 2009, deposes that he is the National Spokesperson for the People's Action Movement and one of his responsibilities is to monitor statements made by Parliamentarians.

[65] According to Mr. Hamilton, on Friday 3rd July, 2009, he saw and heard a certain statement made by the Hon. Prime Minister in the House of Assembly while the sitting was being broadcast on ZIZ Channel 5 Television. This statement referred to some of the Electoral Reform Committees, the Constituency Boundaries Commission and receipt by him of a copy of the Commissions Report from the Chairman thereof.

[66] The deponent makes further reference to another statement in the National Assembly by the Prime Minister on Thursday 9th July, 2009, as carried on ZIZ Channel 5 Television. The statement reproduced concerns the adjournment of court proceedings in order to facilitate discussion on the draft proclamation which embodies the recommendations of the Constituency Boundaries Commission, and an expression of gratitude to the Court for facilitating the process.

[67] Mr. Hamilton was not cross-examined on his affidavits.

Sam Condor

[68] Mr. Sam Condor in his affidavit in answer to the claim for judicial review filed on 7th August, 2009, deposes that he is the Deputy Prime Minister of St. Kitts and Nevis with ministerial responsibility for education, youth, information technology, labour and social security.

[69] At paragraphs 5 to 12, the deponent outlines the events embodied in the electoral reform process following the General Elections of 2004 and the visit of the Commonwealth Assessment Mission and the submission of recommendations. Mention is also made of the White Paper on Electoral Reform, the passage of SRO 18 of 2006 in Parliament and the establishment of certain Committees and the manner in which members of such Committees were selected. According to Mr. Condor, "All appointments received final endorsements of the National Assembly".

[70] According to the deponent, the Committees established were: Electoral Reform Consultative Committee (ERCC); the Boundaries Technical Committee (BTC); the National Advisory Election Reform and Boundaries Committee (NAERBC) and the Parliamentary Constitutional and Electoral Reform and Boundaries Committee (PCERBC).

[71] At paragraph 13, the deponent says that the Boundaries Technical Committee members were appointed solely because of their expertise. He also accepts that the Chairman was previously a candidate of the Labour Party. But according to Mr. Condor, it was in the 1980's and he was selected because he is a well respected land surveyor.

[72] As far Mr. Shawn Richards is concerned, the affidavit says that he was selected to the Parliamentary Constitutional and Electoral Reform and Boundaries Committee (PCERBC). However, Mr. Condor deposes further that Mr. Richards was appointed to every meeting of the (PCERBC) but he never attended. Details of such non-attendance and refusals to attend meetings are detailed at paragraphs 15 and 16 of his affidavit.

[73] With respect to the work of the ERCC, Mr. Condor says that this was by way of public consultations in St. Kitts and Nevis and oversees, and a Report was prepared and submitted to the NAERBC. And in terms of consultation, Mr. Condor deposes at paragraph 18 "All political parties including PAM were invited to take part in the consultation process. All of the political parties took part save and except the People's Action Movement."

[74] At paragraphs 22 and 23, the deponent speaks of the statements allegedly made by him in 2004. In this connection Mr. Condor contends that "if true were made in 2004 in the course of an

emotional celebration after the last election." According to him, "the atmosphere was charged with excitement and it may well be that in the heat of the moment I said those words." He continued: "But these words were allegedly spoken years ago and I had completely forgotten about them until I heard the Claimant's had alleged I uttered them."

[75] Even further, the deponent contends that the alleged utterances were made at a celebration rally and not made after or in relation to the process initiated by the White Paper and SRO 18 of 2006. Motivation by bias is also denied by Mr. Condor. Membership of the Boundaries Technical Committee or The Constituency Boundaries Committee is also denied as well as any attempt to politically or improperly influence the membership of those Committees.

[76] In cross-examination, Mr. Condor testified that he is the Parliamentary Representative for Constituency No.3 but that he does not vote in that constituency.

[77] In reviewing the process of electoral reform, Mr. Condor traced the history of the process commencing with the re-establishment of a Parliamentary Select Committee after the 2000 General Elections on which PAM was not represented because it did not win a seat. He also gave evidence concerning consultations by the Committee and the fact that PAM refused to take part in such consultations.

[78] It is Mr. Condor's evidence that he was aware of PAM's complaint about the voters' list. This he said was the complaint of the entire country and as such the list needed cleaning up. According to Mr. Condor, a re-confirmation process was recommended.

[79] Concerning the words which he allegedly uttered on 26th October, 2004, Mr. Condor admitted that he would have said something like that.

[80] In re-examination, Mr. Condor testified that he could not say that there was a recommendation with respect to Half Way Tree. He said further that he had no interest in the Technical Boundaries Committee Report as he believed that electoral politics go beyond boundaries. Mr. Condor re-stated the fact that he played no part in Boundaries Technical Report.

Anthony Johnson

[81] Mr. Anthony Johnson's affidavit in response was filed on 7th August, 2009. In it Mr. Johnson deposes that except where stated to the contrary, he denies each allegation contained in the Fixed Date Claim Form, Amended Fixed Date Claim Form and the affidavits in support deposed by Shawn K. Richards and Lindsay F. P. Grant.

[82] By way of specific responses, Mr. Johnson deposes that the Constituency Boundaries Report was endorsed by all the members of the Commission and the Report came as a result of deliberations held by the Commission pursuant to Section 50 (1) of the Constitution.

[83] In response to Shawn Richards' affidavit filed on 10th July, 2008, Mr. Johnson gives an account of the signing on 2nd July, 2009, of the Report by himself, Hon. Michael Perkins, Hon. Vance Amory in Nevis and Hon. Dr. Earl 'Asim' Martin and Hon. Cedric Liburd in St. Kitts and the eventual submission to His Excellency the Governor General at 2:15p.m. on the same day.

[84] At paragraph 14, certain contentions by Mr. Richards are denied. First, that the Commission had no jurisdiction to submit the Report to the Governor General. The second is that Commission had an obligation to meet with the deponent or his constituents. The third is the allegation of procedural impropriety, bad faith or improper purposes on the part of the Commission. The fourth is that the Report is in breach of Rule 2 Schedule 2 to the Constitution in failing to give reasons for the recommendations made. The fifth is the allegation of bias, conflict with the policy of the legislation and/or contrary to the Constitution. The sixth is breach of Section 49 (3) of the Constitution.

[85] With respect to paragraphs 10 to 15 of Mr. Lindsay Grant's affidavit in support, Mr. Johnson deposes that he relies on the responses at paragraphs 9 to 14 above[3].

[86] Paragraphs 4 and 5 of Mr. Grant's affidavit in support filed on 24th July, 2009, alleges that the Commission's Report does not contain a review of the constituency boundaries, it abdicated to a stranger to the Constitution and the lack of factual evidence to support the recommendations made. In response Mr. Johnson contends that the Report is consistent with the Constitution.

[87] And with respect to the allegation conferred in paragraphs 21 and 22 of Mr. Grant's affidavit in support filed on 24th July, 2009, where it is contended that the Commission's purpose was to

[3] Thus as noted above is because the affidavits of Richards and Grant in support filed on 10th July 2009 are substantially similar.

weaken PAM's chances at winning seats, Mr. Johnson's response is that the Commission was, at all times in its deliberations guided by the need to ensure compliance with Rule 2 of Schedule 2 to the Constitution.

[88] In cross-examination, Mr. Johnson said that he was an attorney-at-law for some 14 years and that he is familiar with the constitutional law of St. Kitts and Nevis to some extent. He then made reference to those Sections which impacted on the Commission.

[89] Continuing his cross-examination, Mr. Johnson gave dates on which the Commission met and the members who were present. He testified that on 20th May, 2009, at its meeting, the Boundaries Technical Committee Report was made available to members and the meeting was then adjourned so as to reconvene on 5th June, 2009, which, according to him turned out to be the Commission's first official meeting. It is Mr. Johnson's further testimony that at this meeting he made a copy of the Court of Appeal decision of Urban Baron available to all members for the purpose of providing them with the legal principles by which members should be guided. For Mr. Johnson: "It was essential that our deliberations stood up to scrutiny if necessary so that members could have an understanding of the legal principles that applied to a matter such as this."

[90] Mr. Johnson gave testimony concerning an invitation to the Technical Committee. He says that this was dealt with at the meeting of the Commission on 5th June, 2009.

[91] In terms the documents which the Commission relied, Mr. Johnson testified that it was Technical Committee Report, the Voters List of May 2009 and the case of Urban Baron which he said was referred to lots of times. In this regard, Mr. Johnson made the point that the voters' list deals with voters but not inhabitants as stipulated in Schedule 2 to the Constitution.

[92] It is the testimony of the witness that in the Commission's deliberations concentration was placed on the issue of the existing boundaries and after consideration was given to Rule 1 of Schedule 2. The conclusion reached was that it was not applicable in these circumstances. He added that there was no discussion on an increase or decrease of the constituencies. The witness continued: "We did review the number of constituencies and the boundaries and we recommended changes to some of the constituencies. The numbers as they are, show that the Commission considered the existing boundaries and then made recommendations." Even on Mr. Johnson's testimony is that: "I simply addressed my mind to the boundaries. Beyond that there is no further reference to it on the minutes."

[93] On being cross-examined on the interpretation of Section 50(1) of the Constitution, Mr. Johnson's testimony runs this: "Section 50(1) has to be read in conjunction with the Schedule. I agree that there is an obligation to review; but I do not and agree that there is an obligation on the Commission to give reasons for the alteration of the boundaries of constituencies." And later he added: Section 50(1) does not require the Commission to review the boundaries and to state that no alteration is required. It is either/or."

[94] Mr. Johnson was next cross-examined on the matter of the Commission's Report. In this connection he explained that it deals with the boundaries to be drawn and that for the purposes of these proceedings the Boundaries Technical Committee's Report should be read in conjunction with the minutes of the Commission's proceedings.

[95] Regarding the specific recommendations in the Commission's Report, Mr. Johnson gave the following testimony:

> "The Commission did not accept the recommendation of the Technical Committee regarding Polling Division 6 of St. Christopher 2. This was substantially the change from the Technical Committee's recommendations. In respect of Nevis the Technical Committee did not recommend a change. However, the Commission recommended that in relation to Nevis, Polling Division of Nevis 9 become part of Nevis 10 and the Polling Division 6 of Nevis 10 become part of Nevis 11. The reasons for the changes in relation to Nevis, given one remit with respect to equality in the constituencies, we felt it necessary after lengthy discussion to recommend the changes that we did. Also for compliance purposes looking at the voters list relating to Nevis and having interviewed two members of the Election Commission we felt that it was necessary to recommend the changes. The two representatives from Nevis (Perkins and Amory) made recommendations but the decision was not limited to those two persons. Having submitted the Report to the Governor General I did not listen to the proceeding in Parliament. I am advised that the recommendations were not included in the Proclamation. My information is that Parliament did not make any changes to the island of Nevis. No recommendations regarding Nevis were made by the Technical Committee."

[96] Giving further testimony regarding the Commission's Report, Mr. Johnson said:

> "We tried to achieve equality in the numbers. The lowest number in the constituencies is 2083 in St. Christopher 3 and the highest is 4048 in St. Christopher 8. There is a variation of some 2000 votes. The average would be 3043 and 20% of that is 608."

[97] In returning to the Technical Commission's Report, Mr. Johnson said that they made changes to every constituency except St. Christopher 6 which is represented by the Prime Minster. The Boundaries Commission made one change to the recommendation of the Technical Committee.

And later in his cross-examination, Mr. Johnson said that he agreed that there was nothing in the Committee's Report about the movement of persons.

[98] In additional evidence on the changes recommended by the Commission, this is what Mr. Johnson said:

> "In some instances we moved an entire Polling Division. The list would have been provided by the Electoral Office. In relation to St. Christopher 5 it was difficult for certain villages and so whether it was the entire Polling Division I cannot say. I agree that it would be important to know how many inhabitants were being moved. The difficulty was that given the census relating to 2001 we had a difficulty in finding common ground. The Technical Committee would have made recommendation to move inhabitants from St. Christopher 4 to St. Christopher 5. The consideration was the question of land for habitation. I also relied on the voters list for compliance purposes."

[99] On the issue of consultation and invitation to persons to attend the meetings of the Commission, Mr. Johnson testified that no members of Parliament were invited to the meetings for 5th June, 2009, and 8th June, 2009. And on the matter of consultation, he said that there is no legal requirement to consult; and the Commission as a body did not express any view regarding the need for public consultation and would not have written to anyone.

[100] Regarding copies of the Commission's Report, Mr. Johnson's testimony is that he did not deem it necessary to deliver a copy of the same to the Leader of the Opposition and as such none was delivered. In like manner he said that one was not delivered to the Nevis Reformation Party or Mr. Shawn Richards. According to him, the only person to whom a copy was delivered was the Prime Minister.

[101] In so far as the matter of free and fair elections is concerned, this is Mr. Johnson's evidence:

> "The Commission thought of its deliberations and the need for its work to bear scrutiny in relation to the conduct of free and fair elections in St. Kitts and Nevis. The Commission paid high regard to its work. Without addressing specifically the issue of free and fair elections it was obvious to all that fairness in our deliberations was important because it would have impacted on the conduct of free and fair elections."

[102] Continuing his testimony in relation to a question relating to the concerns of Mr. Amory, Mr. Johnson said that Mr. Amory did address the issue of the confusion of voters and would have been guided by his concerns. The witness continued his testimony by saying that at the end of the day the Commission's remit was to make recommendations – not to make final decisions. He ended his testimony by saying that: "The recommendations would have taken into account

Mr. Amory's concerns. The issue was not addressed formally by the Commission as we did not consider it to be part of his remit."

[103] Mr. Johnson was crossed-examined on the words: "We are going to do our own on figures" appearing in the numbers of 5th June, 2009, at pages 21 to 22. They were explained in this way: "We meant that we would do our own analysis. It means that they having obtained the figures before we would arrive at our analysis of the matters before us. This related to Otleys and Cayon which comprised one Polling Division. It is possible that we were discussing one box with two villages. This was not done as we got the figures after the meeting ended."

[104] Against the backdrop of the population figures as at 31st May, 2009, Mr. Johnson noted that Constituency 6 was the second lowest and Constituencies 4 and 5 are less than Constituency 6 based on a population census of 2001. He went on to say that recommendations were made with respect to Constituency 8 even though there were no population figures for the areas in Constituency 8. The combined total of 6,374 is referred to as the population for St. Mary's, but I interpreted this figure to be the total for St. Peter and St. Mary. He continued his testimony by saying that for Constituency 2, the total population is not listed separately as there is a combined figure St. George which has 3 constituencies. Mr. Johnson explained that there are figures but they are not put to the respective constituencies.

[105] The Commission's approach to the matter was put in this way by its Chairman, Mr. Johnson:

> "In respect of each of the constituencies I applied my mind to each of them. One focus was to ensure that each received parity in terms of numbers. But given the figures in relation to inhabitants, we thought it was necessary to consider new figures in order to find some common grounds. We did not produce numbers after the changes. We had the figures from 2001."

[106] It was then put to Mr. Johnson that the whole exercise by the Commission was designed to ensure the re-election of the St. Kitts Labour Party. In response, Mr. Johnson rejected the suggestion as being simply absurd and false. According to him, at no time in our deliberations was there a consideration of the election outcome.

[107] It was further put to Mr. Johnson that the Commission did not consult with persons who would be affected by the changes being considered because this would have given them the opportunity to make recommendations. To this, Mr. Johnson responded by saying that the issue of public consultation was not determined by the Commission and that in any event there is no legal requirements unless the constitution so provides.

[108] Still further, it was put to Mr. Johnson that the changes made in relation to Nevis had more to do with satisfying the concerns of the two opposition members from Nevis on the Commission who were determined that the Technical Committee did not recommend any changes to Nevis. And this was Mr. Johnson's response: "That is simply absurd and completely false. In fact, the Commission as a whole discussed the changes on Nevis and there was lengthy discussion and debate. The two members of the Technical Committee were interviewed and there was a cut-off discussion and debate surrounding Nevis given that in terms of population and the members on the voters' list Nevis had a significant difference in relation to the two other constituencies. We sought to effect greater equality in terms of inhabitants by the recommendations made in relation to Nevis. The discussion centered on satisfying the Constitution.

[109] Finally, Mr. Johnson sought to refute the suggestion that the Commission's Report was signed all on one day because the motion was filed initially on 1st July, 2007.

[110] In re-examination, in response to the question of the physical location of a part of Government Head Quarters, Mr. Johnson testified he was familiar with the building to some extent and that Mr. Liburd's Office is adjacent to that of the Prime Minister in the same area.

Beverly Harris

[111] In her affidavit in response filed on 7th August, 2009, Ms. Harris in responding to the supplemental affidavit of Mr. Lindsay Grant, filed on 24th July 2009, deposes that it is incorrect to say that the Technical Committee recommendations were based on political considerations.

[112] In response to paragraphs 14, 15 and 22 of Mr. Grant's said affidavit, the following is deposed:

> "14. The changes to the existing boundaries recommended by the Committee were based on the population distribution of the various parishes and constituencies. This is a factor we were required to consider under Rule 2 of Schedule 2 of the Constitution.
> 15. The Committee considered the number of inhabitants in each parish and constituency rather than the voters and this was in compliance with Rule 2 of Schedule 2 to the Constitution.
> 16. The Committee followed the rules of delimitation of constituency boundaries as outlined in Schedule 2 of the Constitution."

[113] In cross-examination, Ms. Harris was further questioned on the White Paper and in relation to page 3 of the document she said that she can see a box with figures in relation to St. George with 3

parts. However, she went on to testify that it is fair to say that you cannot tell which portion of the population belongs to which constituency.

[114] Ms. Harris also gave testimony regarding St. George, St. John and St. Mary in terms of percentage of the population being 41.8%, 13.5% and 18.1% respectively.

[115] In relation to the influx of persons into St. Peter and St. Mary, Ms. Harris said that: "We did not have the figures, but if you looked at the 1991-2001 censuses you can see the drift into these areas."

[116] As far as internal migration is concerned, Ms. Harris' evidence is that this occurred during the inter census years. And she added that after 2001 there had been housing developments but this involved people who were already there and as such they were not counted.

[117] Finally, it was put to the witness that her Committee acted in accordance with the dictates of the Government. Ms. Harris disagreed.

Dennis Merchant

[118] In his affidavit in answer filed on 7th August, 2009, Mr. Dennis Merchant, Attorney General and Minister of Justice and Legal Affairs of St. Kitts and Nevis, at paragraph 5 thereof admits paragraphs 1 to 7 and 12 to 14 of the claimants' affidavit. These paragraphs essentially deal with the fact of one of the claimants being an elected member of the National Assembly, the establishment composition and duties of the Constituency Boundaries Commission as well as the time frame within which Reports are to be submitted by the said Commission to the Governor General. On the other hand, paragraphs 12 and 13 relate to the matter of the proclamation with respect to recommendations contained in a Report submitted by the Commission.

[119] The other matter admitted by Mr. Merchant relates to a press release on the Prime Minister's official website concerning the work of the Commission and certain expectations with respect to the Report of the said Commission.

[120] It is Mr. Merchant's contention that Mr. Richards is not the only Member of Parliament who is not on the Boundaries Commission. And it is his further contention that Mr. Richards was appointed to

the Parliamentary Constitutional and Electoral Reform and Boundaries Committee and that the People's Action Movement indicated to the Cabinet Chief Secretary that they would not partake of the Electoral Reform Process.

[121] The issue of consultation, Mr. Merchant deposes that the Parliamentary Constitutional and Electoral Reform and Boundaries Committee had widespread public consultations throughout St. Kitts from 2006. He deposes further that: "This Committee was tasked with the responsibility of advising the Boundaries Commission in its work but the claimant who was appointed to this Committee refused to participate in the work of this Committee".

[122] At paragraphs 13 and 14 of his affidavit, Mr. Merchant denies the matter recorded at paragraphs 16, 17, 18, 19 and 20 (a) of the Claimant's affidavit. These in essence deal with the "real purpose" of the meeting of 3rd July, 2009, implications of the use of the Report submitted to the Commission, the playing of the Labour Party theme song at functions, statements allegedly made by the Deputy Prime Minister concerning changes and certain fears generated by the submission of a Report by the Commission to the Governor General.

[123] The following is deposed at paragraphs 16, 17 and 18 of Mr. Merchant's affidavit in answer:

> "16. Paragraph 20 (b) is denied for the reason that Section 50(2) of the Constitution does not apply in the present circumstances as this is the first Report of the Boundaries Commission and Section 50(2) only applies where there is more than one Report by the same Commission.
> 17. Further, as stated at my paragraph 10 above their have seen widespread consultations in St. Kitts.
> 18. Paragraph 20 (c) is denied and I repeat my paragraph 7 above."

[124] The fears expressed by the Claimant at paragraphs 20 (d), 20 (e) (i) and (ii), 20 (f) and 21 concerning lack of consultation and the hurried and summary alternation of boundaries are all denied by Mr. Merchant at paragraphs 19 to 23 of his affidavit in answer. And as regards the matter of the Court's lack of jurisdiction by virtue of 50 (7) of the Constitution, if a Proclamation is made, Mr. Merchant contends at paragraph 23, that any Report submitted by the Commission is amendable to judicial review.

[125] With respect to the issue of the submission of the Report to the Governor General, Mr. Merchant accepts that it was so submitted on 2nd July, 2009, at around 2:15 p.m.

[126] Finally, at paragraphs 25 and 26, Mr. Merchant deposes as follows:

> "25. Further, the Boundaries Commission was appointed on 24th September 2008 and the Claimant did not raise any concerns to the Constitution of the Commission.
> "26. The claim by way of originating motion is wholly misconceived and improper and I pray that this Honourable court be pleased to dismiss this matter with costs to the defendants".

[127] In cross-examination, Mr. Merchant acknowledged that on 1st July, 2009, the first matter (being SKBHCV 2009 No. 159) commenced and on 2nd July, 2009, an injunction was granted in the said matter forbidding the use of the Constituency Boundaries Commission Report. He said further that on 3rd July, 2009, he applied to set aside the injunction. That application was heard on 6th July, 2009, and the decision refusing the application was handed down on 8th July, 2009. The decision according to Mr. Merchant was that the injunction would continue until the matter is heard.

[128] Continuing his testimony, Mr. Merchant said that on the morning of 8th July, 2009, he understood that the injunction was still in force. He testified further that on that said day he applied for an adjournment the purpose of which was to enable me to attend the House of Assembly which he did. Mr. Merchant went on to say that at that meeting of the House of Assembly the only purpose was to lay the Report, and there was a draft proclamation based on the Report. Mr. Merchant again testified that at that stage the injunction was still in force and on 9th July, 2009, Parliament met again. He explained that in this circumstance he was found to be in contempt and has appealed.

[129] In further cross-examination, Mr. Merchant was questioned with respect to the matter of consultation, mentioned at paragraph 17 thereof said that Boundaries Commission and the Technical Committee did not have widespread public consultation in St. Kitts as far as he was concerned and did not concern itself with PAM or the St. Kitts Labour Party.

[130] In so far as the White Paper is concerned, Mr. Merchant said that he read information to the effect that the voters' list was corrupted since names are on it that should not be there.

[131] It is Mr. Merchant's testimony that he is familiar with the Elections Commission under Section 33 of the Constitution but that he could not say if it played any part in the Electoral Reform Process.

[132] Regarding SRO 18 of 2006, the learned Attorney General testified that it is subsidiary legislation and Section 37 of the Constitution is the enabling law. However, he went on to point out that the Electoral Reform Process began in 2006 and he became Attorney General in September 2006 and as such he was not responsible for the subsidiary legislation in issue.

[133] With respect to the various Committees established for the purpose of the Electoral Reform Process, Mr. Merchant's testimony is that he was aware that they were established by April 2007 but was not aware that no members of the Constituency Boundaries were appointed when the Committees' Report was laid in Parliament.

[134] Mr. Merchant was not re-examined.

ISSUES

[135] At the stage of case management counsel both sides were requested to submit a list of agreed issues. This was done, and the modest amount of seventeen issues was submitted; and to these the Court has added one additional issue. This relates to the constitutional status of the Constituency Boundaries Commission. Accordingly, with some combinations, the following are the issues to be determined by the Court:

1. What is the exact constitutional status of the Constituency Boundaries Commission?

2. Whether Section 50(2) of the Constitution is mandatory?

3. What is the proper construction of Section 50(2) of the Constitution?

4. Whether the Claimant's have rights under the preamble to free and fair elections and under Sections 3 and 10 of the Constitution been breached?

5. What is the effect, if any, of Section 50(7) of the Constitution on these proceedings?

6. What effect, if any, does the breach of the Court injunction of 2nd July, 2009, have on the issue?

7. Did the National Assembly have the competence to enact SRO 18 of 2006?

8. Did SRO 18 of 2006 unlawfully usurp the function of the Constituency Boundaries Commission?

9. Do the pleadings or evidence disclose a description of the nature of the claim in accordance with Part 8.6 of CPR 2000, and whether the same are in compliance with Part 56.7 of CPR 2000 in general and in particular with respect to the needs of judicial review namely, bias, bad faith, improper/improper purposes relevant and irrelevant considerations, right to be heard/duty to consult, procedural impropriety, failure to give any or any proper reasons for proposed changes.

10. Whether the pleadings and/or the evidence show that the Constituency Boundaries Commission failed to consider and/or apply the Rules under Schedule 2 of the Constitution?

11. Did the Claimants waive their rights to be heard, if any, by the Constituency Boundaries Commission and ought they by their conduct to be denied relief?

12. Does the burden of proof lie on the Claimants or the Respondents?

ISSUE NO. 1

What is the exact status of the Constituencies Commission established by Section 49 (1) of the Constitution?

[136] Section 2 of the Constitution is clear and unambiguous in its purpose. It establishes that "this Constitution" is the supreme law. It is worded thus:

> "2.This Constitution is the supreme law of Saint Christopher and Nevis and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution. This Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

[137] Section 49 (1) of the Constitution establishes a Constituency Boundaries Commission in these terms:

> "49-(1) There shall be for Saint Christopher and Nevis a Constituency Boundaries Commission (hereinafter in this Section referred to as the Commission) which shall consist of:
>
> (a) a chairman appointed by the Governor General, acting in accordance with the advise of the Prime Minister given after the Governor General has consulted the Leader of the Opposition and such other persons as the Governor General, acting in his own deliberate judgment, has seen it fit to consult;
>
> (b) two members of the National Assembly appointed by the Governor General, acting in accordance with the advice of the Prime Minister; and
>
> (c) two members of the Assembly appointed by the Governor General, acting in accordance with the advice of the Leader of the Opposition:
>
> Provided that the chairman shall not be a member of the Assembly or of the Nevis Island Assembly."

[138] Apart from the composition of the Commission, it is significant to note the provision says expressly that the Chairman must be a person other than a member of the National Assembly.

[139] Subsection (2) prescribes the circumstances in which members shall vacate his office on the Commission. One such circumstance is on the next dissolution of Parliament after his appointment.

[140] Subsections (3) and (4) are equally important. This is what they say:

> "(3) The Commission may regulate its own procedure and, with the consent of the Prime Minister may confer powers and impose duties on any public officer or on any authority of the Government for the purpose of the discharge of its functions.

(4) The Commission may, subject to its rules of procedure, act notwithstanding any vacancy in its membership and its proceedings shall not be invalidated by the presence or participation or any person not entitled to be present at or to participate in those proceedings: Provided that any decision of the Commission shall require the concurrence of a majority of all its members."

[141] Section 50 (1) of the Commission is critical to the Commission as it gives to that body the function of reviewing the number and boundaries into which St. Christopher and Nevis is divided. This it must do "in accordance with the provision of this Section," being the said Section 50.

[142] Given the above, the exact status of the Commission may be determined by reference to the prescribed constitutional indicia. They are as follows:

1. Sections 49 and 50 of the Constitution are entrenched at the highest level by virtue of Section 38 (3) and Schedule 1 to the Constitution.

2. The membership of the Commission and the method of appointment and cessation of such membership are not in doubt.

3. The Commission may regulate its own procedure.

4. With the consent of the Prime Minster may infer power and impose duties on any authority of the Government for the purpose of the discharge of its functions.

5. The Commission may act notwithstanding any vacancy in its membership.

6. Action of the Commission shall not be invalidated by the presence of any person who is not entitled to be present at or to participate in those proceedings.

7. The Constitution vests in the Commission exclusively the function of reviewing the number and boundaries of the constituencies in Saint Christopher and Nevis.

8. The method and procedure pursuant to which the functions are to be made or carried out are also prescribed by Section 50 as a whole.

[143] Therefore, the indicia that are critical to the matter of the exact status of the Commission are: the entrenchment of Sections 49 and 50 at the highest level, the grant of an exclusive function, and the power to regulate its own procedure.

Conclusion

[144] It is therefore the conclusion of this Court that the Commission is a body established to exercise the exclusive jurisdiction of reviewing the electoral boundaries in St. Kitts and Nevis. More than

that, the provisions of the Constitution which relate to it are deeply entrenched, and as such, beyond the ordinary law-making process of Parliament.

ISSUE No. 2

Whether Section 50(2) of the Constitution is mandatory or directory?

[145] Part 4 of Chapter IV of the Constitution bears the rubric of Delimitation of Constituencies. In the regard Section 49 establishes the Constituency Boundaries Commission while Section 50(1) vests the said Commission with a certain power of reviewing the constituency boundaries and render Reports to the Governor General at the prescribed intervals.

[146] Section 50(2) of the said Section, being the subsection in issue, reads thus:

> "(2) Reports under subsection (1) shall be submitted by the Commission at intervals of not less than two nor more than five years."

Submissions

[147] The basic submissions on behalf of the Claimant are as follows:

> 1. Non-compliance in the present case is so gross that the Report is not to be regarded as valid. Based on the test set out in [Administrative Law - Wade and Forsyth, 8th ed at pp. 227-228] as to what the Court should consider when the legislation does not make it plain as to the effect of non-observance, the Court must do what is just and find the Report null and void.
>
> 2. If the Court finds that "shall" in Section 50(2) of the Constitution is mandatory, and that there is non-observance by CBC and that the non-observance has not been rectified, then we submit that the Report of the CBC is null and void.
>
> 3. Section 50(2) is mandatory in that no core problem exists. Rather, the Section as couched in mandatory language, it is a deeply entrenched constitutional provision (supreme law) and, the consequences of failure to comply with the same are expressly spelt out in the Constitution, namely, relief in the form of declaratory and other relief by the High Court.
>
> 4. Further and/or alternatively, should the core problem be relevant in the case at bar, the Claimant submits that the test in A-G Reference No 3. approved in … Soneji be applied. In applying the test, it is necessary to construe the relevant provision of the SKN Constitution.[4]

[148] For the Respondents, the following are the submissions:

[4] In terms of authorities the Claimant places reliance on the following cases: R v Soneji [2005]4 All E R 321; the State of Maurituis v Khoyralty [2006] UNPC 13; Constituencies Boundary Commission v Baron [2001] 1 LRC 25; Kauesa v Minister of Home Affairs [1994] 2 LRC 263.

"1. The Claimants rely on several authorities in their attempt to convince the Court that Section 50(2) is mandatory. All have very different factual and constitutional contexts. However, all of the authorities speak to the 'consequences of non-compliance' as the litmus test. But the Claimants never address the 'consequences of non-compliance'. If the Claimants are right, and Section 50(2) is mandatory, which is denied, there could never be revisions to boundaries ever again in this Federation notwithstanding a serious need for revision except by a constitutional amendment. This surely was never the intention of the drafters of the Constitution.

2. The issue of the effect of non-compliance was also considered by the Privy Council in Charles v JLSC PCA No. 26 of 200. At paragraph [11] the Right Honourable Justice Tipping said that the answer as to whether non compliance with a time limits will deprive an authority of jurisdiction.

> "… involves an examination of (i) the role of regulation 90, and its individual parts, in the overall regulatory scheme, (ii) the purpose and policy of the time provisions, and (iii) in the end a judgment as to whether those who promulgated the regulations intended that breach of a time limit should deprive the Commission of jurisdiction, thus rendering any later purported decision or determination null and void."

3. The Court ought therefore to consider the fundamental role of the CBC, the need to revise boundaries in accordance with Schedule 2, and the absurd consequences, and great public inconvenience, which would result from a mandatory construction. The failure to revise boundaries in the face of the evidence that revision is required and necessary can and would jeopardize the democratic idea of free and fair elections. Disparities in population, geographical features and representation would remain unabated and undermine the principle of proper representation. Therefore, if compliance with the Rules under Schedule 2 is a requirement for free and fair elections, a mandatory construction may well subvert that requirement by depriving the CBC of jurisdiction to act. Such destructive and undemocratic consequences were clearly not intended by the drafters, and require the Court to construe Section 50 (2) as directory only and as not affecting the jurisdiction of the CBC. [See Montreal Street Railway Company v Normandin [1917] AC 170 at page 174 to 175, Tab [20].]

4. Further or alternatively, the Court should consider the failure of the Claimants to take action since 1988. If Section 50(2) is to be construed in the manner suggested by the Claimants, they took no action and never applied for mandamus or any other order under the provisions of Section 96 or at all to compel the appointment of the CBS for over 20 years. This inaction lends support to the Respondents' case that Section 50(2) ought to be construed as directory only. In view of this delay, the Court ought not to exercise its discretion in favour of the Claimants under Section 96 of the Constitution.

5. Properly construed, there was no contravention of Section 50 (2). However, even if the Court was to find that there has been a breach or breaches of Section 50 (2) may give rise to a Declaration, but it does not go to jurisdiction of the CBC or operate as a complete and absolute bar. The Claimants would have been entitled to Declarations and mandamus had they acted promptly. But the Court would not issue a prohibitory order in the sense of forever precluding the CBC from acting or submit a Report to the Governor-General merely because there has been no Report since 1988. This would subvert the provisions of the Constitution. At best, the Report by the CBC has the effect of remedying any past failure to submit a Report under Section 50 (2) of the Constitution.

6. Section 50 (2) ought to be construed in the context of Sections 49 and 50 and the framework for election in order to ascertain the true legislative or constitutional intent."

Analysis

[149] St. Kitts and Nevis may be classified as a parliamentary democracy. And its Constitution, like that of Jamaica and countries of the New Commonwealth, embodies the Westminster Model of government.[5]

[150] The Westminster Model of government itself has been given these constitutional attributes:

> "The Westminster model is a term that will never appear in legal dictionary, and the political scientist may also prefer to handle it circumspectly. In its index-sense it may be understood to comprise all the main features of the British Constitution. In its narrower sense in which the term is here used – the Westminster model can be said to mean a constitutional system in which the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature**."** [6]

[151] In relation to the Constitution of St. Kitts and Nevis the establishment of the legislature,[7] the provisions exist for appointment of a Governor General,[8] Prime Minister,[9] a Cabinet,[10] and Electoral Commission[11] and a Constituency and Boundaries Commission.[12] Therefore de Smith's learning gives rise to the unquestioned proposition that elections are a fundamental constituent of a parliamentary democracy and by extension the Westminster model of government.

[152] Given the foregoing, Section 50 is undoubtedly part of the equation so that the context narrows even further for the consideration and construction of, in essence, "shall" in subsection (2) thereof. And learned Counsel for the Respondents is correct in saying that: "Section 50(2) ought to be construed within the context of Section 49 and 50, and the framework for elections, in order to ascertain the true legislative or constitutional intent.**"**[13]

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[5] See generally: S.A. de Smith, The New Commonwealth and Its Constitutions, [1964).
[6] de Smith, op cit, at pp. 77-78. See also: Hinds v the Queen [1977] A.C. 195, 212-213 per Lord Diplock.
[7] See: Constitution of St. Kitts and Nevis, Section 25
[8] Ibid, Section 21.
[9] Ibid, Section 52 (1)
[10] Ibid, Section 53 (1)
[11] Ibid, Section 33
[12] Ibid, Section 49 (1)
[13] Submission on behalf of the Respondents (Filed 28th August 2009) at page 5, para 7.

[153] The same point is made by the Claimants in their reliance on the following from Wade and Forsyth: Administrative Law[14]:

> "Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or defect which entails the drastic penalty of invalidity… The distinction [between Mandatory and Directory] is not quite so clear-cut as this suggests, since the same condition may be both mandatory or directory: mandatory as to substantial compliance, but directory as to precise compliance. Where, for example a local authority were empowered to assess coast protection charges on landowners within 6 months but did so after twenty-three months, the delay was so excessive that there was total non-compliance with the condition, and the assessments were void; but had the excess been a few days only, they would probably have been valid. The court may readily find reasons for overlooking irregularities which are trivial or unimportant or merely technical, or which lead to no unjust or unintended consequences.
>
> Sometimes the legislation makes it plain what the effect of non-observance is to be. But more often it does not, and then the court must determine the question. This the court does by weighing the inconvenience of holding the condition ineffective against the inconvenience of insisting upon it rigidly. It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights and the claims of the public interest…The court must look for the statutory intention and seek to do what was just in all the circumstances."

[154] But that is where the agreement ends as the Claimants contend that the Section in issue is mandatory while the Respondents say that it is merely directory.

[155] In the circumstances, therefore, the Respondents place reliance on this ruling of the Privy Council in Montreal Street Railway Co. v Normandin:[15]

> "Where the provisions of a statue relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of that duty would cause serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect to them, though punishable, not affecting the validity of the acts done".

[156] As indicated before, the Claimants rely on R v Soneji and another,[16] a decision of the House of Lords. But prior to that ,the Privy Council had analyzed the issue in Charles v Judicial and Legal Services Commission.[17]

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[14] 8th ed. At pp. 227-228
[15] [1917] AC 170, 1775
[16] [2005] 4 AU 5 R 321
[17] [2002]UK PC 34

[157] The legal context of the Charles case is regulation 90 of the Public Service Commission Regulations under which several time limits were prescribed. In the main, these time limits (ranging from 3 days to 7 days) related to the time within which the investigating officer is required to effect certain administrative acts after a complaint of indiscipline or misconduct.

[158] In the midst of the traditional learning being that such requirements qualified by the word "shall" are mandatory, Mr. Justice Tipping speaking for the Board reviewed a list of authorities[18] and quoted extensively from them including the following from the dictum of Lord Penzance in Howard v Bodington[19] which reads thus:

> "Still, whether the language; the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of the, should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would feel that there are matters which must be strictly obeyed otherwise the whole proceedings that subsequently follow must come to an end."

[159] At paragraph 12, Mr. Justice Tipping reasoned further in this way:

> "The terms of regulation 90 have already been set out. At the outset their Lordship observe that it seems highly unlikely that the Commission can have intended breaches of time limits at the investigation stage would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct. A self imposed fetter of such a kind on the discharge of an important public function would seem inimical to the whole purpose of the investigation and disciplinary regime. The proposition that this was intended is also hard to reconcile with the then existence of Section 129(3) precluding inquiry into procedural irregularities not of a fundamental kind (see Thomas v Attorney General of Trinidad and Tobago
> [1982] AC 113, PC)."

[160] His Lordship concluded in this way at paragraphs 17 and 18:

> "17. If a complaint is made about non-fulfillment of a time limit the giving of relief will usually be discretionary. This discretionary element to which Lord Hailsham referred underlines the fact that problems arising from breach of time limits and other like procedural flaws are not generally susceptible of rigid classification or black and white, a prior rule. With this in mind, their Lordships note that in the present case the delays were in good faith, they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised, and no fundamental human rights are an issue.

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[18] Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286; London and Clydeside Estate v Aberdeen District Council [1980] 1 WLR 182; New Zealand Institute of Agriculture Science Inc. v Ellesmere County [1976] 1 NZLR 630; Howard v Bodington [1877] 2 PD 20; Liverpool Borough Bank v Turner [1960] 29 LJ (Ch) 82; Thomas v Attorney General of Trinidad and Tobago [1982] AC 113.

[19] [1877] 2 PD 203, 210.

> 18. Bearing in mind the relevant aspects of regulation 90 and its regulatory environment, and the other relevant circumstances of the case. Including the lack of significant impact of the time defaults on the appellant, their Lordships came to the clear view that the regulations cannot have been framed with the intention that breaches of the kind in issue would deprive the Commission of jurisdiction to act as it thought fit on the investigating officer's Report and thereby fulfill its public responsibilities."

[161] The latter case is R v Soneji and another[20] which, in essence, concerned a failure to make confiscation order with respect to the proceeds of criminal conduct with a six-month period as prescribed by Section 72A (3) of the Criminal Justice Act 1988. The Court of Appeal had quashed two confiscation orders outside of the six month period and the House of Lords allowed the appeal by the Crown.

[162] In the House of Lords, Lord Steyn gave the leading judgment with the other Law Lords giving separate concurring judgments allowing the appeal.

[163] Lord Steyn, under the heading "The Core Problem" had this to say at paragraph [14]:

> "A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory; a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance."

[164] His Lordship then reviewed the authorities on mandatory and directory legislative requirements and came to the conclusion at paragraph [23] that:

> "[T]he rigid mandatory and directory distinction, and its many artificial requirements have outlined their usefulness. Instead, as held in A-G Ref (No. 3 of 1999), the emphasis ought to be the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would what is ultimately a question of statutory interpretation. In my view it follows that the Court of Appeal was incorrect."

[165] In applying the test of whether or not Parliament intended total invalidity, Lord Steyn rejected arguments relating to the strict approach to the construction of a criminal law statute, the intent of Parliament on a specific time limit being rendered nugatory and the injustice caused by the delay.

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[20] [2005] UKHL 49

And with respect to the latter, His Lordship said this at paragraphs [24] and [25]: "The prejudice to the two accused was not significant. It is also decisively outweighed by the countervailing public interest in allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process. In my view, an objective appraisal of the intent, which must be imputed to Parliament points against total invalidity of the confiscation orders."

Analysis

[166] It must now be common on ground that the test which must be applied in the context of the interpretation of the word 'shall' in Section 50(2) is whether or not in this case the Constitution intend total invalidity where there is non-compliance. With that said it must be equally common ground that the case of Montreal Street Railway Company v Normandin has been overruled *sub-silentio.*

[167] Also, in applying the test as enumerated in the Charles case and the Soneji case the fact that the factual matrix and legislation in one case was regulations and in the other, a criminal statute.

[168] Therefore, in applying the test in this context, the following factors must be brought into the equation: Section 50(2) is part of the Supreme Law of the land and its deeply entrenched; the fundamental role of the Constituency Boundaries Commission generally, and in particular, the connection between the Commission and the holding of free and fair elections; the powers of the Commission in making recommendations with respect to boundaries so as to ensure that there is equality of representation; and the place occupied by elections in a parliamentary democracy such as St. Kitts and Nevis.

[169] In seeking to say that Section 50(2) of the Constitution is directory, learned counsel for the Respondents submitted that one of the consequences of holding the provision to be mandatory is that there could never be a revision of boundaries except by a constitutional amendment. The only point the Court will make in this regard is that Section 50 is just one of the provisions mentioned in Part I of Schedule I to the Constitution.

[170] Lord Steyn did say in the Soneji case that in the end the issue of the intent of Parliament comes down to a matter of statutory interpretation. In this case, it is constitutional interpretation and the principles have been outlined above. And one of the principles is that absurdities should be avoided.

[171] Whether Section 50 is amended textually or non-textually, the procedure for alteration prescribed by Section 38(3) becomes operative. This is said because, as learned counsel for the Respondent has submitted, a mandatory construction of Section 50 of the Constitution means that so long as the Commission does not perform its duty, it thereby lacks jurisdiction. According to him, in order to restore jurisdiction, legislation would have to be enacted to comply with Section 38(3) of the Constitution: a 90 day interval between first and second reading of the Bill; approval by a ⅔ majority of all the Representatives in the National Assembly and approved by ⅔ majority of all votes validly cast on a referendum, both in St. Kitts and Nevis.

Conclusion

[172] Applying the reasoning in the cases of **Charles** and **Soneji**, it is the determination of the Court that Section 50 (2) is directory but there are factors which could render it otherwise. This is because in holding the provision to be directory in the **Charles case** Mr. Justice Tipping[21] made mention of the absence of "no material prejudice, no fair considerations were or could be raised and no fundamental human right was in issue." In other words, it depends on context and circumstances.

Issue No. 3

What is the proper construction of Section 50 (2) of the Constitution of St. Kitts and Nevis?

[173] Section 50 (2) of the Constitution provides that: "Reports under subsection (1) shall be submitted by the Commission at intervals of not less than two or more than five years."

[174] A proper construction of the provision calls for a determination as to whether the Commission is one body that continues to exist regardless of any change in its membership; or whether it becomes a new body once the membership changes especially following a General Election. The other matter for construction is the phrase "at intervals".

[175] Ms. Mia Motley, QC on behalf of the Claimant submits the following:

> "[T]he CBC is an institution established in 1983 by Section 49 (1) of the SKN Constitution and as such continues as an institution notwithstanding any changes in its membership. Indeed the CBC since establishment by the Constitution is an institution in perpetuity (until the relevant provisions of the Constitution are lawfully amended) and carries on its business irrespective of the individual/members

[21] At paragraph 17.

who comprise its membership. Any acts done or omissions done by the CBC as such are enforceable or not enforceable irrespective of the persons who comprise the CBC."

[176] Ms. Motley also prays in aid certain of the Transitional Provisions in Schedule 2 to the Constitution Order.

[177] Learned senior counsel for the Respondents, Mr. Astaphan, SC, in his written submissions at page 45, at footnote 9, says that: "The Respondent will make more detailed submissions on the proper construction of Section 50 (2) later in this document."

[178] In fact there are submissions but they concern the mandatory/directory issue as it relates to the said Section 50 (2). However, it will be recalled that in his affidavit in response, the Honourable Attorney General at paragraph 16 deposed that:

> "Paragraph 20 (b) [in which the Claimant expresses fear of the submission of a Report by the Commission contrary to Section 50 (2)] is denied for the reason that Section 50 (2) of the Constitution does not apply in the present circumstances as thus is first Report of this Boundaries Commission and Section 50 (2) only applies where there is more than one Report by the same Commission."

The Relevant Transitional Provisions

[179] In issue are paragraphs 3(1) and 3(9) of the Transitional Provisions in Schedule 2 to the Order. They provide thus:

> "3(1) Until the next dissolution of Parliament, the number of constituencies into which St. Christopher and Nevis is divided, and their respective boundaries, shall, for the purpose of the election of Representatives, be the same as those of the constituencies into which Saint Christopher and Nevis was divided immediately before 19th September 1983 for the purpose of the election of members of the House of Assembly under the former Constitution; and that number and those boundaries shall be deemed to have been established under Section 50 of the Constitution.
>
> (9) For the purpose of Section 50 of the Constitution, the Constituencies Boundaries Commission shall be deemed to have carried out a review of the number and boundaries of the constituencies and to have submitted the relevant Report on 9th May 1979."

[180] The Respondents make the following submissions in relation to the Transitional Provisions:

> "The Claimant rely on paragraph 3 (1) and (9) of the Transitional Provisions, but such reliance is misplaced. Paragraph 3 (1) is part of the Transitional Provisions and begins with the words "Until the next dissolution of Parliament." These are unambiguously, words of limitation. The clear constitutional mandate conveyed by these words was that the boundaries carried over under paragraph 3 (1) of the Transitional Provisions were not intended to go beyond "the next dissolution of Parliament" after the coming into force of the 1983 Constitution.

> Further, paragraph 3 (9) is a mere deeming provision. Therefore, it must be read subject to paragraph 3 (1) of the Transitional Provisions. Properly construed, paragraph 3 (9) provides the lawful basis for the boundaries carried over under paragraph 3 (1). This submission is fully supported by the words "…..9th May 1979..." in subsection (9). The 9th May 1979 is a date which preceded the coming into effect of the Constitution. Consequently, read in context with paragraph 3 (1), which provided for the boundaries of the constituencies "until the next dissolution of Parliament", the Report deemed to have been carried out under subparagraph (9) cannot be construed as applying after "the next dissolution of Parliament" or as the bench mark for the construction of Section 50 (2)."

Is the Commission a single body?

[181] It is the view of the Court that bodies and institutions established by a Constitution continue regardless of membership. Therefore, bodies like Parliament, the Cabinet and the Judiciary continue unless altered as in the manner prescribed by the Constitution.

[182] It is clear to the Court that Section 50 and the Transitional Provisions cannot be divorced from the Commission. There is a serious link. And it would create a constitutional absurdity to say that Section 50 (2) and paragraphs 3(1) and 3(9) are speaking of two different Commissions.

[183] VCRAC Crabbe, **Legislative Drafting**, in discussing a transition provision describes it as: "A provision intended to facilitate a transition from one statute to another or a provision that is intended to apply for a limited period…."[22] Along the same lines, Francis Benion, **Statutory Interpretation**, has this to say:[23]

> "Where an Act contains substantive, amending or repealing enactments it commonly also includes transitional provisions which regulate the coming into operation of those enactments and modify their effect during the period of transition. Where the act fails to include such provisions expressly, the court is required to draw such inferences as to the intended transitional arrangements as, in light of the interpretative criteria, it considers Parliament to have intended."

[184] Whatever the learned authors say in relation to statutes, applies equally to constitutions. And in the case of St. Kitts and Nevis paragraph 3 (1) speaks of ***inter alia,*** "the former Constitution."

[185] The former Constitution is Schedule 2 to the Saint Christopher and Nevis and Anguilla Constitution Order 1967[24] which was revoked by the present constitution with effect from 19th September, 1983.

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[22] (1998) at page 135
[23] (1992) (2nd ed.) at page 213
[24] S. I. 1967 No. 228 (UK)

And significant of this issue is the fact that the former Constitution established "a Constituency Boundaries Commission" and vested it with the duty to reviewing the constituency boundaries.

[186] Therefore, in the context of transition from one constitution to another, it cannot be misplaced as counsel for the Respondents contends, to rely on the transitional provisions. The learning from Crabbe and Benion show that this is the purpose of such provisions. Thus, paragraph 3(1) preserves the constituency boundaries as at 19th September, 1983, "Until the next dissolution of Parliament"; while paragraph 3(9) speaks to the Constituency Boundaries Commission. This can only be that which was established by the former Constitution.

[187] But paragraph 3(9) cannot be dismissed as a "mere deeming provision." It is a technical term used by Parliament. It creates a legal fiction whereby the Commission is deemed to have carried out a review of the number and boundaries of the constituencies and to have submitted a relevant Report thereon on 9th May, 1979. The importance of this legal fiction with respect to the continuity of the Commission is patent.

[188] By a legal fiction Parliament or other authority[25] renders a person, a body, or even a draft order with a status which in fact it does not or may have. In this case, the Constitution deems the Commission to have done certain things with respect to a Report and that ends the matter as the supreme law has spoken – *cadit questio.*

Construction of the phase "at intervals"

[189] Regardless of what the Commission may or may not have done prior to 9th May, 1979, the Constitution says that it carried out a review on that date and submitted the relevant Report thereon. This is "For the purposes of Section 50 of the Constitution."

[190] It means therefore that future reviews and Reports are to be measured from 9th May, 1979, at intervals of not less than two or more than five years.

[191] It is therefore the conclusion of the Court that Section 50(2) of the Constitution cannot be construed without reference to paragraphs 3(1) and 3(9) of the Transitional Provisions. And this means that the Commission's reviews and Reports are to be carried out at intervals of not less than two nor

[25] Upon application in Chambers a Judge may deem a list of documents, a witness statement or the like filed out of time to have been properly filed.

more than five years from 9th May,1979. Thus paragraph 3(9) gives life and purpose to Section 50(2) of the Constitution. And Section 50(2) is very relevant in the present context.

[192] Given the learning on the circumstances of the Report, the Court is of the view that 'shall' in the Constitution could not have intended the consequence of holding otherwise. And as before, the word could be construed as being mandatory if the circumstances warrant it.

[193] As far as the twenty year interval is concerned, there is no evidence before the Court to indicate that certain consequences flowed from the non-submission of the Report. And at this point, what must be brought into the question is the fact that the new members of the Commission were only appointed in September 2008.

Submission to the PM

[194] The Chairman of the Commission revealed evidence that a copy of the Report was given to the Prime Minister prior to the submission to the Governor General. This is contrary to Section 50 (1) which prescribes the reverse order.

[195] Learned counsel for the Report sought to excuse or minimize this event by saying that the period involved was one hour. This must be rejected. Instead, the rulings, in relation to the directory/mandatory distinction, which hold that that requirement in this context must be treated as being directory, must be applied.

The Report of 2009

[196] With the question of the meaning settled, the question that arises is whether the Commission's Report of 2009 was submitted in accordance with Section 50 (2) of the Constitution.

[197] It is common ground that the Commission submitted Reports in 1979, 1983 and 1988. However, in narrow arguments, the sub-issue are these: The claimants are saying that with the elapse of more than twenty years since the last Report in 1988, the Report is not in accordance with the provision. For the respondents the contention is that Section 50 (2) of the Constitution is only relevant where the Commission has submitted more than one Report which is not the case with this Commission as it has new membership.

[198] It has already been determined that the Commission continued from the former Constitution to the current one. And the answer as to whether the Report submitted as prescribed, resort must be made to the learning on the mandatory/directory distinction examined before, given the use of the word 'shall' in the provision.

[199] With that said, the question becomes whether the Constitution intended that a Report should be a nullity if submitted outside of the prescribed interval. Of immediate relevance to the equation is the matter of General Elections in a parliamentary democracy, and the events that follow in the plenitude of governance.

Conclusion

[200] The determinations of the Court on the issue are as follows:

(a) the Constituency Boundaries Commission is a single body which transitioned from the former Constitution to the present Constitution;

(b) the change in membership of the Commission does not alter its status as a single body;

(c) the requirement to submit a Report to the Governor General at intervals is directory as

(d) the requirement to submit the Report to the Governor General before any other person is also directory.

ISSUE NO. 4

[201] Have the Claimants rights under the Constitution to

(a) free and fair election as contained in Section 3; and

(b) protection of the law/due process of the law,

been infringed?

[202] In so far as the right to free and fair elections is concerned, the Claimant's submissions[26] are essentially these:

[26] The authorities relied on by the Claimants are: Kauesa v Minister of Home Affairs [1994] 2 LCR 263; R v Electricity Commissioners, ex parte London Joint Committee Company [1920] 1 KB 171; Schmidt v Secretary of State [1969] 1 All E R 1; Ridge v Baldwin [1964] AC 40; R v Gaming Board [1970] All ER 533; Re K(H) (an infant) [1967] 1 All ER 226; R v Birmingham City Justice [1970] 3 All ER 948; Council of Court Service Unions v Minister for the Civil Service [1984] 3 All ER 935; S. A. De Smith, Judicial Review of Administrative Action.

"9.2 The Claimants submit that the concept of free and fair elections is guided by the principle of true democracy. True democracy is reliant upon the proper procedure and conduct of elections. The way in which the wishes of the people are given effects to are based on the election of representatives to each of the Constituencies in St. Kitts and Nevis. Therefore, the relationship between the number and boundaries of Constituencies and the conduct of free and fair elections is essential to the achievement of the true democracy in which we all by the Constitution profess to believe.

9.3 This idea is grounded on the following facts:

a. St. Kitts and Nevis is the only one of the few Commonwealth Countries with these words expressly in its preamble.

b. The Affidavit of the Rt. Hon. De. Sir Kennedy Simmonds filed on 28th July 2009 (Tab 38 of the Trial Bundle filed 17th August 2009) lays out the historical, political and constitutional past of St. Kitts and Nevis and adds further (at his paragraph 37) the significance and necessity of adding Preamble and Constitutional supremacy provisions in the Constitution of St. Kitts and Nevis.

c. The Constitution at Chapter I Section 1 immediately following the Preamble describes Saint Christopher and Nevis as a sovereign democratic federal state, again reflecting our decision as a people to be governed in a manner of our own choosing, that is, to be a democracy.

9.4 Where the body charged with the responsibility of reviewing the number and boundaries of the Constituencies into which St. Kitts and Nevis is divided by the Constituencies sets out on deliberations following, we say, improper and inadequate procedure and compiles a Report upon which alterations recommended therein are effected or are to be effected by Parliament, we submit that that directly affects the Claimants' rights to free and fair elections."

[203] It is the further submission of the Claimant that the draft proclamation came as a result of a breach of the Court injunction of 2nd July, 2009, and reconfirmed on 9th July, 2009, issued pursuant to Section 96 of the Constitution of St. Kitts and Nevis constitutes an illegality or breach of due process.

[204] The Respondents make certain submissions which are *in limine*:

"A claimant cannot properly invoke Section 96 of the Constitution to allege a contravention of Section 3 to 10 which are provisions in Chapter II of the Constitution. Section 96 expressly excludes these provisions by the words "(other than a provision of Chapter II)". In additional, Section 3 and 10 cannot be invoked in an application for judicial review. A constitutional motion is very different from an application for judicial review. A constitutional motion is concerned with substantive rights. The Constitution requires that if fundamental rights provisions are contravened, the jurisdiction of the court ought to be invoked under the provisions of Section 18 of the Constitution. There are no Section 18 proceedings before the Court.

The Respondents contend that there ought to be no question that the authorities and texts relied on by the Claimants are distinguishable. The protection of the law provisions of the Constitution apply to judicial authorities or authorities who exercise judicial powers, or bodies like the Mercy Committee who powers affect civil rights and obligations such as

the right to property, life or death. Section 3 of the Constitution is in general terms, but gets its ambit and scope from Section 10 (8) of the Constitution."

[205] Section 10 (8) of the Constitution provides:

> "Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."
>
> On the other hand, the CBC is not an authority set up to determine the existence or extent of any civil right or obligation. [See R v Boundaries Commission ex parte Foot [1983] 1 QB 600 and Gilbertson v State of South Australia [1977] 3 WLR 503]. The CBC was set up by the Parliament in the exercise of its powers to provide technical support. There are no provisions which fettered the right of the National Assembly to do so. The CBC's jurisdiction was unaffected by the Technical Committee, and the final decision on boundaries lies with the National Assembly. However, it will be seen from Section 50 (3) of the Constitution, that the Prime Minister is vested with constitutional power to submit the draft proclamation to the National Assembly, "whether with or without modifications".
>
> The Respondents case is supported by Thomas v The Attorney General of Trinidad and Tobago [1982] AC 133. At page 3 134 (e) Lord Diplock made it clear the Police Service Commission "although an administrative body, was performing a quasi-judicial function which would affect his legal rights and obligations and so attracted his constitutional right under Section 2 (e) of the Constitution to a fair hearing in accordance with the principles of fundamental justice." In direct contract to the Police Service Commission, the authorities establish that the CBC is not a body or authority which exercises either executive, judicial or quasi-judicial powers. It merely makes recommendations to Parliament which makes the final decision. [See Harper Tab [3], Foot Tab [4] and Gilbertson Tab [12]]."

The enforcement point

[206] Section 18 of the Constitution, grant a right to seek redress with respect to contravention of Sections 3 to 17 (inclusive). These provisions constitute Chapter II of the Constitution. On the other hand, Section 96 of the Constitution also grants a right to seek redress with respect to "any provision of this Constitution (other than a provision of Chapter II)."

[207] The point being made by learned Senior Counsel, Mr. Astaphan, is that the rights in respect of which redress is sought are Chapter II rights or fundamental rights for which there is a prescribed procedure to be followed in instituting proceedings. Before the Court is a constitutional motion under Section 96. There are no proceedings under Section 18 of the Constitution.

[208] In the case of Attorney General and others v Joseph and Boyce[27] a constitutional motion was filed after the Barbados Privy Council had given certain advice to the Governor General. This would have been pursuant to Section 24 of the Constitution of Barbados.

[209] In giving its decision on Attorney General's appeal, the Caribbean Court of Justice held *inter alia*:

> "That redress for an infringement of the respondents' rights to the protection of the law under Section 11 (c) of the Constitution of Barbados was not obviated by the limitation on the scope of redress under Section 24 of the Constitution to infringements of Sections 12 to 23."

[210] This persuasive authority cannot be interpreted to mean that the redress regarding protection of the law outside of Section II (c) of the Constitution can be sought without invoking the provision of the Constitution that grants the right to seek redress outside of the fundamental rights. To apply the reasoning to the present Constitution of St. Kitts and Nevis would render Section 96 otiose.

The Commission and rights

[211] The Constituency Boundaries Commission with its powers under the Constitution to make recommendations with respect to constituency boundaries is undoubtedly subject to judicial review. At the same time, bodies of this nature are regarded as not being engaged on the determination of rights and obligations which in effect is the constitutional test under Section 10 of the Constitution.

[212] In Bates v Lord Hailsham[28] Mr. Justice Megarry gave some indication as to quasi – judicial bodies:

> "Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated."[29]

[213] The following dicta of Sir John Donaldson M. R. in R v Boundary Commission, Exp.[30] Foot are apt:

> "There are undoubtedly distinctions between the position of the commission and that of a minister or local authority taking executive action under statutory powers which affects the individual citizen. The commissions have no executive power. Their function and duty is limited to making advisory recommendations. Furthermore the commission's task is ancillary to something which is exclusively the responsibility of Parliament itself, namely, the final decision on parliamentary representation and constituency boundaries. These are distinctions of which we will return when giving further consideration to what action should or should not be taken by the court in the circumstances of this case. At the moment all that need be said is that it is common ground that in some circumstances it would be wholly proper for the courts to consider whether the commission have, no doubt

[27] CCJ Appeal No. CV 2 of 2005
[28] [1972] 1 WLR 1373
[29] Ibid, at 1378
[30] [1983] 1 QB 600

inadvertently, misconstrued the instructions which they have been given by Parliament and, if they have done so to take such action as may be appropriate in order to ensure that the will of Parliament is done."[31]

[214] Section 50 of the Constitution, as it relates to the Commission, is in these terms:

> "50. (1) The Constituency Boundaries Commission (hereinafter in this Section referred to as the Commission) shall, in accordance with the provisions of this Section, review the number and boundaries of the constituencies into which Saint Christopher and Nevis is divided and submits to the Governor General Reports either-
>
> (a) showing the constituencies into which it recommends that Saint Christopher and Nevis should be divided in order to give effect to the rules set out in schedule 2; or
>
> (b) 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.
>
> (2) The Reports under subsection (1) shall be submitted by the Commission at intervals or not less than two nor more than five years."

[215] Based on the plain words of Sections 50 (1) and (2) of the Constitution, it is clear that the Commission not judicial, quasi-judicial or executive. It merely recommends with the final decision on those recommendations resting with Parliament. In short, it does not determine rights or obligations.

Conclusion

[216] The Court therefore agrees with the submissions on behalf of the Respondents that: 1. There can be no enforcement of rights under Section 3 and 10 of the Constitution by way of a constitutional motion instituted pursuant to Section 96 of the said Constitution. 2. The Commission not be a judicial, quasi-judicial or executive body it does not determine rights or obligations so that violation of the right to the protection of the law with respect to the said Commission cannot arise.

ISSUE NO. 5

What is the effect; if any, of Section 50(7) of the Constitution on these proceedings?

[217] Section 50(7) of the Constitution is in these terms:

> "The question of the validity of any proclamation by the Governor General purporting to be made under subsection (6) and reciting that a draft thereof has been approved by resolution of the National

[31] Ibid at 616

Assembly shall not be enquired into in any court of law except upon the ground that the proclamation does not give effect to rule 1 in schedule 2."

Submissions

[218] The main submissions by the Claimant are as follows:

"7.2 Section 50(7) purports to be a partial ouster clause. '..Shall not be enquired into in any court of law' on the face on of it, denies the court jurisdiction and conforms to the definition of an ouster clause or a 'no certiorari' clause. Where this is subject to a condition as in 'except upon the grounds that the proclamation does not give effect to rule 1 in Schedule 2.' It takes the form of a partial ouster for the court now has a limited jurisdiction to look into the proclamation with the challenge restricted to rule 1 in Schedule 2 of the constitution. But despite the presence of an ouster clause, the court has a supervisory jurisdiction which it has often exercised where fundamental rights of an individual have been infringed, where a tribunal or public body has acted ultra vires, and/or where such a body has failed to observe the laws of natural justice.

7.3 We submit that this case is one in which the court must exercise its supervisory jurisdiction as the CBC, the 1st Respondent herein, has, as the evidence adduced in cross-examination of the Chairman, exceeded its jurisdiction in taking into account irrelevant considerations such as the voters list and a heavy reliance on the Dominica case of Constituencies Boundary Commission v Baron [2001] 1 LRC 25, and its failure to consult with the Claimant Shawn Richards, the voters in his constituency or his party.

7.4 Ouster clauses represent a clash of three competing constitutional principles- the right of Parliament to decide on appropriate legislation for the good governance of the polity, the citizens' right of access to the courts and the protected jurisdiction of the Supreme Court: See Hinds v R [1977] AC 195; [1976] 2 WLR 366.

7.16 While Anisminic was a case which dealt with a statutory tribunal, constitutional ouster clauses do not shield public bodies if the error they are alleged to have committed are deemed to be fundamental: See Charles v Judicial and Legal Services Commission [2003] 1 LRC 422, It meant therefore that courts are willing to view the ouster clause if the allegation against a public body touched on a breach of natural justice or the ultra vires doctrine: See Thomas v AG [1982] AC 113."

[219] For the Respondents the main submissions read as follows:

"61. Section 50(7) of the Constitution is a partial ouster clause. It does not completely oust the jurisdiction of the court. In Thomas v Attorney General [1982] AC 113 the Judicial Committee of the Privy Council considered, at page 134 (b) to 135 (f), the effect of a "no certiorari" clause. A "no certiorari" clause is a complete ouster clause. On this basis alone, Thomas and the other authorities on complete ouster clauses need to be distinguished or read carefully. Their Lordships made two important points. The first is that these clauses, which are part of the Constitution, apply if the constitutional body exercises functions conferred on it by the Constitution. In other words, once the body acts or exercises its constitutional functions and doers not go beyond its powers, the Court is precluded from inquiring. [See page 134 (f) and 135 (d)]. The second point made in Thomas is that "no certiorari" clauses will not protect a decision made in contravention of a fundamental right provision. [See page 135 (e) to (f)]. Therefore, unless it is established that a commission acted outside its constitutional powers or violated a fundamental right provision, "no certiorari" clauses will preclude inquiry by the Court.

62. Thomas was applied in Jones v Solomon (1989) 41 WIR 299. In Jones the Court of Appeal held that the Commission had acted within its powers and applied the "no certiorari" clause.

65. There is no question in this case that the CBC exercised the functions conferred on it by Section 50 of the Constitution, and that the fundamental rights and provisions for the protection of the law in Chapter II of the Constitution, do not apply to the CBC. The CBC does not exercise executive or quasi judicial powers or make decisions which affect the rights and obligations of any person. Additionally, these matters concern boundaries and elections. Section 50 (7) makes it clear that the drafters of the Constitution did not intend a wide ranging inquiry by the Court which would have the effect of delaying the dissolution Parliament, revision of the boundaries and calling of elections unless CBC had violated Rule 1 of Schedule 2 in relation to matter peculiarly within the jurisdiction of the CBC and National Assembly.

66. The Respondents contend that nothing in Thomas or Jones which applies Section 50 (7) and therefore the Court is debarred from inquiring into the validity of the CBC's recommendations".

Analysis

[220] As far as the Claimant and the Respondents are concerned, they agree that despite the presence of a no certiorari clause in a constitution or a stature the review court still has jurisdiction to quash a decision of the body if its action gives rise to any of the three grounds of review or has violated any right enshrined in a Constitution; where they differ is whether the Court can review the actions of the Commission.

[221] The Court however agrees that Section 50 (7) of the Constitution is not an absolute ouster and in this regard the Court will ground its conclusion on the following dicta.

[222] In HMB Holdings Ltd v The Cabinet of Antigua and Barbuda[32] the Privy Council in addressing the question of ouster clauses said: "An examination of its proper area is not precluded by a clause which confers finality of its decisions. Clauses of that kind can only relate to decisions which have been given within the field of operation that has been entrusted to the decision maker."

[223] Quite importantly, the position was restated in Attorney General and Others v Joseph and Boyce[33] in the context of a decision-making body and a constitutional ouster clause aimed at ousting the jurisdiction of the Court in relation to that body. This is part of the reasoning of the Caribbean Court of Justice at paragraph 41:

> "The Barbados Court of Appeal held, correctly in our view, that the [Barbados Privy Council] was a decision-making body and that the Court may, in appropriate proceedings, either set aside a decision of that body or declare it to be a nullity. There was nothing to prevent the court from examining the procedure adopted by the [Barbados Privy Council] and testing it for procedural fairness by reference

[32] [2007] UKPC 37
[33] CCJ Appeal No. CV2 of 2005

to the rules of natural justice, and for compliance with the fundamental rights and freedoms recognized in the Constitution. If the procedure adopted failed that test, then there was a breach of the respondents' right to the protection of the law, one of the fundamental human rights enumerated and recognized in Section II of the Constitution."

Conclusion

[224] It is therefore the conclusion of the Court that the effect of Section 50 (7) of the Constitution is to oust the jurisdiction of this Court provided its actions do not trigger any of the established grounds of review or there is no violation of rights enshrined in the Constitution of St. Kitts and Nevis.

ISSUE NO. 6

What effect, if any, does the breach of the Court injunction of 2nd July 2009, have on the issue?

[225] It is common ground that the Attorney General was found to be in contempt of court with respect to actions relating to these proceedings. In giving her this is what Madame Justice Joseph-Olivetti said:

> "I am satisfied that the Government breached the order by making use of the Report to lay the motion and proclamation before the National Assembly to implement the recommendations in the Report albeit with modifications and that the Attorney General himself acted in breach of the order by facilitating the government in so doing by advising Prime Minister that if he acted in accordance with his constitutional duty under Section 50 (3) it would not be in breach of the order."

[226] And later Her Ladyship continued:

> "I am of the view that this is a grave matter as it concerns the rule of law and the administration of justice and that the case demands that a finding of contempt be made against the Attorney General in his official capacity and calls for a reprimand and censure."

[227] It is patent that the action of the Attorney General is an act of illegality and as such contrary to the rule of law. However, the Claimants in addressing the issue under consideration and seeking to extend or build on the illegality contend as follows at paragraph 6.26 of their submissions:

> "6.26 While the Court has resolved the issue of contempt and the Honourable Attorney General is benefiting from the protection of the law/ due process as guaranteed by Sections 3 and 10 of the SKN Constitution, the prejudice to the litigants continue from the existence of a Draft Proclamation without the litigants being given the opportunity to show in Suit No. 159 of 2009 that it should not even have reached that stage of being laid before Parliament."

[228] In their submissions on the issue, the Respondents raised a number of matters that properly belong to the realm of an appeal. But the following appears to be relevant to the issue under consideration: "But in any event, the Judge's finding of a breach does not, and not; to preclude the CBC and the other Respondents from maintaining that the Proclamation is untainted by any such finding and is lawful. They were not in breach or in contempt and are lawfully entitled to resist the Claimant's allegations and claims."

[229] The Court interprets the Respondents submission as saying that breach of the injunction has no effect on the proceedings. The Court disagrees.

[230] Paragraph I of the injunction granted on 2nd July, 2009, and continued on 8th July, 2009, is in these terms:

> "The respondents are hereby restrained by themselves, their servants, and/or agents or persons subject to their control, authority or direction or however otherwise from submitting to the Governor General, or making use of any Report purportedly pursuant to Section 50 (1) (a) until the hearing of this action or until further order of this Honourable Court."

Conclusion

[231] In plain and simple terms, use was made of the Report to the extent that a Proclamation based thereon was assented to by the Governor General.

[232] The essential findings of Madame Justice Joseph-Olivetti are these:

> "[37] From the totality of the evidence I find that that the Attorney-General knew of the terms of the order. He was present at the National Assembly on 8th and 9th July during the Prime Minister's debate and he participated in the proceedings to lay the Report. I find that the Attorney-General had advised the Prime Minister, who by virtue of the Constitution is the member of Government responsible for laying the Report before the National Assembly, that doing so would not be a breach of the order. In so doing, undoubtedly, the Attorney General facilitated the Government in doing the very thing which the order restrained, making use of the Report."

[233] After noting the special legislative position of the Attorney General under Attorney General's Act 2000 and his functions and duties, Her Ladyship continues in this mode:

> "[38] As chief legal advisor of the Government, the Attorney General can undoubtedly be said to have major influence with the Government on legal matters. It can also be said be inferred from his duty to advise on and supervise all legislative matters that he assisted in the drafting of the draft proclamation and the draft resolution before they were tabled in the National Assembly."

> "[39] I am satisfied that the Government breached the order by making use of the Report to lay the motion and proclamation before the National Assembly to implement the recommendations in the Report albeit in breach of the order by facilitating the Government in so doing by advising the Prime Minister that if he acted in accordance with his constitutional duty under Section 50 (3) it would not be in breach of the order."

[234] The short point that emerges is that use was made of the Report, being the second limb of the injunction. And the Attorney General is a person who acted contrary to the injunction, whether or not he is a proper party to the proceedings.

[235] But the law is that an order of a Court is good until set aside.[34] The injunction is yet to be set aside so that the actions taken with respect to the Report by the Respondents, their servant and/or agents, or persons subject to their control, authority or direction would have no effect in law.

[236] Accordingly, the action of the Governor General in purporting to give assent to the Proclamation (SRO 12 of 2009) which sought to give effect to the recommendations contained in the Report of the Commission is hereby declared to be null and void and of no legal effect.

ISSUE NO. 7

Did the National Assembly have the competence to enact SRO 18 of 2006?

[237] The abbreviation 'SRO' is a reference to Statutory Rules and Orders which in turn signifies subordinate legislation. As such the issue comes down to whether the National Assembly of St. Kitts and Nevis can enact subordinate legislation, simpliciter.

Submissions

[238] The Claimants make extensive submission on this issue. They begin with the United Kingdom origin of Statutory Rules and Orders (SRO) being made under the Rules Publication Act 1893 and later pursuant to the Statutory Instruments Act 1946 and were now styled Statutory Instruments (SI). The point is also made that delegated legislation or secondary legislation is law made by an executive authority by virtue of a delegation of power under primary legislation enacted by Parliament.

[34] See Isaac v Robertson [1985] AC 97 (PC).

[239] In distinguishing between an SRO and a Resolution of Parliament the following submissions are made:

> "In Parliament every question, when agreed to, assumes the form of an order, or a resolution of the House. By its orders, the House directs its committees, its members, its officers, the order of its own proceedings and the acts of all persons whom they concern. By its resolutions, the House declares its own opinion and purposes (Mozley & Whiteley's Law Dictionary.)"

[240] In distinguishing between primary and subordinate legislation, the submission is made that under primary legislation which has been enacted by the legislature, power may be delegated to the executive or other parties limited powers to make subordinate legislation such a rules, regulations and orders which give effect to policy in detail. The submission concludes by noting that "Under the Westminster System, an item of primary legislation is known as an Act of Parliament after enactment."

[241] The Claimants' submissions continue thus:

> "10.7 Although this document is headed **SRO 18 of 2006**, the headnote states "Resolution of the National Assembly of Saint Christopher and Nevis dated 1st day of August 2006 made to outline the policy on electoral reform." It is respectfully submitted that the label SRO applied to this Resolution is an example of loose terminology. The term SRO seems calculated to elevate what is a mere Declaration of the "opinion and purpose" of the National Assembly into a law.
>
> 10.8 But there is nothing binding in a Resolution of the National Assembly which is not backed by the force of law.
>
> 10.9 A simple analogy suffices to make the point. The Land Acquisition Act, Chap 273 of the Laws of St. Christopher and Nevis (Revised Edition 1961) at Section 3(1) states that if the Governor General, acting in accordance with the advice of Cabinet, considers that any land should be acquired for a public purpose, may with the approval of the National Assembly, cause a Declaration to that effect to be made by the Secretary to the Cabinet. Here such approval by the National Assembly is typically made by Resolution because it is backed by the force of law, namely, the enacted requirement for the approval of the National Assembly.
>
> 10.10 What, pray, is the enacted requirement for the resolution couched in SRO 18 of 2006? The answer is that there is none. In a typical resolution signifying the approval of the National Assembly with regard to the Governor General's Declaration that a particular piece of land is required for a public purpose, the heading of the particular resolution cites its enabling legislation; to wit, Section 3 of the Land Acquisition Act. It is noteworthy that the heading of SRO 18 of 2006 cites no enabling legislation, the reason being the there is none. There is none because SRO 18 of 2006 does not have the force of law and is the mere Declaration of the opinion and purpose of the National Assembly; no more, no less.

10.11 In cross-examination by Counsel for the Claimants, Attorney General Dennis Merchant acknowledged that an **SRO is Subsidiary Legislation.** When asked what was the enabling legislation giving SRO 18 of 2006 the force of law, he said that s. 37 of the Constitution is the Enabling Legislation. Let us examine Section 37 and the validity of the Attorney General's claim. In fairness to the Attorney General, he may have been caught off guard by the question. But what if the case of Respondents genuinely hangs on the belief that SRO 18 of 2006 genuinely derives from Section 37 of the Constitution.

10.12 Section 37(1) encapsulates the pith and substance of the Section and it reads as follows:

> "Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of St. Christopher and Nevis."

10.13 It is accepted that this is a grant of legislative sovereignty to the Parliament of St. Kitts and Nevis though subject to limitations. It is also accepted that the words by themselves, apart from the limitations, confer the widest powers to deal with every kind of subject matter. The Parliament of St. Christopher and Nevis is in no sense a delegate of Parliament of Great Britain and it has full power to delegate legislative authority to subordinate bodies (cf. Riel v R 1885 10 App. Cas. 675, where the power to make laws for the peace order and good government of Canada is explained.)

10.14 But this merely begs the question. Is a resolution a law? More specifically is the resolution couched in SRO 18 of 2006 in any sense a law? It is respectfully submitted that on any construction of the word "resolution", it is apt to do no more than make a Declaration of the opinion and purpose of its expounder. SRO 18 of 2006 is nothing more than a statement dressed up in the finery of statutory garb, but this garb is ill-fitting and fails to disguise the true emptiness of its substance."

[242] There are no substantial submissions on behalf of the Respondents on the issue, but after giving a summary of the factual background the following statement is made: "The Parliament passed a resolution entitled SRO 18 of 2006 which set out the policy and process for reform."[35] And at a later stage in addressing the matter of the Boundaries Technical Committee, it is said that: "It was entirely within the plenary powers of the Parliament to establish the Committee…."[36]

[243] Still later, the following is submitted:

> "The plenary power of the National Assembly under Section 37 of the Constitution is unquestioned. Section 37 is an enabling provision. It confers wide law making powers on the National Assembly. Under the Constitution and the Interpretation and General Clauses Act of the Federation 'law' and 'subsidiary legislation' includes a statutory instrument or resolution. Therefore it is wrong to suggest that the National Assembly required an enabling Act of Parliament instead of Section 37 of the Constitution in order to make SRO 18 of 2006".

[35] See paragraph 2 of Submission on behalf of the Respondents.
[36] Ibid, at paragraph 51.

Conclusion

[244] It is the view of the Court that the submissions on behalf of the Claimants are unassailable. The fundamental point is that Parliament is not a delegate, nor is it the Executive or body that is subordinate in so far as law-making is concerned. Parliament by definition by virtue of the Constitution is the primary source of legislation and is only subject to the Constitution itself in so far as law making is concerned.

[245] One of the principles relating to the interpretation of a constitution is that it should not be construed too narrowly in such a manner which produces anomalies and inexplicable inconsistencies.[37] By the same token it cannot be interpreted too widely to produce the same result. This is said, because learned counsel for the Claimants make the point that SRO 18 of 2006 is labeled as an SRO but it is in fact a resolution of Parliament without any enabling legislation.

[246] Such enabling legislation cannot be Section 37 of the Constitution as the learned Attorney General sought to say under cross-examination. That would be an anomaly as Section 37 is Parliament's authority to make law for the peace, order and good government of St. Christopher and Nevis. This is primary legislation that is contemplated. In fact, this familiar phrase has been characterized as the widest law-making authority that is possible.[38]

[247] Resolutions are common in the context of primary legislation in order to give effect to a particular aspect of the legislation. Quite commonly it is in the form of affirmative or negative resolutions as defined in most Interpretation Acts.[39] And they are employed typically in relation to the financial legislation.

[248] But in any event, **Bradlaugh v Gosset**[40] is authority for the proposition that a resolution, simpliciter, cannot change the law of the land.

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[37] See: Societe United Docks v Government of Maurituis [1985] AC 585, 599 (PC).
[38] See: Ibralebbe v R [1964] AC 900 (PC) and Riel v R [1885] 10 App. Cas. 675. For a full commentary on the case see: Sir Fred Phillips Commonwealth Caribbean Constitutional Law (2000) at p. 147. The phrase 'peace order and good government' is said to have been first used in Section 91 of the British North America Act 1867- now the Constitution Act 1867 of Canada.
[39] See for example Interpretation Act, Cap. 224 (A & B).
[40] (1884) 12 QBD 271.

[249] The point has already been made that there is no primary legislation giving rise to a resolution that assumes some of the attributes of subordinate legislation. Even then, it has a difficulty as again there is no delegation by Parliament in this regard.

Conclusion

[250] It is therefore the conclusion of the Court that the National of Assembly of St. Kitts and Nevis is incompetent to enact SR0 18 of 2006. It therefore has no legislative authority in this regard in view of the fact the action purported to be taken was not taken pursuant to any enabling or primary legislation.

ISSUE NO. 8

Did SRO 18 of 2006 unlawfully usurp the functions of the Constituency Boundaries Commission?

[251] This issue flow logically from the previous issue and the answer is patent.

Submissions

[252] Learned senior counsel Ms. Mia Motley, QC for the Claimants advanced a number of submissions in this regard.[41] The first is that Resolution 10 calls for the establishment of a Constituency Boundaries Commission which as the submission goes, is a clear expression of bad faith since the body is already established by Section 49 of the Constitution with provision for membership, vacation of membership and the power to regulate its own procedure. The second submission is that Resolution 6 provides for the establishment of a Boundaries Technical Committee. According to the Claimants: "That is not in accordance with Section 50 (1) or Schedule 2 to the Constitution. The Constitution does not speak about a Boundaries Technical Committee, much less give it the power to form any view as to what appears practicable". The third submission is related to the second in that it deals with the terms of reference of the Technical Boundaries Committee, as set out in the White Paper.[42]

[253] These submissions go towards the Claimants' contention that the SRO 18 of 2006, in law, usurps the function of the Constituency Boundaries Commission.

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[41] Claimants' final written submissions, filed 1st September 2009, at paragraphs 11.24 – 11.30.
[42] See exhibit SKR 3 at page 10.

[254] There are no direct submissions on behalf of the Respondents on this issue but as shown above their contention is that SRO 18 of 2006 is within the competence of the Parliament of St. Kitts and Nevis.

Analysis

[255] As noted from the submissions on behalf of the Claimants, Section 49 (1) provides for the establishment of a Constituency Boundaries Commission and its membership. At the same time, Section 49 (3) empowers the Commission to regulate its own procedure and further, with the consent of the Prime Minister, may confer powers and impose duties on any public officer or on any authority of the Government for the purpose of the discharge of its functions.

[256] Section 50 (1) of the Constitution is clear as to its purpose and on whom it confers a function. It says:

> "50.(1) The Constituency Boundaries Commission (hereinafter in this Section referred to as the Commission) shall, in accordance with the provisions of this Section, review the number and boundaries of the constituencies into which Saint Christopher and Nevis is divided and submit to the Governor General Reports ether-
>
> (a) showing the constituencies into which it recommends that Saint Christopher and Nevis should be divided in order to give effect to the rules set out in schedule 2; or
>
> (b) 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.
>
> (c) Reports under subsection (1) shall be submitted by the Commission at intervals of not less than two nor more than five years."

[257] And Schedule 2 of the Constitution reads thus:

> "1. There shall be not less than eight constituencies in the island of Saint Christopher and not less than three constituencies in the island of Nevis and if the number of constituencies is increased beyond eleven, not less than one-third of their number shall be in the island of Nevis.
>
> 2. 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 rule to such extent as it considers expedient to take account of the following factors, that is to say-
>
> (a) the requirements of rule 1 and the differences in the density of the populations in the respective islands of Saint Christopher and Nevis;
>
> (b) the need to ensure adequate representation of sparsely populated rural areas;
>
> (c) the means of communication;
>
> (d) geographical features; and

(e) existing administrative boundaries."

[258] On the other hand, Resolutions 6 and 10 of SRO 18 of 2006 are in these terms:

> "6. That a Boundaries Technical Committee be established to provide technical support to ensure that constituencies contain nearly equal numbers of inhabitants, as appears reasonably practicable, in accordance with Section 50 (1) and Schedule 2 of the Constitution.
> 9. That a Constituency Boundaries Commission be appointed which shall Report to Parliament any may share its Report, on the Parliamentary Constitutional and Electoral Reform and Boundaries Committee."

[259] In the White Paper, New Electoral Framework, St. Kitts and Nevis August 2006 at paragraph 5, the following is stated:[43]

> "5. BOUNDARIES TECHNICAL COMMITTEE
>
> Membership: To consist of a surveyor, Demographer, Statistician and Economist.
> Terms of Reference:
> The Committee will conduct the necessary demographic and survey work to ensure that the constituencies are equitable as possible. It will advise the Constituency Boundaries Commission on all matters of re-alignment. It will regulate its own activities and chose its chairman.
> Expected Life Span: 4 weeks"

[260] There can be no doubt that the Constitution vested the function with respect to the boundaries of constituencies in the Constituency Boundaries Commission. This rests on Section 50 (1) of the Constitution and Schedule 2 thereof. They are both entrenched provisions and they are entrenched at the highest level.

[261] It may be said therefore that the Constitution never intended anybody other than the Commission to deal with constituency boundaries other than the Commission. Indeed, there is not even a disentrenching provision in this regard which permits Parliament to vest similar or ancillary function in another body. In other words, Section 50 is of and concerns the Commission and no one else.

[262] What Section 49(3) does contemplate is that the Commission itself can confer power and impose duties on any public officer or any authority of the Government for the purpose of the discharge of its functions so long as the Prime Minister consents to such conferral. This is intended to be a delegation of the Commission's own making; but there is no room for any imposition of a body on the Commission. Thus, for Parliament to purport to vest authority in the Boundaries Technical

[43] Exhibit DM 4 (Exhibit to Dennis Merchant's affidavit).

Committee to vest in the Committee or any other body part of the Commission's function, "in accordance with Section 50(1) and Schedule 2 of the Constitution" amounts to an attempt to amend the Constitution by a colorable device – a mere resolution that cannot survive the rigors of the supreme law. Indeed, the procedure in this regard is prescribed by Section 38 (3) of the Constitution and it is said that "Parliament cannot ignore the conditions of law-making which are set out in the Constitution which gives it power to make law."[44] This will never change so long as a Constitution is controlled.

Conclusion

[263] The Court has already determined that Parliament did not have the competence to enact SR0 18 of 2006. And additionally, SRO 18 of 2006 in so far as it purports to infringe or usurp the function of the Commission is void and of no effect, by virtue of the supreme law clause.

ISSUE NO. 9

Do the pleadings or evidence disclose a description of the nature of the claim in accordance with CPR 2000 Part 8.6 and whether the same are in compliance with CPR 2000 Part 56.7 in general, and in particular, with respect to the heads of judicial review namely, bias, bad faith, improper motive/improper purposes, relevant and irrelevant considerations, right to be heard/duty to consult, procedural impropriety, failure to give any or any proper reasons for proposed changes.

[264] The nature and extent of this issue compels its consideration in two parts: 1. compliance with CPR 2000 Part 8.6; and 2. compliance with CPR 2000, Part 56.7

[265] Part 8.6 (Claim Form).

Submissions

[266] The Claimants contend that they have met the minimum requirements by disclosing a number of documents[45] which described the nature of the claim and the remedies sought.

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[44] See: Bribery Commissioner v Ranasingh [1965] AC 172, 197 per Lord Pearce. See also: The State v Khoyralty [2006] All E R (D) 361 (Mar). For commentary on Bribery Commission v Ranasingh. See: Jeffrey Marshall, Constitutional Theory (1971) at page 53.

[45] They are as follows: (a) Origination Motion for Declaration filed 1st July 2009 Tab 1; (b) Affidavit by Shawn Richards in Support of Originating Motion filed 1st July 2009 Tab 2; (c) Amend Originating Motion for Declaration filed 7th July 2009 Tab 10; (d) Further Amended Originating Motion for Declarations filed 8th July 2009 Tab 15; (e) Supplemental affidavit by Shawn Richards in Support of Originating Motion for Declarations filed 8th July 2009 Tab 16; (f) Further

[267] It is further contended by the Claimants that: "The affidavit of Dennis Merchant filed 8th July, 2009, in answer to Originating Motion, apart from saying at paragraph 26 that 'the claim by way of origination motion is wholly misconceived and improper' make no allegation that the pleadings on the evidence fail to disclose a description of the nature of the claim."

[268] Similarly, it is submitted that the affidavit of Beverly Harris in answer to the Claim for Judicial Review filed on 7th August, 2009, makes no reference to any failure of description of the nature of this claim.

[269] For the Respondents the following submission is made:

> "The Respondents' case is that the Section 96 application ought to be dismissed on the ground that the Claimants' pleading and evidence do not establish that the provisions of Section 50 (2) of the Constitution have been contravened, and in any event not in a manner which affects the jurisdiction of the Constituency Boundaries Commission."

Pleadings

[270] In his further amended originating motion for Declarations, the Claimant, Hon. Shawn K. Richards seeks a number of Declarations in relation to the following: the status of the Commission whether Section 50 (2) of the Constitution is mandatory; the effect of Section 50 (2) being mandatory; the jurisdiction of the Commission to submit a Report to the Governor General, pursuant to Section 50 (2) of the Constitution (whether in breach of the rules of natural justice, without public discussion or with consultation with the Applicant so as to constitute bad faith and/or improper purposes); the Boundaries Technical Committee had no jurisdiction to submit recommendations to the Commission; and the Commission being in breach of the preamble to Sections 3 and 10 of, the Constitution. Additionally orders were sought to quash the Commission's Report, to restrain the

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Amended Originating Motion for Declarations Filed 8th July 2009 Tab 20; (g)Fixed Date Claim Form filed 10th July 2009 Tab 26; (h) Affidavit of Shawn Richards in Support for a Claim for Judicial Review filed 10th July 2009 Tab 27; (i) Affidavit of Lindsay F. P. Grant in Support of a Claim for Judicial Review filed 10th July 2009 Tab 28; (j) Affidavit in Support of Originating Motion (Chesley Hamilton) filed 13th July 2009 Tab 29; (k) Amended Fixed Date Claim filed 13th July 2009 Tab 32; (l) Supplemental affidavit of Lindsay Grant in Support of Claim for Judicial Review filed 24th July 2009 Tab 33; (m) Supplemental affidavit of Shawn Richards in Support of Claim for Judicial Review filed 24th July 2009 Tab 34; (n) Affidavit of Chesley Hamilton in Further Support of Originating Motion filed 24th July 2009 Tab 35; (o) Affidavit of Rt. Hon. Dr. Sir Kennedy Simmonds filed 28th July 2009 Tab 38; (p) Supplemental affidavit in Support of a Claim for Judicial Review filed 14th August 2000 Tab 44; (q) Affidavit of Lindsay Grant in Support of the Constitutional Motion and Application filed 14th August 2009 Tab 48; (r) Affidavit of Chesley Hamitton in Support of Constitutional Motion and Application for Judicial Review filed 14th August 2009 Tab 51.

Defendants and other persons from making use of the said Report until the hearing of this action and such further or other as may be just.

[271] In terms of the grounds these centre on certain information revealed by a Minister of Government concerning changes in the constituency boundaries, a meeting of the National Assembly scheduled for 3rd July, 2009, and the Claimant's belief as to the purpose of the meetings.

Evidence

[272] In so far as the affidavits in support are concerned, there are six affidavits which are sworn to by the Claimant, Chesley Hamilton and Lindsay Grant.

[273] The Hon. Shawn K. Richards, the Claimant, in his affidavit filed on 1st July, 2009, deliberates on the matters raised on the originating motion. Accordingly, matters such as the constituencies comprising St. Kitts and Nevis, the manner in which the Commission is constituted and its duties are addressed. Also some details of statements by the Minister of Information and the Prime Minister concerning changes in the constituencies boundaries, the Commission's Report and the lack of consultation by the Commission with him as well as the inhabitants of St. Christopher 5 are detailed.

[274] At paragraphs 16 to 18, the following is deposed by Mr. Richards:

> "16. Since the last General Election was held on the 25th day of October, 2004, it is clear that we are on the eve of the next General Election, and the circulation of the said notice of meeting at this time, without the Order Paper, leaves the real purpose of the said meeting open to speculation and surprise.
>
> 17. The Claimant can and may be adversely affected by the submission and/or use of the Report of the Commission as he is a Representative in Parliament of a minority party with no representation on the Constituency Boundaries Commission, and there is a real danger that his constituency and his candidacy may be altered to his disadvantage.
>
> 18.The theme song played at the Labour Party functions is "All 8 again", which I understand to mean that the Government is focusing on defeating me at the forthcoming General Elections, since my constituency is the only one in St. Kitts not represented by the Ruling Labour Party."

[275] In a second affidavit filed on 8th July, 2009, the Claimant, again, at paragraphs 2 and 3 thereof returns to the issue of the Order Paper with respect to the meeting of the House of Assembly on 3rd July, 2009, the fact that under the heading 'Motions' was listed Draft Proclamation but a copy of the document was not handed to him. Statements by the Prime Minister in Parliament concerning the

Commission and its Report are also detailed. Further, the position of his political party on electoral reform is also mentioned as communicated to the Cabinet Secretary.

[276] The two affidavits sworn to and filed 13th July and 24th July, 2009, by Chesley Hamilton also dwell on certain statements made by the Prime Minister concerning the draft proclamation, the Commission's Report and constituency boundaries.

[277] Mr. Lindsay Grant in his affidavit filed on 14th August, 2009, in support of the consolidated matters deposes to issues concerning electoral reform and the position taken by this political party on the said matters.

Conclusion

[278] The basic requirement of Part 8.6 of CPR 2000 is that the claim form must include a short description of the nature of the claim and specify the remedy that the Claimant seeks.

[279] In view of what has been outlined above, the Court cannot agree with learned senior counsel, Mr. Astaphan, that the Claimant has not complied with Part 8.6. And in terms of Part 56.7 of CPR 2000, the affidavits also comply with Part 56.7 generally; and, in particular, in identifying the provision of the Constitution alleged to be breached, the grounds on which the relief is sought and the facts on which the claim is based.

[280] To the Court, it is clear that the Claimant has pleaded contraventions of Sections 49 and 50 of the Constitution. The concern is the matrix of the constituency boundaries, the Commission's Report and the recommended changes to constituency boundaries. In that context the rule in Spencer v. Attorney-General[46] that unless the contravention is pleaded a Claimant will have no cause of action or standing under Section 96 of the Constitution, has no place in the equation.

[281] Part 56.7 (Judicial Review)

[282] Compliance with Part 56.7 of CPR 2000 must now be addressed in relation to the claim for judicial review by the Hon. Shawn K. Richards and Mr. Lindsay F. P. Grant.

Submissions

[46] [1993] 3 LRC 1.

[283] It will be recalled that the Claimants made a general submission that they have complied with the legal requirements for the pleadings and the evidence. As such there are no further submissions.

[284] The same cannot be said of the Respondents, as they have made copious submissions in this regard. They begin with the following: "It is also the Respondents case that the Claimants have failed to properly plead and prove the several generalized allegations made in the application for Judicial Review. Importantly, the Claimants failed to establish any violations of rights or that they have suffered or will suffer prejudice."

[285] After quotes from the judgment of Mr. Justice Georges, in Dr. Errol L. Cort v. Leroy King[47] the submissions continue in these terms:

> "10. The Claimants have not only failed to prove that their rights, if any, had been adversely affected, they have also failed to establish that they have or will suffer harm or prejudice. The legal challenge mounted by the Claimant is not predicated on the basis the Claimants will lose or are very likely to lose safe seats because of the proposed changes. Indeed the Claimants cannot make this allegation. The PAM has one Parliamentary seat in the National Assembly and none in the Nevis Island Assembly. The evidence is that the Honourable Shawn Richards has not been disadvantaged. So much was accepted by his Lead Counsel in her opening statement, which triggered a response from the Respondents' Lead Counsel.
>
> 11. Mr. Shawn Richards gave no evidence whatsoever of being disadvantaged even though he sought to distance himself from his Counsel's observation that he was the only one who was not disadvantaged when he said "I heard my lawyer say my position was strengthened and I do not know where she got that from." In cross-examination, his evidence was that he did not know whether he had been disadvantaged, and made no attempt to ascertain if he was.
>
> 12. The same evidence applies to Lindsay Fitz Patrick Grant. He gave no evidence whatsoever of being disadvantaged or having lost any rights. He could not. What he did instead was alleged that he would have to work hard to win votes. But, by no stretch of the imagination can this ever amount to harm or prejudice or the adverse alteration of legal rights. All politicians have to campaign and new candidates perhaps harder. Mr. Grant said he ran for the first time in Constituency 4 in 2004 and almost won. He was Political Leader in 2004 and therefore his suggestion that the people who may become part of his constituency are not known to him is unacceptable. Political Leaders are expected to campaign in every constituency and are well known public figures.
>
> 13. The Respondents contend that the required harm or prejudice which had to be pleaded and proved has to be more than the usual trials and tribulations of any politician who must campaign to win votes. What was required, but never pleaded or proved, was the kind of disproportionate stripping of a constituency and significant dilution of votes in direct and wholesale violation of the Rules as occurred in Urban Baron [TAB 5]. This simply did not happen in this case, and the Claimants cannot, and did not, prove any contravention of the Rules or prejudice."

[47] Suit No. 263 of 2001.

[286] After quoting Lord Justice Brendon in Cinnamond v British Airports Authority[48] and Lord Wilberforce in Mallock v Aberdeen Corporation[49] on the issue of opportunity and 'breach of procedure', respectively, the submission continue thus:

> "16. In Judicial Review unlike other proceedings, the Court is not concerned with "the general nature of the case." Part 56.3 (3) (c) of the CPR 2000, which is in mandatory terms, requires an applicant to state **"**the grounds on which such relief is sought**"** and 56.4 required that the application must be verified by an affidavit "which must include a short statement of all the facts**".** After leave has been granted, Part 56.7 (4) (d) and (e) required that the affidavit in support of the Fixed Date Claim Form must state "the grounds", and "facts upon which the claim is based"**.**
>
> 17. Also, Part 56.9 (3) requires that a claimant serve a copy of the application for leave, affidavit in support and order granting leave. A Fixed Date Claim Form is a claim form for the purposes of Part 8 of the CPR. Part 8.7 (1) requires that a claimant must include "….all of the facts upon which the claimant relies" in the claim form. It is submitted that in view of the aforementioned provisions of the CPR 2000, a claimant must set out a detailed statement of the grounds and facts relied upon. In every application for judicial review a claimant is under a duty to disclose all material facts and most definitely in affidavits after leave has been granted.
>
> 18. In R (Gjini) v London Borough of Islington [2003] EWCA Civ. 558 the Vice Chancellor at paragraph 24 said:
>
> > "It is incumbent on those applying for judicial review to make clear in the detailed statement of their grounds and facts relied on required by CPR 54 PD 5.6. paras 1 and 2 what their case is. This is particularly important where, as here, the applicant seeks to rely on a number of inconsistent alternatives. ……. In my view it would be unjust to the Council to allow it to be pursued now."
>
> 19. Significantly, the allegations of bias, bad faith and ulterior motive are pleaded in vague and general terms. Also, the Claimants' affidavit evidence is equally vague. There are no specific facts or particulars in the affidavits which establish the wide ranging and sweeping allegations against the Executive or Legislative Council. No parties or acts, dates or other particulars are given. Yet, the Court is being asked to find a wide ranging conspiracy or fraud involving members of the Technical Committee, the CBC, Cabinet and National Assembly.
>
> 20. Further, there are no pleaded grounds impugning the Report of the CBC. The only ground which comes remotely close is ground 3 of the Amended Fixed Date Claim Form Tab [32]. In this ground 3 the attack is on the failure of the Report to give "reasons" for the proposed changes to the boundaries. This allegation was however premised on one page of the Report. But the evidence is that the CBC's Report included all of the appendices including the map and Report of the Technical Committee. This Report which was accepted in principle, and the Minutes, provides more than ample reasons for the proposed changes to the boundaries."

[287] In summary, it may be said that the Respondents' case in this connection is that the Claimants have made generalized allegations and more to the point they have made allegations of bias, bad faith, and ulterior motive are pleaded in general terms. It is also argued that neither of the Claimants has shown that his rights have been affected. And equally vague is the evidence.

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[48] [1980] 1 WLR 582.
[49] [1071] 1 WLR 1595.

Pleadings

[288] In an Amended Fixed Date Claim Form filed on 13th July, 2009, the Claimants seek orders to: quash the Report of the 1st Respondent submitted to the Governor General (4th Respondent); quash the Report of the Technical Boundaries Committee which was considered on acted up by the 1st Respondent; quash the Draft Proclamation and/or any Proclamation relating to and/or giving effect to the said Report; restrain the 4th and 5th Respondents from in any way acting upon and/or signing, and/or making use of the said Proclamation; restrain the 2nd and 3rd Respondents from in any way acting upon and/or making use or in any way and/or conducting, and/or supervising any Election or General Election on the basis of any new boundary changes to the constituencies in the Federation of St. Kitts and Nevis and/or any recommendations, and/or Orders, and/or legal instrument based on the said Draft Proclamation, based on the said Report of the 1st Respondent with or without modifications. Also sought are orders of mandamus suspending the Proclamation signed by the Governor General on 9th July, 2009, and requiring the 1st, 2nd, 3rd, 4th and 5th Respondents to conduct and/or supervise any Election or General Election which is constitutionally due within 90 days of the dissolution of the Parliament. Finally, a Declaration is sought that the Proclamation signed by the Governor General on 9th July, 2009, is null and void and of no effect.

[289] The grounds upon which the claim is made are as follows:

> "1. The 1st Respondent had no jurisdiction to submit a Report to the Governor General pursuant to Section 50(1) of the Constitution given that to do so would be inconsistent with and/or in contravention of and/or in breach of Section 50 (2) of the Constitution.
> 2. The act of preparing the Report by the 1st Respondent pursuant to Section 50(1) (a) of the Constitution in the absence of consultation with the Applicant and the Constituents in the respective constituencies throughout the Federation of St. Kitts and Nevis was procedurally improper and/or constitutes bad faith, and/or improper purposes, and/or conflicts with the policy of the legislation and/or is contrary to the Constitution and/or law.
> 3. The Report of the 1st Respondent fails to give any or any proper reasons for the changes proposed, and consequently is in breach of Schedule 2, Rule 2 of the Constitution of St. Kitts and Nevis and/or takes into account irrelevant considerations, and/or conflicts with the policy of the legislation, and/or in contrary to law.
> 4. The Report of the 1st Respondent, and/or the Draft Proclamation, and/or Proclamation based on the Report referred to herein is biased and/or reveals a real danger of bias and/or prejudice and/or conflicts with the policy of the legislation, and/or is contrary to the Constitution and/or law.
> 5. The act of the 1st Respondent in abdicating its responsibility under the Constitution of the Federation of St. Kitts and Nevis and/or taking dictation from the Boundaries Technical Committee considering, and/or agreeing, and/or appending the Report of the Boundaries Technical Committee is improper, and/or in excess of its jurisdiction and consequently the Report on the 1st Respondent is null and void and of no effect as the Boundaries Technical Committee, having been established in 2006 '2' years before the members of the 1st Respondent were appointed, is an entity not established either by the 1st Respondent or the Constitution and further had no jurisdiction, nor lawful authority to

prepare and/or submit a Report to the 1st Respondent which is the only entity under the Constitution charged with the responsibility of delimiting constituency boundaries in the Federation of St. Kitts and Nevis and with regulating its own procedure under Section 49 of the Constitution.

6. The act of the Prime Minister of laying on 8th July, 2009, the Report prepared by the 1st Respondent, and submitted pursuant to Section 50(1) (a) of the Constitution, and the Draft Proclamation with an accompanying Resolution is in breach of the Injunction given by the High Court in Suit No. SKBHCV2009/159 on the 2nd day of July, 2009, and reconfirmed and extended on 8th day of July, 2009 after an Application on the 6th July, 2009, by the 1st and 2nd Respondents to set aside the same and is in breach of the Preamble, Sections 3 and 10 of the Constitution in that it undermines the ability to hold free and fair elections and/or breached the protection of the law provisions, and/or further was procedurally improper, and/or constitutes bad faith, and/or is for improper purposes, and/or is as a result of irrelevant considerations being taken into account, and/or conflicts with the policy of the legislation, and/or is contrary to the Constitution, and/or law.

7. The Draft Proclamation has been prepared improperly on the basis of a Report by the 1st Respondent, which is biased and/or reveals a real danger of bias and/or prejudice and to which attaches procedural impropriety and/or bad faith, and/or takes into account irrelevant considerations, and/or improper purposes and which conflicts with the policy of the legislation, and/or is contrary to the Constitution and/or the law.

8. The National Assembly of the Federation of St. Kitts and Nevis and all of its members, elected and/or nominated must act consistently and in accordance with the Constitution of the Federation of St. Kitts and Nevis.

9. The National Assembly met in an Emergency Session on the 8th July, 2009, and the Prime Minister laid the Report of the Constituency Boundaries Commission and the Draft Proclamation with the accompanying resolution. The debate on the accompanying Resolution referred to herein commenced at 10 a.m. on 9th July, 2009, and was passed on or about 3:45 p.m., on the same day. The Draft Proclamation was forwarded for signature to the 4th Respondent on the 9th July, 2009.

10. The Report of the 1st Respondent proposes to alter all constituencies in the Federation of St. Kitts and Nevis, with the exception of Constituency St. Christopher No. 6 which is represented by the Prime Minister.

11. The 2nd Claimant is the leader of the People's Action Movement, a political party in the Federation of St. Kitts and Nevis, which has fielded candidates in every election since 1966. The 1st Claimant is the Deputy Political Leader of the People's Action Movement.

12. The 1st Claimant is a Member of Parliament in the National Assembly for Constituency St. Christopher 5 and therefore stands to be directly affected and/or prejudiced by any changes to the existing boundaries as a result of the Report of the 1st Respondent, the Draft Proclamation and any modifications thereto submitted by the Prime Minister and/or approved by the National Assembly and/or the Proclamation.

13. The 2nd Claimant will be standing in the next General Election for Constituency St. Christopher 4 and therefore stands to be directly affected and/or prejudiced by any changes to the existing boundaries as a result of the Report of the 1st Respondent, the Draft Proclamation and any modifications thereto submitted by the Prime Minster and/or approved by the National Assembly and/or the Proclamation.

14. Since the last General Election it is clear that we are on the eve of the next General Election and hence the urgency of these matters.

15. The 1st Claimant and myself can and may be adversely affected by the submission and/or use of the Report of the 1st Respondent, and/or the Draft Proclamation with or without modification, and/or the Proclamation as they will both be contesting the elections on behalf of a minority party with no representation on the Constituency Boundaries Commission, and there is a real danger that our constituencies and or candidacies may

be prejudiced, and/or altered to our disadvantage as well as the fate, and/or chances of success of the People's Action Movement in the upcoming General Election.
16. The 1st Claimant has also caused to be issued in his court an Origination Motion pursuant to Section 96 of the Constitution and the general law as Suit No. SKBHCV2009/0159.
17. If a Proclamation is signed by and/or made by the Governor General pursuant to Section 50(6) of the Constitution, there will be no jurisdiction in the Court to enquire into the matter and to grant relief other than that of judicial review under Part 56 of the Civil Procedure Rules 2000 and Section 50(7) of the Constitution. Without this, jurisdiction to grant relief before the proclamation is made, the Applicants, who are intended to be protected, would be significantly disadvantaged given the imminent date for the General Elections. The 1st Claimant and myself fear that, unless restrained, the Respondents will deprive us of our right to be heard.
18. The Proclamation, which was signed by the Governor General on July 9th, 2009, is largely and/or wholly premised on the Draft Proclamation which was based on the purported Report of the 1st Respondent. Accordingly, the Proclamation is null and void and of no effect.
19. Failure to grant the 2 mandatory injunctions would render the claim herein nugatory.
20. The 1st and 2nd Claimants are bringing this matter pursuant to Parts 17 and 56(3) of the Civil Procedure Rules 2000."

Affidavits

[290] The affidavits in support of the claim for judicial review are deposed to by the Hon. Shawn K. Richards, and Mr. Lindsay F. P. Grant and Mr. Chesley Hamilton.

[291] In his affidavit filed on 10th July, 2009, Mr. Richards deposes to a number of matters relating to past and forthcoming elections in St. Kitts and Nevis as well as electoral reform. Included are: A statement which he says was made by the Deputy Prime Minister on the day following the General Elections in 2004. According to Mr. Richards, it concerned boundary changes. Also deposed to, is the visit of the Commonwealth Observer Mission, which concerned electoral reform, and PAM's position concerning the White Paper thereon and the various Committees proposed for the purpose.

[292] At paragraphs 9 to 16 the following is deposed by the Hon. Shawn K. Richards:

"9. It is against this background that I have taken this action in the High Court firstly, to get a determination of the constitutionally mandated procedure by which the Boundaries Commission should function, and as my fears that the threats made by Deputy Prime Minister Sam Condor in 2004 seem more real, to have the Court review the decision-making of the Commission on the basis of bias and bad faith.

10. On the day before the National Assembly was to meet on Friday 3rd July, 2009,

Mr. Anthony Johnson, the Chairman of the Constituency Boundaries Commission journeyed to Nevis to have members of the Commission on that island sign the Commission Report. Further, he stated at paragraph 5 of his Affidavit in Support of Application to set aside the Injunction filed on the 3rd day of July, 2009 at 3:00 p.m., that he, "… submitted a Report of the Constituency Boundaries Commission to His Excellency Dr. Sir Cuthbert Sebastian GCMG, OBE, MD, MS at 2:15 pm on the 2nd July, 2009".

11. The 1st Respondent had no jurisdiction to submit any such Report to the Governor General pursuant to Section 50(1) of the Constitution given that it was inconsistent with and/or in contravention of and/or in breach of Section 50 (2) of the Constitution.

12. The act of preparing the Report by the 1st Respondent pursuant to Section 50(1) (a) of the Constitution in the absence of consultation with the Applicant and the Constituents in the respective constituencies throughout the Federation of St. Kitts and Nevis was procedurally improper; and/or constitutes bad faith; and/or improper purposes; and/or conflicts with the policy of the legislation; and/or is contrary to law.

13. The Report of the 1st Respondent fails to give any or any proper reasons for the changes proposed, and consequently is in breach of Schedule 2, Rule 2 of the Constitution of St. Kitts and Nevis and/or conflicts with the polity of the legislation and/or is contrary to law.

14. The Report of the Constituency Boundaries Commission is biased ad conflicts with the policy of the legislation and/or is contrary to the Constitution and/or law.

15. The act of the Constituency Boundaries Commission in considering and/or agreeing and/or appending the Report of the Boundaries Technical Committee is improper and/or excess of its jurisdiction and is consequently null and void and of no effect as the Boundaries Technical Committee is an entity not established either by the Constituency Boundaries Commission or the Constitution and further had no jurisdiction to submit a Report to the Constituency Boundaries Commission which is the only entity under the Constitution charged with the responsibility of delimiting constituency boundaries in the Federation of St. Kitts and Nevis and with regulating its own procedure.

16. The act of the Prime Minister of laying the Report by the Constituency Boundaries Commission pursuant to Section 50(1) (a) of the Constitution and the Draft Proclamation with an accompanying Resolution is in breach of the injunction given by the Court in this matter on the 2nd day of July, 2009, and reconfirmed and extended on the 8th day of July, 2009, after an Application on the 6th July, 2009, by the 1st and 2nd Respondents."

[293] Various other inferences are drawn from the fact of the Report submitted by the Commission and Emergency Session of the National Assembly on 8th August, 2009, and which extended to the following day when the Draft Proclamation was approved. Mr. Richards also says at paragraph 20 to his said affidavit that: "The Report of the Constituency Boundaries Commission proposes to alter all constituencies in the Federation of St. Kitts and Nevis with the exception of Constituency St. Christopher No.6".

[294] In the remainder of this affidavit Mr. Richards address the manner in which the changes are likely to affect his chances of being re-elected and those of his party, being a minority party.

[295] The essential purpose of the supplemental affidavit filed by the Hon. Shawn Richards on 24th July, 2009, is to put into evidence the Report of the Commission dated 29th June, 2009.

[296] The other supplemental affidavit deposed to by Mr. Richards and filed on 14th August, 2009, is concerned with the whole Electoral Reform Process and the reasons for PAM's participation or non-participation therein. And at paragraphs 18 and 20, the following is deposed:

> "18. In November 2007 the National Assembly passed the National Assembly Elections (Amendment) Act 2007, No. 22 of 2007. This Act was the Government's culmination of a two year process called Electoral Reform. But at the end of the process, nothing much had changed. The process had been farce. The substantive change was the insertion of Section 108 into the Act which allowed for a period of "re-confirmation". It allowed voters to "confirm" their names on the Voters Register so that the fraudulent practice of individuals registering to vote where they did not live was legalized. There was to be no enumeration. No security features were introduced into a new National ID Card which did not contain the voters Constituency nor Polling Division information, and during the Confirmation period from December 27, 2007 to September 2008, significant numbers of people did not "re-confirm" their names as they did not trust the new system.
>
> 20. I know that new members of the constitutionally mandated Constituency Boundaries Commission were appointed in September 2008. At no time did I believe that I should be nor request to be a member of that Commission. But I do know that the Boundaries Commission did not meet at any time before June 2009 and then on only two occasions. The Boundaries Commission at no time consulted me, nor to the best of my knowledge, any of the constituents whom I represent in doing the work and preparation of their Report. There was no public announcement of a discussion with anyone. The first time I saw the Report was after it had been tabled in the national Assembly. And the so-called Report of the Boundaries Commission, exhibited as "**SKR 1**" to my Supplemental affidavit sworn and filed on 24th July 2009, does not meet the minimal standard that a reasonable man would expect from a Report of this importance. There is no discussion, no analysis, and only one recommendation in relation to polling division No. 6 in Constituency No. 2, when changes are to be proclaimed in eight (8) constituencies."

[297] The other affidavit is Mr. Lindsay F. P. Grant who on 11th July, 2009, swore to and filed an affidavit in support of the claim for judicial review.

[298] In real terms, the affidavit of Mr. Grant is quite similar to that filed by Mr. Richards on 10th July, 2009, except that at paragraph 21 Mr. Grant deposes as follows:

> "I have a legitimate expectation to contest the next General Elections to be a Member of Parliament in the National Assembly for Constituency St. Christopher 4 and therefore stands to be directly and/or prejudiced by any changes to the existing boundaries as a result of the Constituency Boundaries

Commission, the Draft Proclamation and any modifications thereto submitted by the Prime Minister and/or approved by the National Assembly."

[299] On 24th July, 2009, Mr. Grant filed another supplemental affidavit in which he deals with broad areas: the Commission's Report, legal proceedings instituted with respect to the voters' list, the 2001 population and housing census and the boundary changes recommended and the implications for PAM.

[300] In terms of the Report, Mr. Grant deposes thus at paragraphs 4 to 6:

> "4. The Report does not contain or include any review of the Constituency Boundaries as mandated by Section 50(1) of the Constitution. I have been advised by my Attorneys-at-Law and verily believe that the Constituency Boundaries Commission, by adopting wholesale its Report of a committee that is a stranger to the Constitution abdicated its constitutional function.
> 5. I have not seen any factual evidence or anything contained in the Report to support or substantiate the recommendations of the Commission. In my opinion the Report is baseless and devoid of serious analysis, of a review of the changes in the demographics or any explanation for its recommendations other than to adopt the Boundaries Technical Committee Report.
> 6. The Boundaries Technical Committee, which was established as set out in the 'White Paper', based their Boundaries Report on an outdated 2001 Census Statistics which did not account for the many changes in growth and distribution of the population in the Federation."

[301] Regarding the recommended changes to constituency boundaries, Mr. Grant contends that they do not lead to equal numbers in the various constituencies as required by Rule 2, Schedule 2 of the Constitution.

[302] Further, at paragraphs 22 and 23 of the said affidavit, Mr. Grant comes to the following conclusions regarding the recommendations of the Commission:

> "22. The deliberation attempt at reducing the Labour Party Candidate's majority in one constituency in order to defeat a PAM Candidate in another constituency appears to be the objective of the Constituency Boundaries Commission and the Boundaries Technical Committee which dictates the Boundaries Commission follow rather than the contrary and opposed to complying to the rules set out in Schedule 2 of the constitution.
> 23. The effect of the shifting of these particular polling divisions is to weaken those candidates from PAM who were narrowly defeated in the last election and who are the main seats upon which the party will rely. This is achieved as the system on which a person is returned to the National Assembly is based on what is referred to as the 'First past the post' system where the candidate attaining the most votes in a particular constituency is returned as the representative…."

[303] At paragraphs 28 and 29, Mr. Grant expresses certain beliefs. First that the change in constituency boundaries at this late time will affect the holding of a free and fair election and will

confuse many of the constituents in those constituencies that have been recommended to be moved. And secondly that the recommendations of the Boundaries Technical Committee that dictated the recommendations of the Constituency Boundaries Commission were activated by bias and bad faith and a wish to prevent the People's Action Movement candidates from being returned as representatives in the National Assembly.

Conclusion

[304] It is clear to the Court that the Claimants in their pleadings and the affidavit evidence have focused substantially on the matters of the Report of the Commission and the process by which the recommendations for changes to the constituency boundaries were made. Equally, there is concentration on the Commission's relationship with the Boundaries Technical Committee. Coupled with the foregoing is the matter of *vires* in relation to certain provisions of the Constitution as they relate to the Commission.

[305] Based on classical learning as to the purpose of a judicial review Court[50] these matters are sufficient to satisfy a prima facie threshold in this regard in some respects.

[306] Allegations of bad faith, bias improper motive, failure to grant a right to be heard or consulted and abdication and fettering are mentioned in the pleadings and the affidavits. However, whether these allegations are generalized or particularized to the Court's satisfaction, must await further consideration. Indeed, it is said that one of the questions then would be whether the pleading defined or particularized the issues and gave the other party fair notice of the case which he has to meet.[51]

[307] Therefore, in responding to the Respondents contention the Claimants have simply made generalized allegations, it is the ruling of the Court that given the pleadings and evidence in relation to the Commission, its Report and the issue of the Boundaries Technical Committee these are sufficient to sustain the claim for judicial review. As such, even if there are generalized allegations, they cannot negate the specific allegations in relation to the Commission, the Report of the Commission, the Boundaries Technical Committee and Sections 49 and 50 of the Constitution.

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[50] See: Wade and Forsyth Administrative Law (7th ed.) p. 380. And see also: Chief Constable of North Wales Police v Evans [1982] 1 WIR 155, 1174 per Lord Brightman.
[51] Per Hoffman in Barclays Bank v Boulter [1999] 1 WLR 1919, 1923.

[308] Given the foregoing, the Court must now embark on a full consideration of the claim for judicial review and specifically in relation to the heads of judicial review pleaded namely, bias, bad faith, improper motive/improper purposes, relevant and/or irrelevant consideration, right to be heard/duty to consult, procedural impropriety, failure to give any or any proper reasons for the proposed changes and abdicating and fettering.

Bias

[309] Under this head of judicial review, the following combined issues will be considered:

Does the evidence show that the Boundaries Technical Committee appointed under SRO 18 of 2006 was biased against the Claimants; and did the Constituency Boundaries Commission and/or the Executive and/or the National Assembly all with bias against the Claimants?

Introduction

[310] Michael Fordham, JUDICIAL REVIEW HANDBOK[52] had this to say regarding judicial review:

> "Judicial review is a central feature of administrative law (public law). By judicial review, the judiciary assumes the constitutional responsibility of curbing abuses of executive power. This safeguard promotes the public interest, ensuring that public bodies are not above the law, and protecting the rights and interests if those affected by uses and abuses of power. Judicial review is a special supervisory jurisdiction which is different from ordinary (adversarial) litigation between the parties. The Court's approach the supervisory jurisdiction in a special way. In a nutshell, the question is not whether the Court may disagree with what a public body has done. Rather the question is whether the justice body's approach is flawed by reason of some recognizable public law wrong."

[311] Wade and Forsyth, ADMINISTRATIVE LAW make the point by way of a different illustrations. According to them:[53]

> "The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of the decision under appeal. When subjected some administrative act or order to judicial review, the court is concerned with its legality. On appeal the question is right or wrong? On review the question is lawful or unlawful?"

[312] Lord Brightman in Chief Constable of North Wales Police v Evans has put the matter succinctly, for all times, when he said that judicial review "is concerned, not with the decision, but the decision-making process."[54]

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[52] Third Edition at page 21.
[53] (7th ed.) at p. 38, supra.

Submissions

[313] In making their submissions, the Claimants refer to a number of authorities[55] on bias and then the following is advanced:[56]

> "8.3. An allegation of apparent bias does not involve a finding of judicial impropriety or misconduct, or breach of the judicial oath. It involves a finding that circumstances exist from which a reasonable and informed observer may conclude that there was bias in the conduct of the proceedings. Except where actual bias is alleged, it is not useful to investigate an individual's state of mind. The courts have recognized that bias operates in such an insidious manner that the person alleged to be biased may be unconscious of the effect. It is trite law that if a reasonable apprehension of bias arises the whole proceedings becomes infected. Credibility issues no longer arise; the reasonable apprehension of bias remains and the proceedings cannot be saved."

[314] A further submission is in these terms:[57]

> "8.7 The example given above is clearly treating to a difference set of circumstances. The case at bar involves a body making recommendations to the executive and the National Assembly. The fact that the Chairman under Section 49 of SKN Constitution is not a Member of Parliament is important. Even though members of the CBC are MPs (and hence political) and the Chairman is appointed by the Governor General on the advice of the Prime Minister, this is not a license to be partisan. The comments as to the reality of the position of the Speaker favouring the Government in the Baron case is instructive. What would the person taking the Caribe Surf Ferry from St. Kitts to Nevis believe in these circumstances? Would they view the actions of the CBC as independent of the Government and the majority in the National Assembly?"

[315] There are no specific submissions from the Respondents except that the issues for consideration are referred to as "extraordinary allegations".[58] And it will be recalled that, an earlier submission[59] is that: It is also the Respondents' case that the Claimants have failed to properly plead and prove the several allegations made in the application for judicial review.

Pleadings and Evidence

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[54] [1982] 1 WLR 1155, 1174, supra.
[55] These include: Basdeo Panday v Senior Superintendent Wellingtron Virgil, Mag. Appeal No. 75/2006 (T&T); Dr. John Roylance v GMC [1999] UK PC16, Franklin v Ministry of Town Planning [1987] 2 All ER 289, 296 per Lord Tamberton; Lawal v Northern Spirit Ltd [2003] UKHC 35; Porter v Magill [2002] 2 AC 357 (HC); De Smith Judicial Review of Administrative Action (6th ed.) dp. 266; Wade & Foresyth, Administrative Law (9th ed.) at 457.
[56] Claimants' final written submissions, (filed 1st September 2009) at page 85.
[57] At page 88 of the claimants final written submissions.
[58] At page 53 para. 91 of the Respondents' Submissions.
[59] Ibid at page 5, para. 8

[316] It will be recalled, that in the grounds for the application for judicial review the following is stated:

> "4. The Report of the 1st Respondent and/or the Draft Proclamation and/or the Proclamation based on the Report referred to herein is biased and/or reveals a real danger of bias and/or prejudice and/or conflicts with the policy of the legislation and/or is contrary to the constitution and/or the law."

[317] And in terms of evidence, both Mr. Shawn K. Richards and Mr. Lindsay F. P. Grant in their affidavits in support of the claim for judicial review,[60] give identical evidence at paragraphs 14 and 17 of the said affidavits:

> "14. The Report of the Constituency Boundaries Commission is biased and conflicts with the policy of the legislation and/or is contrary to the constitution and/or law.
> 17. The Draft Proclamation has been prepared improperly on the basis of a Report by the Constituency Boundaries Commission which is biased and to which attaches procedural impropriety and/or bad faith and/or improper purposes and which conflicts with the policy of the legislation and/or is contrary to the Constitution and/or the law."

[318] There is no further evidence that emerges from cross-examination in so far as bias is concerned.

[319] In their submissions, the Claimants refer to apparent bias and apply the reasonable informed observer test. However, it is the view of the Court that bias is insufficiently particularized and the evidence is also insufficient to lead to a determination on bias. The Court therefore agrees with the Respondents that in so far as bias is concerned, what is pleaded amounts to a generalized allegation.

Bad faith/improper purpose

[320] It is said[61] that: "Judicial review will lie where a decision made is shown to have acted in bad faith. This is something which should not lightly be alleged and is difficult to prove." Further, that judicial review will lie where the decision-maker was motivated by some aim or purpose regarded by the law as illegitimate."

Submissions

[321] The following are the submissions on behalf of the Claimants:

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[60] The affidavits were filed on 10th July 2009 – Trial Bundle Tabs 27 and 28.
[61] Michael Fordham, op cit, at page 751.

"1. The act of preparing the Report by the CBC in the absence of consultation with the First Claimant (2009/0159), his constituents or any constituents constitutes bad faith and/or improper purposes; and/or conflicts with the policy of the legislation; and/or is contrary to law.

The Respondents would have this Honourable Court believe that the Claimants and the People's Action Movement did not take part in "the process". This is far from the truth. The Affidavits of Shawn Richards and Lindsay Grant filed on 14th August, 2009, clearly set out the significant contributions they and their Party made to the Electoral Reform process.

2. This application for Judicial Review relates to Boundaries. Although there are White Paper Committees which have the word "Boundaries" in their name, this is extremely misleading, for there is no evidence whatsoever to show that these Committees carried out any consultation whatsoever on Boundaries, whatever else they consulted on. And, as has been stated earlier, the Boundaries Technical Committee nor the CBC did not consult or seek consultation.

3. Further undisputed examples of bad faith are:

> The inordinate haste to have the Report laid before the National Assembly. There were two attempts to deal with this matter – the 2nd July, 2009 (restrained by the First Injunction) and 8th July, 2009, (action taken in breach of the Injunction after it was reconfirmed on the same day by Justice Belle). The Order Paper for the National Assembly was distributed on the said day (2nd July, 2009) that the Report of the CBC was submitted to the Governor General and the Prime Minister. On the 8th July, the Report was laid by the Prime Minister along with the resolution accompanying the draft Proclamation, debated by the National Assembly on the next day, the Proclamation signed within 45 minutes of the closure of the debate by the Governor General and gazetted that same evening within hours.
>
> Presently, Shawn Richards with an Order Paper deliberately excluding the sittings agenda.
>
> Up until the day before the Report is to be laid before Parliament (2nd July, 2009), deliberately withholding the Report from Shawn Richards and from the public.
>
> The intention to frustrate comment and a free and democratic environment by having the Report signed on one day and rushed through Parliament on the next, in spite of there being and application for an Injunction filed on 1st July, 2009. There is evidence that even though it was an ex parte injunction hearing on 2nd July, 2009 Counsel for the Respondents were present at the hearing, evincing knowledge of the proceedings.
>
> Even if, which we deny, there was widespread consultation, the citizens with whom there had been consultation ought, at least, to have had time to deliberate on recommendations based on their contributions to the process.
>
> Smaller constituencies getting smaller as was acknowledged by Mr. Johnson in cross-examination in respect of Constituency No. 4. Indeed, the political complexion changed (otherwise known as gerrymandering) as can be seen from

the affidavit evidence of the 2nd Claimant as it relates to the traditional voting patterns of the boxes.

No changes whatsoever to the constituency of the Prime Minster, Constituency No. 6, even though it was and still is one of the smallest.

No separate office nor Budget for the CBC. Indeed the operation of a Commission created by the Constitution on an ad hoc and informal basis.

The Chairman spent more time on the witness stand in this case than meeting to deliberate on Boundary Changes (5 hours and 48 minutes) after there had been no changes after 21 years.

The connection between the Chairman of the CBC and the Executive and the St. Kitts Labour Party (he admitted to being a member at some time and also to advising the Prime Minister.

The statements of the Deputy Prime Minister (October 25th, 2004) and the Prime Minister (May 1st, 2006) as to their intention to use boundary changes to defeat the First Claimant and the candidates of the People's Action Movement.

The failure to recommend adjustment of boundaries in St. Kitts even though the disparity in the number of inhabitants across parishes was greater between the smallest and largest parish than in Nevis where recommendations were made after lengthy discussion driven by the two Nevis MPs. (See Cross Examination of Mr. Johnson and the Minutes of the CBC and the Report of the BTC). There was a difference of 12 573 between the largest parish St. George and the smallest parish Trinity in St. Kitts. The difference between the largest and smallest in Nevis (St. Paul and St. John) was only 1211.

The failure of the members of the BTC to sign their Report.

Not only was there bad faith, but the Government acted with improper purposes.

[322] The following submissions were tendered on behalf of the Respondents:

"25. It is trite law that bias or bad faith must be properly pleaded and proved. Bias and bad faith cannot be imputed or established by a side wind. They must be expressly pleaded and established by strong and compelling evidence. In Simmonds v Williams (No. 2) (1999) 57 WIR 95 [TAB 13], the Court of Appeal rejected mere political affiliation and support as a sufficient basis for bias, and held that the Court had to review all of the facts. [See page 107(j) to 108 (a)]. In Hugh Wildman v The JLSC CA No. 9 of 2006 [TAB 15] The Court of Appeal, at paragraph [33], held that in order to make a proper finding of bias, the test is "whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias."

26. The Respondents contend that no viable allegation of bias or bad faith has been specifically pleaded or directed against the CBC, Electoral Commission, the Supervisor of Elections and the Governor General. Accordingly, the judicial review proceedings against them ought to be dismissed. In addition, as the Claimants failed to join any Minister, Member of the Executive or National Assembly, these judicial review proceedings in which serious but generalized allegation in pejorative terms were made without specifics

or particulars, ought to be dismissed. The Attorney General is not a proper party. [See Minister of Foreign Affairs, Trade and Industry v Vehicle and Suppliers Limited (1989) 39 WIR 270, Tab [7], and Spencer v Attorney General [1999] 3 LRC 1, Tab [1].

27. There is an undeniable fact, among others, which militates against any allegation of bias, bad faith or ulterior purpose. The undisputed evidence is that Newton Grounds, which is part of the Prime Minister constituency, abuts the constituency of Shawn Richards. In 2004, voters in Newton Grounds voted overwhelmingly in favour of the Labour Party. In light of the fact that changes could not be made to the South or North boundaries because of the sea and mountains, the options open to the CBC was to move Newton Grounds or a part of constituency 4 which voted in favour of the PAM into constituency 5. The CBC did not move Newton Ground. Had the CBC recommended moving Newton Ground, Mr. Richards' prospects would have been significantly affected.

28. The Claimants also relied on alleged political affiliations, public officers being paid from the Treasury and alleged haste on the part of the Government. In his evidence, Mr. Grant effectively abandoned the first two grounds. The later allegation is dealt with more fully below in response to the Claimants' submissions. But at this stage, Respondents submit that the CBC is not part of "the Government" and there is no pleading or evidence which is capable of establishing collusion or a conspiracy between members of the CBC, Cabinet and/or the National Assembly.

29. Bad faith and improper motive are serious allegations directed at the conduct and motive of a particular person. They are similar if not akin to misfeasance in that knowledge; motive and intent of the person; minister or authority accused are important fact for determination by the Court. Quite apart from any pleading defect, there is simply no evidence whatsoever of any knowledge; motive and intent reasonably capable of establishing bad faith or improper motive on the part of any member of the CBC, Executive or Legislature. The accused persons had to be made parties and the allegations directed against them in express terms. In this case, there is no pleading or cogent evidence of bad faith against any individual member of the CBC, Cabinet or National Assembly. As a result, the Respondents contend that the Claimants have failed to establish bias, bad faith, fraud or improper purpose as alleged or at all."

Pleadings and evidence

[323] In seeking to have the Report of the Commission, the Report of the Boundaries Technical Committee and the Proclamation quashed, the Claimants advance these grounds:

> "2.The act of preparing the Report by the 1st Respondent pursuant to Section 50(1) (a) of the Constitution in the absence of consultation with the Applicant and the Constituents in the respective constituencies throughout the Federation of St. Kitts and Nevis was procedurally improper and/or constitutes bad faith and/or improper purposes and/or conflicts with the policy of the legislation and/or is contrary to the Constitution and/or law.
>
> 7. The Draft Proclamation has been prepared improperly and the basis of a Report by the 1st Respondent which is biased and/or reveals a real danger of bias and/or prejudice and to which attached procedural impropriety and/or bad faith and/or takes into account irrelevant considerations and/or improper purposes and conflicts with the policy of the legislation and/or is contrary to the Constitution and/or the law."

[324] In his affidavit filed on 10th July, 2009, Mr. Shawn K. Richards cites a number of events or actions which he characterized as constituting bad faith. They are the statement by the Deputy Prime Minister, the preparation of the Report by the Commission without consultation, and the laying of the said Report in the House of Assembly by the Prime Minister.

[325] The statements allegedly made by the Hon. Sam Condor in 2004 following the General Elections is this:

> "…dey aint gon dictate nothing, they days done; they done, they gon get electoral reform and they aint gon like it; you want a tell you a next reform what dey gon get."
> And
> "…de boundaries gon change, all de boundaries gon change, all a dem gon change; and Sandy Point is going to be part of Newton Ground; that is the electoral reform that dey gon get….".

[326] In his affidavit in response filed on 7th August, 2009, Deputy Prime Minister, Mr. Sam Condor deposed thus at paragraph 22:

> "The alleged statements made by me, if true, were made in 2004 in the course of an emotional celebration after the last election. The atmosphere was charged with excitement and it may well be that in the heat of the moment, I said the words. But these words were allegedly spoken years ago and I had completely forgotten about them until I heard the Claimants had alleged I uttered them."

[327] Further, in cross-examination, the Hon. Sam Condor said this: "I do not remember the exact words, My Lord. That was many years ago. I had just woken up from sleep. I probably would have said something like that but I wouldn't say those are the words; but I know I said something like that on the morning of October 25th, 2004."

The Law

[328] A leading authority has already been quoted which suggests that the burden of proof with respect to bad faith is high. It is difficult to prove.

[329] The following learning from JUDICIAL REVIEW OF ADMINISTRATIVE ACTION[62] is also to the point:

> "13-010 Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with motives such as fraud (or dishonesty), malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, cause the decision to be taken in bad faith or for an improper purpose (the term "improper" here bearing a

[62] (5th ed.) by De Smith, Wolf and Jowell at paras. 13-010 to 13-014

connotation of moral impropriety). Some of the decisions based on bad faith will also violate the ground of illegality, as the offending motive may take the decision outside the "four corners" of the authorised power. Irrespective of whether this be so, any ingredient of bad faith may in itself cause a decision to be invalid.

13-011 Bad faith cannot be relied on to challenge an Act of Parliament. Although bad faith can be imputed to Ministers of the Crown, the courts will not in readily impute it to the Crown itself, or to the Crown Council. A court will not in general entertain allegations of bad faith made against the repository of power unless bad faith has been expressly pleaded and properly particularized. If the good faith of a party to proceedings is impugned on the ground that his evidence given on affidavit is false, leave should be sought to cross-examine the deponent.

13-012 A power is exercised *fraudulently* if its repository intends to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interest. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

13-013 Examples of cases involving fraudulent or dishonest motives include those where a local authority acquired property for the ostensible purpose of widening a street or redeveloping an urban area but in reality for the purpose of reselling it at a profit; or preventing the owner from reaping the benefit of the expected increase sought to acquire land for its benefits, when its true motive was to remove gypsies from the land.

13-014 A decision based on malice is usually one that is directed *ad hominem*-e.g. where a byelaw or order has been made especially to thwart and individual application for a permit. The malice may arise out of personal or political animosity built up over a series of past dealings. For instance, in a Canadian case the cancellation of a liquor licence was held to be an abuse of power where the decision was prompted by the proprietor's support of a religious sect who sere considered a nuisance by the police. In another Canadian case the court inferred mala fides from the fact that a byelaw was made for the compulsory purchase of land which was the subject of pending litigation between the owner and the local authority. And in a third it was held that a local authority cannot use its licensing power to prohibit lawful businesses of which it disapproves. In a recent English case the decision of the Derbyshire County Council to cease advertising in journals controlled by Times Newspaper which had written articles critical of its councilors was explicitly held to have been motivated by bad faith and therefore declared invalid for that reason alone."

[330] In a word then, bad faith involves proof of fraud or dishonesty, malice or personal self-interest. But it does not end there. For, as learned senior counsel has submitted,[63] the Claimants allegations of "bias, bad faith and ulterior motive are pleaded in vague and general terms". And in the above quoted text there is mention of the requirement, with respect to fraud that it must be expressly pleaded and properly particularized.

[331] Jessel, MR. in Errington v Metropolitian District Railway Co[64] dealt with proof of *bona fides* in this way:

[63] Claimants' Submissions at page 9 at para. 19.
[64] [1881-1882] 19 Ch D 559, 571

> "It is the company who are to be the judges of what they require unless they are not acting *bona fide*, and the evidence, and the only evidence required is the opinion of the surveyor, or engineer or other officer of the company, unless the other side can shew that they are not acting *bona fide*. Now of course you can shew want of *bona fides* in two ways, you can shew it by proving that the lands are wanted for some collateral purpose as a fact, or you may shew it by proving that the alleged purpose is so absurd, under the circumstances that it cannot possibly be *bona fide*. As regard the first ground there was an attempt made here, but it was unsupported by evidence. It was a belief of a gentleman without any facts, and was not admissible in evidence at the trial of the cause. That, therefore, must be put out of the case."

[332] In C J Touring Service and others v St. Lucia Air and Sea Ports Authority and others,[65] Mr. Justice Michael Gordon articulated the position in this way: "Maliciousness, fraud or any other improper motive on the part of a respondent cannot be presumed; it must be asserted and proved."

[333] Generally, with respect to the allegation of bad faith, the Court is of the view that the pleadings and particulars do not reach the threshold of proof in this context merely by saying that the laying of the draft Proclamation on the Report is bad faith are examples in this regard.

[334] And although the statement by the Hon. Sam Condor is particularized, there are factors which reduce its potency and render it remote from the current events. Put otherwise, it may have the effect of making the onus of proof even more difficult to discharge. The first is that it was made on 25th October, 2004, the day after the election, in an atmosphere that was charged. This is reasonable and normal. The witness in admitting a statement that is similar to that alleged, added that he was fresh from sleep. In the context, the question becomes whether, from the time factor, was Hon. Sam Condor on 25th October, 2004, exercising a power with respect to changes in constituency boundaries or even with regard to law reform? The answer must be in the negative. Further, there is no evidence to link Mr. Condor's statement about boundary changes to the recommendations made by the Boundaries Technical Committee, of which he was not even a member.

[335] The Court therefore agrees with the submission by the Respondents that again the matter of bad faith, the pleadings and the evidence are insufficient. In his words:[66] "bias, bad faith and ulterior motive cannot be established by surmise or speculation."

Relevant/Irrelevant considerations

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[65] Civil Appeal No. 23 of 2006 at paragraph 11.
[66] Respondent's Submission at para. 32 at page 18.

[336] The next head of judicial review, insofar as the Claimants are concerned, is relevant and irrelevant considerations. It is the Claimants' contention that the Commission failed to take into account relevant considerations and instead took into account irrelevant considerations. A synopsis of the law reads thus:

> "If the exercise of a discretionary power has been influenced by consideration that can not lawfully be taken in account, or by the disregard of relevant considerations required to be taken into account, a court will normally hold that the power has not been validly exercised. It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters; and it may be right to overlook a minor error of this kind even if it affected an aspect of the decision."

Submissions

[337] The following are the submissions made on behalf of the Claimants:

> "5.3 Section 50(1) of the Constitution imposes two obligations on the CBC:
>
> i. to review the number and boundaries of the constituencies into which St .Kitts and Nevis is divided; and
> ii. to submit [a Report thereon] to the Governor General.
>
> 5.4 The Chairman of the CBC while admitting under cross-examination that the CBC had an obligation to review the numbers and boundaries, under Section 50 (1) stated that the CBC did not address its mind to the numbers of constituencies (increasing or decreasing) but only to boundaries. This significant breach of a mandatory provision of the Constitution alone is sufficient to render the Report of the CBC null and void and of no effect. Indeed, it is our view that it is fatal to the Respondents.
>
> 5.5 The CBC is required under Section 50(1) to comply with the requirements of the Second Schedule to the SKN Constitution. Under Rule 2 of Schedule 2, constituencies shall contain as nearly equal numbers of inhabitants as appear to the CBC to be reasonably practical but it may depart from this rule to such extent as it considers expedient to take into account the following factors:
>
> (a) the requirements of rules and the difference in the density of populations in the respective islands of Saint Christopher and Nevis;
> (b) the need to ensure adequate representation of sparsely populated rural areas;
> (c) the means of communication;
> (d) geographical features and
> (e) existing administrative boundaries
>
> 5.6 The Minutes of the CBC and the Report do not reflect any discussion on (a), (b) and (d) at all. Further in respect of (a) there is virtually no discussion but a recognition of the BTC's density of population tables but no analysis takes place. There was a cursory discussion of (e) regarding the boundaries in Nevis and virtually little or none in respect of St. Kitts.
>
> 5.7 The oral evidence of Chairman Anthony Johnson on 19th August 2009 discloses that the CBC relied on three matters, viz, the Boundaries Technical Committee Report, the Voters List and the Baron case. It is clear that a perusal of the minutes of the CBC that the excessive reliance on both the Voters list and the Baron case were irrelevant considerations. Schedule 2 speaks in terms of "inhabitants" not voters."

[338] The submissions on behalf of the Respondents are in these terms:

> "100. The Claimants were therefore obliged to prove that the recommendations made by the CBC were such that no sensible person who had applied his mind to the question to be decided could have arrived at them. The Claimants have manifestly failed to prove that the CBC's recommendations were irrational. However, as seen in Harper v Home Secretary [1955] 2 WLR 316 at page 325 to 326 [Tab 3], it is a matter for the National Assembly to decide whether to modify, accept or reject any recommendation made by the CBC. This adds to the heavy burden placed on the Claimants.
>
> 102. There ought to be no serious dispute that the CBC considered the material and Report of the Boundaries Technical Committee. The fact that "voters" may have been also been discussed or considered by the CBC is irrelevant. What is however important is that Rule 2 was considered and applied. There is no question that the Technical Committee's Report and Minutes show that the dominant considerations were population and inhabitants and geographical features. This was the clear evidence of the Chairman of the CBC and Miss Beverly Harris of the Technical Committee. Accordingly the use or reference to voters, which was and the dominant or only consideration, cannot affect the lawfulness of the recommendations made by the CBC.
>
> 103. [The Claimants] ... had the obligation to prove that the material and data before the Technical Committee, which was considered and accepted by the CBC, was totally inaccurate, and that the recommendations made by the CBC depend radically from the criteria under Rule 2. [See R V Boundaries Commission ex parte Foot [1983] 1QB 600.] The burden is a heavy one because the language of the Constitution gives the CBC a wide discretion ground of expediency. Rule 2 of Schedule 2 says:
>
> > "All constituencies ... as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this rule to such extent as it considers expedient...".
>
> 104. At paragraph 9.11 of their submission the Claimants allege that. "The Minutes of the CBC and the Report do not reflect any discussion of (b), (c) and (d) at all. Further in respect of (a) there is virtually no discussion but a recognition of the BTC's density of population tables but no analysis. There was a cursory discussion of (e) existing administrative boundaries in Nevis and virtually little or none in respect of St. Kitts. The Respondents contend that these are flawed and misleading allegations. The Report and Minutes show that the CBC accepted the Technical Committee's Report in principle, which included detailed data and material directly relevant to Rule 2.
>
> 105. Further, the evidence of Mr. Johnson at paragraphs 9 to 11, 21, 22 and 27 in his affidavit filed on the 7th August, 2009, Tab [41] establishes that the CBC considered and accepted in principle the Technical Committee's findings and recommendations. There is absolutely no question that the data and information collated by the Committee related to the criteria set out in Rule 2 (a) to (d), [See page 2 and 3 of their Report]. Therefore, by considering and accepting the Committee's Report, the CBC also considered and applied the same data, information and rules. The Technical Committee's Report is part of the CBC's Report.
>
> 106. It is submitted that the important issue for the Court's consideration and determination is whether the CBC's recommendations met the criteria under Rule 2 of Schedule 2. Consequently, in order to prove that the CBC acted arbitrarily or perversely the Claimants were obliged to plead and establish that:
>
> - The CBC completely ignored the criteria under Rule 2.
> - Blatant and sharp disparities will result between constituencies in terms of size and inhabitants.

- No reasonable Commission could have come to the recommendations based on the data and information available to the CBC.
- If the recommendations become law, they will result in unfair, disproportionate and ineffective representation;

107. The evidence shows that the claimants failed to discharge the burden of proof to show the CBC's recommendations did not satisfy Rule 2 of Schedule 2."

Pleadings

[339] At paragraph 3 of the grounds upon which the application for judicial review is based, the following is pleaded:

> "3. The Report of the 1st Respondent fails to give any or any proper reasons for the changes proposed and consequently is in breach of schedule 2, Rule 2 of the Constitution of St. Kitts and Nevis and/or takes into account irrelevant considerations and /or conflicts with the policy of the legislation and/or is contrary to law."

Evidence

[340] Both Claimants at paragraph 15 of their respective affidavits filed on 10th July, 2009, depose as follows:

> "15. The act of the Constituency Boundaries Commission in considering and/or agreeing and/or appending the Report of the Boundaries Technical Committee is improper and/or in excess of its jurisdiction and is consequently null and void and of no effect as the Boundaries Technical Committee is an entity not established either by the Constituency Boundaries Commission or the Constitution and further had no jurisdiction to submit a Report to the Constituency Boundaries Commission which is the only entity under the Constitution charged with the responsibility of delimiting constituency boundaries in the Federation of St. Kitts and Nevis and with regulating its own procedure."

Boundaries Technical Committee

[341] The evidence which says that the Constituency Boundaries Commission is the only body charged with the function of delimiting constituency boundaries is significant as it points to Section 49 of the Constitution which confirms the statement.

[342] It is common ground that the Constitution is the Supreme Law and Parliament cannot by the ordinary law-making process vest similar functions in another body without amending the Constitution in the manner prescribed. This was prescribed above.

[343] The Boundaries Technical Committee is a creature of SRO 18 of 2006 which purported to vest in it functions similar to that of the Commission. This as shown above is inconsistent with the Constitution and void to the extent of its inconsistency. The further academic point is that the Committee is not a creation of the Commission under Section 49 (3) of the Constitution. Indeed it is unconstitutional.

Analysis

[344] The Claimants in their submissions point to what they consider to be relevant consideration to include the requirements of Section 50 (1) and Schedule 2 of the Constitution. On the other hand, they point to the admission by Chairman of the Commission that the Commission placed reliance on three matters: the Boundaries Technical Committee Report, the Voters' Lists and the Baron Case. They characterized these as irrelevant considerations.

[345] On the other hand, the Respondents argue that Technical Committee's Report is valid and relevant and that there was compliance with Schedule 2.

[346] A consideration of the Boundaries Technical Committee Report is sufficient to deal with this issue. This rests on the proposition that the Boundaries Technical Committee, to the extent that it assumes or exercised the constitutional functions of the Commission is void. As a consequence, the Report which it prepared and submitted to the Commission is nugatory hence and of no effect. These conclusions negative the submissions of learned senior counsel for the Respondents as his premise is that the Committee's Report is lawful. There can be no issue with the fact that the Commission considered the Boundaries Technical Committee's Report which it had no legal or constitutional obligation to do. Mr. Astaphan accepts this, but he takes the issue into the realm of lawfulness and relevant considerations.

[347] In the Constituency Boundaries Commission's Report dated 29th June, 2009, there is no room for doubt as at page 4, the following is stated in this form:

> "THE COMMISSION ACCEPTED IN PRINCIPLE THE RECOMMENDATIONS MADE IN THE REPORT OF THE BOUNDARIES TECHNICAL COMMITTEE IN RESPECT OF THE EIGHT (8) CONSTITUENCIES ON THE ISLAND OF ST. CHRISTOPHER."

[348] Bearing in mind the unconstitutional status of the Boundaries Technical Committee and the content of Resolution 6 of SRO 18 of 2006, the following extracts from the affidavit of Chairman, of the Commission further compounds the situation:

"9. The Commission issued a Report dated 29th day of June 2009, which Report was endorsed by all members of the Commission. The Report was produced as a result of deliberation held by the Commission pursuant to Section 50 (1) of the Constitution of the Federation of St. Christopher and Nevis.

10. The deliberations of the Commission were informed by a Report from the BTC dated May 2009; electoral lists for each polling division in each constituency updated as at May 31 2009; Section 49 and 50 of the Constitution; and the Rules contained in schedule 2 of the said Constitution.

11. Additionally, we invited two (2) members of the Boundaries Technical Committee, Mrs. Beverly Harris and Mr. Oliver Knight; to provide us with information and assistance.

21. In my view and that of the Commission, Section 49 (3) of the Constitution permitted the Commission to rely on the Boundaries Technical Committee's Report and recommendations. I am advised that the public officers on the Committee were to my knowledge appointed with the consent of the Prime Minister.

22. The Commission was certainly entitled, in preparing its Report, to consider the Report of the Boundaries Technical Committee and to either accept or reject the contents and recommendations of the Report. Moreover, the Commission's Report is clear in its findings of the Report of the Boundaries Technical Committee were accepted in principle by the Commission."

Conclusion

[349] It is some importance to be reminded by Professor Albert Fiadjoe, Commonwealth Caribbean Public Law,[67] that: "The basic rule is that a public functionary must and stray from the confines of the power conferred upon him. He must factor into the exercise of his discretion only those considerations which are relevant and material for that purpose". The learned author uses as part of his thesis the case of C. O. Williams Construction Ltd. v Attorney General of Barbados in which it is held, in effect that in awarding a contract based on tenders, with the desire to redress historical injustices of the past was an irrelevant consideration.[68] Further, in Garner's Administrative Law[69] the Court's approach in this context is explained thus: "In reviewing decisions on this ground, the Courts look to the governing statute to see what factors or matters are required to be taken into account in reaching a decision as to the exercise of power; and conversely, what factors or matters should not be taken into account. Other factors may be permissive (i.e. are *relevant* but not *required* to be taken into consideration) rather than obligatory or prohibited considerations (i.e. factors which must or must not be taken into account)."

[67] (3rd ed.) at page 36.
[68] Ibid.
[69] (8th ed.) by B.L. Jones & K. Thompson at p. 223

[350] In terms of the issue being considered by the Court, it is hardly necessary to go beyond Section 49 of the Constitution, the Commission's Report and the Boundaries Technical Committee's Report. The reason being that the Constitution, being the supreme law, has vested functions in the Commission to the exclusion of all other bodies; and with power to regulate its own procedure and the methodology whereby this may be affected. As such, therefore, the Commission has no power to accept or consider any recommendation from another body which purports to exercise the same or similar functions. The Boundaries Technical Committee cannot feature in that equation by virtue of a Resolution of the House of Assembly.

[351] As declared above, the Boundaries Technical Committee is a nullity to the extent that purports to exercise the same or similar functions to those of the Commission. And the Report of the Committee suffers the same fate. Further, and more importantly, the Commission was under no legal or constitutional obligation to even consider, far less accept the recommendations of the Committee which have no legal or other effect anyway. Such action would constitute an irrelevant consideration which taints the Commission's Report with illegality. And Section 49 (3) of the Constitution provides no basis upon which the Commission could lawfully rely on the Boundaries Technical Committee's Report and its recommendations.

[352] It is of some significance to note that given Resolution 6 of SRO 18 of 2006, the Boundaries Commission Report at page 1 indicates the following to be its Terms of Reference:[70]

> "The Committee will conduct the necessary demographic and survey work to ensure that the constituencies are equitable as possible. It will advise the Constituency Boundaries Commission on all matters of re-alignment. It will also regulate its own activities and choose a chairman."

[353] It is not clear to the Court whether Resolution of SRO 18 of 2006 or the Committee's Terms of Reference was considered by the Commission. But the evidence is that the Committee's Report guided their deliberations immensely.

[354] According to Lord Pearce in Anisminic v Foreign Compensation Board,[71] two of the circumstances in which excess of jurisdiction may arise is where the tribunal asks itself the wrong question or if it takes into account matters which it was not directed to take into account.

[70] These are in fact drawn from the White Paper on Electoral Reform.
[71] [1969] 2 AC 147, 237

[355] This is raised by the Court because the Commission invited and heard from two members of an unconstitutional organization who did not come in their own right as professionals, but as members of the Boundaries Technical Committee an illegal body. This too would constitute a further irrelevant consideration or illegality. Accordingly, the Report of the Constituency Boundaries Commission is null and void and of no legal effect.

Abdication/fettering

[356] It is the Claimants' contention that the Commission abdicated its functions or fettered its discretion. Reliance is placed on a number of dicta and learning from leading text. Among them, is the following from Michael Fordham, Judicial Review Handbook:

> "Basic duty not to abdicate/fetter: A public body's basic statutory functions are inalienable. It must own its functions and actions. Bodies are not entities to surrender or ignore therein powers and duties, nor 'fetter' themselves to a particular course or approach."

Submissions

[357] The following are the submissions on behalf of the Claimants:

> "12.7 The entire Minutes of the CBC reflect a surrender/abdication to the BTC. Other than the most cursory discussion in relation to Nevis and a FEW districts in St. Kitts, there was little analysis of the matters before the Committee. There was little or no analysis or independent thought with respect to the boundaries. This cannot be divorced from the inferences which may legitimately be drawn from the following:
>
> > "[T]he remit of the BTC appointed by the Government virtually mirrored that of the CBC; the failure to appoint members to the CBC for two years after the BTC was created the failure of the CBC to do any work for about nine months the single change in St. Kitts that varied from BTC's recommendations (the Changes in Nevis arose as a result of the vigorous representation by the two Nevis MPs sitting on the CBC the failure of the CBC to have any independent resources, viz., budget, office the failure of the CBC to address its mind to the omissions and/or imperfect data of the BTC's Report, eg, missing population data for St. Peter the fact that the CBC invited only two people to its meetings, viz, two and only two members of BTC."

[358] On the part of the Respondents, the following are the submissions:

> "109. On the assumption, SRO 18 of 2006 has the force of law, the language of clauses 6 and 10 make it clear that the CBC was not bound or obliged to accept any technical support or Report from the Boundaries Technical Committee. There is nothing in the language of the SRO which binds or fetters the discretions or functions of the CBC. On the other hand, even if the SRO is a mere resolution, and the Claimants have not denied that the SRO is at least a valid resolution, it would not be binding on any person

or body in the sense of being enforceable in a court of law. However, Parliament is authorized to set up Committees.

110. The provision of "technical support" to the CBC does not, and cannot, fetter the exercise of a discretion or function. The CBC was not obliged to consider or accept any finding or recommendation from the Committee. In Dr. Errol L. Cort v Leroy King et al Suit No. 263 of 2001, Mr. Justice Georges held that the Executive was empowered to set up ad hoc committee. Surely, the National Assembly must have at least the same authority as that of the Cabinet. The evidence of the Deputy Prime Minister was that the findings and recommendations of the various committees were collated, summarized and presented to the National Assembly for consideration by his Parliamentary Committee.

111. In this case, the Technical Committee had no function other than to collate data and provide technical support. It too was no executive or coercive powers. All that it could do and did was provide technical support. The CBC was entitled under the provisions of Section 49 (3) of the Constitution or its implied powers to consider, accept or reject any support or recommendations from the Technical Committee. There is no evidence of any advance statement or assurance given by the CBC that it would accept whatever was submitted to it by the Committee. On the contrary the evidence from Mr. Johnson and the Minutes show that there was vigorous debate and at the end, the CBC did not accept all of the findings or recommendations of the Technical Committee.

112. The Claimants rely on East Devon District Council v Electoral Commission, The Boundaries Committee for England [2009] EWHC 4. But again, this case provides no assistance to the Claimants. The obligations to consult were created by statute. At paragraph 31, page 15, the Claimant argued that 'the rejection of the Exeter proposal breached a fundamental rule of public law, that the Boundary Committee was obliged to consider the matter for itself, rather than simply to accept the views expressed at an early stage by the Secretary of State that she was not minded to adopt it because of problems of affordability'."

Pleadings

[359] Ground 5 upon which the claim for judicial review is based, is in these terms:

> "5. The act of the 1st Respondent in abdicating its responsibility under the Constitution of the Federation of St. Kitts and Nevis and/or taking dictation from the Boundaries Technical Committee considering and/or agreeing and/or appending the Report of the Boundaries Technical Committee is improper and/or in excess of its jurisdiction and consequently the Report of the 1st Respondent is null and void and of no effect as the Boundaries Technical Committee, having been established in 2006 2 years before the members of the 1st Respondent were appointed, is an entity not established under the 1st Respondent or the Constitution and further had no jurisdiction nor lawful authority to prepare and/or submit Report to the 1st Respondent which is the only entity under the Constitution charged with the responsibility of delimiting constituency boundaries in the Federation of St. Kitts and Nevis and with regulating its own procedure under Section 49 of the Constitution."

Evidence

[360] In his supplemental affidavit in support of a claim for judicial review, Mr. Lindsay F. P. Grant deposes a follows at paragraphs 3-7:

"3. Since the Constitution provided for the establishment of the Constituency Boundaries Commission in 1983, there has been no realignment of boundaries in the Federation of St. Kitts and Nevis.

4. The Report does not contain or include any review of the Constituency Boundaries as mandated by Section 50 (1) of the Constitution. I have been advised by my Attorney-at-Law and verily believe that the Constituency Boundaries Commission, by adopting wholesale in its Report the Report of a committee that is a stranger to the Constitution abdicated it constitutional functions.

5. I have not seen any factual evidence or anything contained in the Report to support or substantiate the recommendations of the Commission. In my opinion the Report is baseless and devoid of serious analysis, of a review of the changes in the demographics or any explanation for its recommendations other than to adopt the Boundaries Technical Committee Report.

6. The Boundaries Technical Committee, which was established as set out in the "White Paper", based their Boundaries Report on an outdated 2001 Census Statistics which did not account for the many changes in growth and distribution of the population in the Federation.

7. The Parliamentary Committee that named the Boundaries Technical Committee on or about the 18th April 2007, was chaired by the Honourable Deputy Prime Minister, Sam Condor who on 25th October, 2004, almost three years before the Boundaries Technical Committee was appointed, predicted that the boundaries would change and that in so doing, neither I, nor any candidate of the Peoples Action Movement, could ever be able to be returned as the representative for a constituency."

[361] The following statement will also be recalled from the Commission's Report at page 4:

"THE COMMISION ACCEPTED IN PRINCIPLE THE RECOMMENDATIONS MADE IN THE REPORT OF THEBOUNDARIES TECHNICAL COMMITTEE IN RESPECT OF THE EIGHT (8) CONSTITUENCIES ON THE ISLAND OF ST. CHRISTOPHER."

[362] Under cross-examination, Mr. Anthony Johnson, Chairman of the Commission, in seeking to explain the Commission's power to regulate its procedure testified that:[72]

"…It is constrained in terms of the authority that the Commission has to regulate its own procedures. However Section 49 (3) allows the Commission to impose duties and powers on the officer or authority for the purpose of discharging its functions subject to the consent of the Prime Minister …."

[363] And in testifying about the preparation of the Commissions Report, this is the essence of Mr. Johnson's evidence:

"We having become aware of the availability of the [Boundaries] Technical Committees Report and bearing in mind that it comprised a number of experts' demographer, economist/statistician, and surveyor we felt that it would be useful that the Report of that Committee would guide our deliberations. And having read the Report it is clear that the Committee did work taking into account the issue of population distribution and density. It was important to determine whether the Technical Committees work was accurate. The accuracy and the weight to be attached was discussed by members. We did not feel bound to accept the Report."

[72] Transcript of Trial Proceedings, Wednesday 19th August 2009 at page 7, lines 4-7

The Law

[364] With respect to abdication/fettering the following are basic propositions of law: [73]

> "It is elementary that a public body should 'own' its functions and decisions. Bodies are not entitled to surrender or ignore their powers and duties. Nor may they 'fetter' their discretion by over committing themselves to a particular course or approach.
>
> A public body is not entitled to surrender its independent judgment to a third party. Nor is one public body entitled to procure such a surrender from another.
>
> A public body or decision-maker may not 'give away' its functions to another person or body."

Analysis

[365] The Respondents' basic argument is that assuming that SRO 18 of 2006 has the force of law, then clauses 6 and 10 of that Resolution make it clear that the Boundaries Technical Committee was merely providing technical support to the Commission which the Commission could have refused. There are two immediate difficulties with these two propositions. First, SR0 18 of 2006, as the Court has already determined does not have the force of law and even if it did, it is patently unconstitutional. Second, the provision of technical support is a cover that does not help the Respondents as the Commission's Report reveals the reality as to the manner in which the Committee's (technical support) or more accurately, recommendations were treated.

[366] The basic piece of evidence which is uncontroverted is that the Commission accepted in principle the recommendations of the Boundaries Technical Committee and went much beyond that.

[367] On a consideration of the relevant evidence as a whole leads to the following conclusions and findings:

> 1. A perusal of the Commissions Report and that of the Committee reveals that the Commission did very little original work, pursuant to its function under Section 50 (1) of the Constitution.
> 2. The Chairman of the Commission gave evidence that the Commission was not bound to accept the Committee's recommendations. This was also repeated in the submissions by learned senior counsel. But the above has only to be stated to be rejected as being irrelevant as the Commission said clearly in its Report that the recommendations were accepted in principle.
> 3. The Chairman of the Commission, being an attorney of 14 years standing did not fully understand that Section 49 (3) of the Constitution permitted the Commission to regulate

[73] Fordham, op, cit at paras. 50.1 to 50.3

its own procedure and that by virtue of that power the Commission could have secured the services of the demographer, statistician and economist (being public officers) the approval of the Prime Minister and the services of Mr. Buchanan or any other land surveyor of its own violation. What compounds the issue is that at page 1 of the Commissions Report it is stated that the services of the recording secretary, Mrs. Claudia Williams, in accordance with Section 49 (3) of the St. Christopher and Nevis Constitution. The rhetorical question must be this: Why didn't the Chairman with all his legal experience guide the Commission in reflecting the Committee's recommendations at the end or in rejecting it as *ab initio* given its dubious legal basis?

4. The matter of technical support is fully explained in the Terms of Reference as stated at page 1 of the Boundaries Technical Committee Report where it is stated as follows:

> "The Committee will conduct the necessary demographics and survey work to ensure that constituencies are equitable as possible. It will advise the Constituency Boundaries Commission on all matters or re-alignment. It will also regulate its own activities and chose a chairman."

5. For the entirety of the Commission's Minutes of the 5th and 8th June, 2009, the Committee's recommendations are discussed to the extent where at the meeting of 8th June, 2009, the Hon. Vance Amory and Hon. Liburd made the following statements:[74] Hon. Amory: "So to speak my position is based on the recommendation of the Technical Committee. I would support the recommendations that has been made in changes to be done that will affect the boundaries in constituencies, three, four and five together with changes which have already [been] agreed to by the majority of the members constituencies eight and seven." Hon. Liburd: "I am not in support of changes which is not base[d] on [the] technical committee Report. That is our position. I am in the position to decide on both again. In the previous situation I base my position on the recommendations of the technical Report in respect of this for my own."

6. There is hardly a page in the minutes of the Commission where the words 'Technical Committee', 'technical Report' or 'technical people' are not mentioned and discussed in some form.

[368] It is therefore the determination of the Court, in agreement with the Claimants, that the Constituency Boundaries Commission abdicated in favour of the Boundaries Technical Committee. And further that the actions of the said Commission fall within the principles quoted above from Judicial Review Handbook in this regard.

ISSUE NO. 10

Whether the pleadings and/or the evidence show that the Constituency Boundaries Commission failed to consider and/or apply the Rules under Schedule 2 of the Constitution?

[369] Schedule 2 to the Constitution is both concise and specific in terms of what must concern the Commission in the exercise of its function.

[74] Minutes of the [Constituency] Boundaries Commission of 8th June 2009 at pages 22-23.

[370] While Rule 1 addresses the total number of Constituencies in St. Kitts and Nevis, respectively; Rule 2 of the Schedule speaks of all the constituencies containing as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable. But this Rule may be departed from by the Commission based on the following conjunctive factors: (a) differences in density in population in the two islands, the need to ensure adequate representation of sparsely populated rural areas; means of communication; geographical features; and the existing administrative boundaries.

[371] It is the view of the Court that the determination by that the Commission abdicated in favour of the Boundaries Technical Committee in itself address the issue in part.

[372] Further, the evidence reveals that one member of the Commission, Hon. Michael Perkins, had difficulty with the 'technical Report' as it is based on a census of 2001.[75]

[373] As noted above, central to the discussion among the members of the Commission was the 'technical Report' on the 'Committee's Report'. This is revealed by the members of the two meetings of the Commission.

[374] The Court considers it fair to say that the dominant concern of the Committee, and by extension the Commission, were boundary changes, simpliciter, brief mention of equality and voters when the schedule speak of inhabitants. In any event, it cannot be said that the factors prescribed in Rule 2 (a) – (e) were discussed in any detail or at all. This follows naturally from the abdication.

[375] It cannot be unreasonable or even illogical to expect the narrative in the Commission's Report to deal, to some extent, with the requirements of Schedule 2 to the Constitution. In the circumstances, the following must be construed as the basis for the recommended changes in St. Christopher:[76]

> "The Commission considered the proximity of Polling Division six (6) of St. Christopher two (2) to St. Christopher three (3) and specifically the fact that certain areas and or villages immediately beyond the existing Polling Division six (6) of St. Christopher two (2) namely La Guerite, Shadwell Site and Shadwel Estate, presently comprised the existing Polling Division one (1) of St. Christopher three (3). The Commission recommended that the existing Polling Division six (6) of St. Christopher two (2) becomes part of St. Christopher three (3) instead of Polling Division five (5) of St. Christopher two (2) as recommended by the Technical Boundaries Committee.

[75] Minutes of the Meeting of the Boundaries Constituencies Commission held on 5th June 2009, at pages 5.
[76] Report of the Constituency Boundaries Commission, (dated 29ttth June 2009) at page 4.

Therefore the Commission recommended that the eight (8) constituencies on the island of St. Christopher constituencies be divided as outlined in schedule 1 hereto."

[376] With respect to Nevis, the basis of the Commission's recommendation is stated in the Report thus:

"…The Commission considered the fact that based on the 2001 census figures and the number registered voters as of May 31, 2009, Nevis nine (9) has a much larger population than both Nevis ten (10) and Nevis eleven (11).

In the circumstances and in an attempt create greater equality among the existing three constituencies on the island of Nevis while removing the obvious aberration which presently exists in Nevis nine (9) the Commission recommended that the following changes be made in respect of the Constituency Boundaries in the island of Nevis namely:

(i) That Polling Division one (1) of Nevis (9) becomes part of Nevis ten (10) and

(ii)That Polling Division six (6) of Nevis nine (9) becomes part of Nevis eleven (11).[77]"

[377] The following excerpts taken from the minutes of the Commissions' meetings of 5th and 8th June, 2009, are considered by the Court to be helpful in this regard:

[378] "Hon. Earl "Asim" Martin:[78] "You have the Report from the Technical Committee and the Technical Report, page[s] three to five looked at the population breakdown and distribution for constituencies [based] upon recommendations made both in St. Kitts and Nevis."

[379] Hon. Vance Amory:[79] "We have a list from the Technical Committee for three constituencies, bear in mind it would be affected by our recommendations for re-alignment in St. Kitts and Nevis. We look at the disparity which is not necessarily the size of the population; you will see also none with respect – four thousand voters, size only to eight in St. Christopher. It is larger by forty percent than most of the others in terms of registration of voters, in the population as well – four thousand, six hundred, you will see we are larger than most of the constituencies and so larger than seven. It is larger than four; it is larger than six.

[380] Hon. Cedric Liburd:[80] "We are here to look at boundaries after so many years – almost over twenty-five years, but the issue we have done that in the past. I want to know first from this Commission if we are in support of changes in the Boundaries."

[381] Hon. Perkins:[81] "It seems that we face a 2001 census because we do have 2009 population figures, when we check up the distribution for new constituencies. The new distribution of voters

[77] Ibid, at page 5.
[78] Minutes of the Meeting of the Constituency Boundaries Commission of 5th June 2009. Page 3.
[79] Ibid at page 4.
[80] Ibid at page 7.

assigned to each constituency it is impossible to say whether or not we reached any equity. You have a census; it would all be looked at. You could have a boundary change next year."

[382] Chairman Johnson:[82] "Where I see the problems I believe inhabitants. Quite frankly, how the framers were thinking [at] the time, but when in general I think about how I may from my personal opinion. Inhabitants should be replaced by voters. We are speaking about an election, constituency election and speaking having merely equitable number of inhabitants/voters as a pair in the Constitution departs from this route into pass rural area."

[383] Chairman Johnson:[83] "Only the Technical Report, recommended changes at least only those lines. That does remove, that should cover all of as what decision we take what difference we can rationalize not only to the public but to whatever institution subject to any contribution."

[384] Hon. Vance Amory:[84] "You look back at the balance two to three would be good. How can we define that would be three up to twenty-three hindered from the old math. If you move six to three. If we without the boundary we are shifting persons in the new area down to three – two thousand, four hundred and seventy-eight even if we do move any to four. We look at four – that three and four if any changes made to three would be equal. Then you look at five and six they would roughly be equal. Couple of votes here and there. What we are saying agree that two to three without changing anything and leaving four as it is. We are trying to equalize. What do we do with eight. Eight like nine is clearly way above the others – six hundred voters for the largest ever constituency."

[385] Hon. Cedric Liburd:[85] "When you check the constituencies in Basseterre in the future we have to look at twelve or thirteen thousand voters after the next census. The three largest in St. Kitts is really centered around in the past to St. Peter's to Cayon."

[386] Hon. Earl Martin:[86] "The Constitution talks about inhabitants and on par you are talking about issue on number, on electoral list. That can't be the sole defense. Perhaps immediately after a Census, changes should be made at that point so that after the Census, the boundaries could be changed at the same time. The Constitution speaks about a Census."

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[81] Ibid at page 13.
[82] Ibid.
[83] Minutes of the Meeting of the Constituency Boundaries Meeting held on 8th June 2009 at page 5.
[84] Ibid at p. 5-6.
[85] Ibid pages 6-7.
[86] Ibid, pages 7-8.

[387] Hon. Vance Amory:[87] "Then really the three reviews around St. Christopher eight, one and two would reflect the balance in those areas. If you look at constituency No. two it doesn't provide that density. If you look at the population – one, two and eight which involves the area the heaviest population. Then those three constituencies adjustment from eight, for eight to become equal. So then it would mean because of their location and then the other locations – changing them…."

[388] Chairman Johnson:[88] "I am in support of the recommendation made on this commission in respect to the changes from constituency two and three following division six remains in the constituency. And the ratio for the support is part of what polling division six part and parcel of the constituency.
In respect of polling division three to include adjustment in that part of the constituency. In respect of the representation made by the Technical Committee all recommendation are in respect of St. Christopher two.
This Commission recommends that Polling that indeed polling division six move to constituency three and the other changes be adopted."

[389] Hon. Cedric Liburd:[89] **"**I am not in support of changes which [are] not based on the Technical Committee Report. That is our position."

[390] Hon. Earl "Asim" Martin:[90] **"**I in a sense given the presentation earlier indicated, we have to take into consideration the voters on the list but also in terms of the population of the various constituencies and parishes that make up with those."

Conclusion

[391] That the Commission considered and was guided by the Boundaries Technical Committee Report has already been determined and there were legal consequences too. But even further, the Court also concludes that the concern of the Commission was boundary changes based on the recommendations. In so doing the Court considered the submissions on behalf of the Respondents[91] which sought to show that the Commission gave consideration to the requirements of Schedule 2. But given the domination of the Committee's Report in the Commission deliberations, there could be no reasonable discussion of that which the Commission is required to

[87] Ibid, pages 11-12.
[88] Ibid at page 22.
[89] Ibid at page 22.
[90] Ibid at page 24.
[91] See submissions on behalf of the Respondents at paragraphs 53 – 60.

consider. That is the evidence. Therefore an examination of the minutes of the Commission as a whole and especially the above extracts therefrom lead to the conclusion that the Commission failed to consider and apply the Rules under Schedule 2 to the Constitution.

ISSUE NO. 11

Did the Claimants waive their right to be heard, if any, by the Constituency Boundaries Commission and ought they by their conduct to be denied relief?

[392] It is common ground the Constituency Boundaries Commission is vested by Section 50 (1) of the Constitution with the function of reviewing the constituency boundaries and to submit a Report with recommendations, as it determines, to the Govern-General. It is the vesting of this function in the Commission which weighs heavily in the determination of the above-stated issue.

Submissions

[393] The Claimants cited a number of common law authorities plus leaning the legal circumstances of a statutory/context.[92] They also detail certain factual situation to illustrate their contention. They are:

> "Failing to give the Applicant or his constituents on the People's Action Movement the opportunity to consider and or comment on any Report.
> The CBC acting improperly upon the advice of the BTC, an entity not established by either the Constitution or the CBC.
> Acting contrary to the purposes of the Preamble and Sections of the Constitution."

[394] The following are the submissions on behalf of the Respondents:

> "40. The Respondents submit that there are three lawful sources of a right to be heard or consulted. These are the Constitution, Statute or a legitimate expectation. There is no question that there is no provision of the Constitution or Statute which confers a right to be heard or consulted, or to hold public inquiries. There is no evidence of any settled practice or representation of consultations. In HMB Holdings Ltd v Cabinet of Antigua and Barbuda PCA 18 of 2006 Lord Hope, at paragraph 31, said:
>
> > Then there is legitimate expectation as an additional ground of review. As Lord Fraser of Tullybelton explained in Attorney General for Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, 636 E-F, the concept of legitimate expectation is capable of including expectations created by something that falls short of an enforceable legal rights, provided they have some reasonable basis. But if the public body has done nothing or said nothing which can legitimately have generated the expectation that is contended for, the case must end there:

[92] Cooper v Wandsworth Board of Works [1863], 14 CB (NS) 180; Ridge v Baldwing (1964) AC 40, Wiseman v Bourneman [1971] AC 297, Halsbury Laws of England, Vol. 34 (4th ed.) at para 1089.

R (Bibi) v Newham London Borough Council [2002] 1 WLR 237, para 21.

41. At paragraph (28) of their submissions, the Claimants rely on Halsbury's Laws of England Vol. 34, 4th Edition, under the heading "Procedure of Boundary Commissions", at paragraph 1089 However, footnotes 1 to 10 under paragraph 1089 show clearly that the Commission's obligation to consult in the United Kingdom was imposed by Statute [See also Foot]. No such statutory provisions or requirement exists in St. Kitts and Nevis.

42. The Claimants also rely on Cooper v Wandsworth Board of Works, Ridge v Baldwin and Wiseman v Bourneman. But these authorities concern the exercise of executive or quasi-judicial powers which affect the legal rights of citizens. Cooper dealt with the acquisition or taking of land, Ridge with the termination of employment and Wiseman a tax determination. In Wiseman v Bourneman Lord Quest explained the true position. He said "It is reasonably clear on the authorities that where a statutory tribunal has been set up to decide final question affecting parties rights and duties, if the statute is silent upon the question, the courts will imply into the statutory provision a rule that the principles of natural justice should be applied". By referring to "a statutory tribunal has been set up to decide final questions affecting parties' rights and duties". Lord Quest was not referring to bodies such as the CBC which do not exercise executive or quasi-judicial powers.

43. This distinction between "a statutory tribunal ……. Set up to decide final questions affecting parties rights and duties" and a body like CBC, which exercises no executive or judicial powers, is reflected in the judgment of the NSWCA Minister for Local Government v South Sydney Council (No 2) [2002] NSWCA 317 Tab [10], Vol. 2, where in relation to a Boundaries Commission the Court of Appeal of New South Wales held, at paragraph 13, that:

> "As properly conceded a trial, the Commission had no obligation to hold an inquiry. Neither did the Commission have an obligation to seek ministerial approval to that end. The statue is silent in this regard and there is no basis for finding an implicit procedural obligation."

Analysis

[395] It has already been noted that the Commission's function is confined purely to the making of recommendations concerning constituency boundaries in St. Kitts and Nevis. It can go no further, so that no question of financial or quasi-judicial power arises. This rests on the proposition that such bodies also do not determine rights or obligations and as such the issue of natural justice does not arise. As such the Court agrees with the Respondents' argument that the line of cases[93] in which it was held that the bodies concerned were concerned with the rights of individuals arose, and as such, the rules of natural justice had to be observed.

[93] See cases cited at footnote 56, supra.

[396] The Court agrees further that the sources of the right to be heard and the duty to consult arise from the Constitution, statute or the common law. The latter would of course include the doctrine of legitimate expectation.[94]

[397] In so far as the Commission is concerned, the first two sources do not apply, as there is nothing in Sections 49 or 50 of the Constitution which can be so construed. Even further Section 8 (8) of the Constitution speaks of "any court or other authority prescribed by law for the determination of the existence extent of any court right on obligations." This would not apply for the reason given above. The same applies to statute as none has been cited to the Court which gives rise to such a right to be heard or a duty to consult.

[398] In R v Boundaries Commission ex parte Foot Sir John Donaldson M. R. explained the situation in this way:[95]

> "There are undoubtedly distinctions between the position of the commission and that of a minister or local authority taking executive action under statutory powers which affects the individual citizen. The commission has no executive power. Their functions and duty is limited to making advisory recommendations. Furthermore the commission's task is ancillary to something which is exclusively the responsibility of Parliament itself, namely, the final decision on parliamentary representation and constituency boundaries. These are distinctions to which we will return when giving further consideration to what action should or should not be taken by the court in the circumstances of this case. At the moment all that need be said is that it is common ground that in some circumstances it would be wholly proper for the courts to consider whether the commission have, no doubt inadvertently, misconstrued the instruction which they may have been given by Parliament and, if they have done so, to take such action as may be appropriate in order to ensure that the will of the Parliament is done."

[399] In the same case the Master of the Rolls made a further distinction thus:[96]

> "The situation of the commission differs from that of many other public authorities in that, even at the very end of their inquiries and deliberations, they make no final decision; they merely make a recommendation to the Secretary of State who, after making any modifications to their Report which he thinks appropriate, has to pass it on to Parliament for final approval or rejection. This distinctive nature of the function of the commission might well make the court in the exercise of its discretion more slow to intervene in regard to their activities than it would be in relation to those of many other public authorities. Nevertheless, it has not been suggested before this court, and in our opinion could not be correctly suggested, that the commission are above the law, in the sense that their activities are never susceptible to review by the courts."

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[94] See Attorney General of Hong Kong v Ny Yuen Shiu [1983] 2 AC 629, 636 (e) – (f) per Lord Fraser.
[95] [1983] 1 Q.B. 600, 616 b-d
[96] Loc cit at 626 b-c

[400] This means, logically, that in other jurisdictions such as Britain and Australia where bodies similar to the Commission exist, they are governed by statute and as a consequence the legal result will be different.

[401] Thus in Britain the House of Commons (Redistribution of Seats) Act 1949, regulates the Boundary Commissions and that statute gives the Boundaries Commissions an express power to inquiries[97] in the course of the exercise of their functions. This contrasts with the same situation in New South Wales, Australia where in **Minister for Local Government v Smith Sydney Council** (No. 2)[98] it was held by that State's Court of Appeal that the Boundaries Commission, which is governed by statute, had no obligation to hold an inquiry. And further that the silence of the statute in this regard created no room for finding an implicit procedural obligation of this nature."

[402] This Court and other Courts are no doubt aware of the celebrated dictum of Byles J in **Cooper v Wandsworth Board of Works** that "although there are no positive words in a statute, requiring that the party be heard, yet the justice of the common law will supply the omissions of the legislature". But that dictum has its context, and it is where the public authority has power to affect rights. Accordingly, given the context of the Commission in St. Kitts and Nevis and given the absence of any right to be heard or duty to consult in the Constitution or Statute, there are omissions to be supplied. Nor does the doctrine of legitimate expectation apply since there is no evidence of any course of conduct by the Commission to trigger the doctrine.

[403] In the result the conclusion of the Court is that the Claimants have no right to be heard and the Commission has no duty to consult.

[404] But even if the Court is wrong in reaching the above conclusion, the other question is whether the Claimants waived their right. In this regard there is an abundance of evidence.

[405] From the inception of Electoral Reform, the Hon. Shawn K. Richards indicated his party's position thus:[99]

> "My party indicated that it looked forward to participate in the process of electoral reform. However, the party was concerned with the relationship of these committees to the constitutionally mandated Electoral Commission, the 2nd Respondent and the Constituency Boundaries Commission, the 1st Respondent and requested clarification from the Government as to these arrangements without success."

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[97] House of Commons (Redistribution of Seats) Act 1949.
[98] [2002] NSWCA 317
[99] At paragraph 7 of his affidavit in support of a claim for Judicial Review filed on July 10, 2009.

[406] In a later affidavit, the said affiant sought to clarify matters by saying that: "For the avoidance of doubt, neither I nor the PAM boycotted the Electoral Reform Process. We were completely involved in the consultative process conducted by the Newton Committee and were in agreement with most if not all of the recommendations of the Newton Committee most of which, if not all the government failed to implement."

[407] In cross-examination,[100] Mr. Richards was questioned as to his attendance at a meeting of the Parliamentary Constituency and Electoral Reform and Boundaries Committee to which he was appointed. He admitted that he did not attend any of that Committee meeting but said that he attended only one town hall meeting convened by the Newton Committee at which time he presented a paper bearing the title: "Electoral Reform a Guarantee for Better Governance in the Federation of St. Kitts and Nevis." Mr. Richards further admitted that he did not attend any meeting of the other committees set up under SRO 18 of 2006 but would have heard some of the proceedings live on radio.

[408] In response this question: "Do you not think it is important that if invitations were sent to attend specific meetings of the committees that you as the only elected member should have been informed?" Mr. Richards' response was: "Not necessarily."

[409] Concerning the matter of changes, Mr. Richards agreed that in a paper delivered to the Newton Committee his party's position was stated in these terms under the caption "Constituency Boundaries": "There shall be no consideration of boundary changes before the completion of a full re-registration has been taken and a new voters' list has been approved as a certified list representing the completed process." And according to Mr. Richards it is still the party's position today.

[410] With respect to the launch of the White Paper, Mr. Richards testified that he attended with the political leader and "believed" that they stayed until the end of the function.

[411] Both the Attorney General, Mr. Dennis Merchant and the Deputy Prime Minister, Minister in their affidavits in response[101] conform the extent of the non-participation by Mr. Richards, Mr. Grant and

[100] See Transcript of Trial Proceedings, Monday 17th August 2009 at pages 86 et seq.
[101] Both affidavits were filed on 7th August, 2009

the People's Action Movement in the Electoral Reform process. In particular, Mr. Condor deposed as follows at paragraphs 5, 15 and 16 of his said affidavit:

> "5. I recall that prior to 2000 there was public discussion on electoral reform and changes to the constituency boundaries. In 2001 a Parliamentary Select Committee on Constitutional Reform was established by PAM refused to participate in the process stating that they would not take part in any Constitutional Reform without first addressing Electoral Reform.
>
> 15. I invited the 1st Claimant to each and every meeting of the PCERBC[102] but his response was that he would not attend any of the meetings and he did not in fact attend any of the meetings. Also, on every adjournment of our Committee's meetings, I contacted the 1st Claimant and invited him to participate in the following meeting by the 1st Claimant repeatedly stated that he would not attend any meeting of the PCERBC.
>
> 16. In addition to Mr. Richards refusal to participate, the PAM made public statements that they had no intention whatsoever of participating in the process. For example, in an interview with the Sun St. Kitts, Mr. Grant made it clear that the PAM would not accept any invitation to serve on any of the Committees. His interviews on excerpts therefrom were published. On the 25th August, 2006 the Sun St. Kitts & Nevis Newspaper published the following words: '[Lindsay] Grant, however, made it clear that his party would not accept any invitation to serve on any of the committees that were established to assist in the process.' A true copy of the said newspaper article is exhibited as **'DM7'** to the Affidavit of Dennis Merchant sworn and filed on 7th August 2009."

[412] In cross examination on both affidavits, there were no material contradicts regarding the matter of non-attendance, non-participation or otherwise, of their evidence.

[413] In any event, the Claimants' tasks is not made any easier on account of a whole spate of correspondence[103] principally between the Cabinet Secretary and the General Secretary, Peoples' Action Movement with respect to the Electoral Reform process. It begins a letter drafted 8th May, 2006, seeking PAM's nominee to serve on the National Advisory Electoral Reform Committee and ends with a letter to the Chairman, National Advisory Electoral Reform and Boundaries Committee from the General Secretary Peoples' Action Movement. It is dated 24th November, 2006. The letter draws attention to the fact that PAM's views are "well documented and known" regarding the "obvious bias" in the composition of the National Advisory Electoral Reform and the Boundaries Committee. The latter ends in these terms: "our views have not changed. As a consequence our non-participation or your Committee stands."

Conclusion

[102] Being the acronym for the Parliamentary Constitutional and Electoral Reform and Boundaries Committee.
[103] See exhibit SKR2 referred to in the affidavit of Shawn K. Richards file on 8th July, 2009.

[414] In all the circumstances, the Court agrees with the Respondents' contention that even if the Claimants has a right to be heard or to be consulted, it was waived by their overwhelming non-participation in the Electoral Reform process as a whole consistent with the position articulated on behalf of the Peoples' Action Movement. In a word, the Claimants "wanted the best of both worlds, which the doctrine of waiver did not allow."[104]

ISSUE NO. 12

Does the burden of proof lie on the Claimants or Respondents?

[415] It is clear that these proceedings as a whole are concerned with a Constituency Boundaries Commission and proposed changes to the electoral boundaries in the Federation of St. Kitts and Nevis.

[416] In the view of the Court, the issue hardly requires argument. Therefore, most appropriately, in saying that the onus of proof lies on the Claimants' reliance will be placed on two dicta from the case of R v Boundary Commission, ex parte Foot[105], a case which deals with the exact issue. They are from the judgment of the English Court of Appeal given by Lord Donaldson M. R. at pages 634 and 637:

> "It cannot be emphasized too strongly that on these present application the onus does not fall on the commission to justify their proposals, either in general terms or in particular instances, and either by evidence or otherwise. The onus falls fairly and squarely on any person who seeks to challenge their proposals.
> Furthermore, the onus is a heavy one since the legislation has conferred no express right on any person, to challenge the Commissions' decisions and any attack has to be based on the Wednesbury principle."

[417] His Lordship concludes his judgment in this way:

> "It is for the applicants to satisfy us that the Commission are doing other than faithfully obeying the instructions of Parliament. Thus the applicants have completely failed to do. It follows that there are no grounds for us to intervene."

Conclusion

[418] The burden of proof in these proceedings rests on the Claimants.

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[104] See: MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun [2003] 1 LRC 339 following Locabail (UK) Ltd v Bayfield Properties Ltd [2000] 3 LRC, 142, Auckland Casino Ltd v Casino Central Authority [1995] 1 NZLR 142.
[105] Loc cit.

Costs

[419] In so far as costs are concerned, the awards to the Claimants are as follows: In respect of Claim SKBHCV 2009/0159, the 1st Defendant must pay the Claimant costs in accordance with Part 65.5 (2) (b) (iii) of CPR 2000. Further, with respect to Claim No. SKBHCV 2009/0179, the 1st and 4th Respondents must each pay the Claimants costs in accordance with Part 65.5 (2) (b) (iii) of CPR 2000.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Constituency Boundaries Commission ('the Commission') is a body established by the Constitution of St. Kitts and Nevis with the exclusive jurisdiction of reviewing the electoral boundaries in St. Kitts and Nevis and making recommendations, if necessary, and it is protected by entrenched provisions of the said Constitution and as such beyond the ordinary law-making process of Parliament.

2. Section 50 (2) of the Constitution is directory but the existence of certain factors in the particular context could render the impugned action a total invalidity.

3. The Commission is a single body which transitioned from the former Constitution to the present Constitution, a change in the membership of the Commission does not alter its status as a single body; the requirement to submit a Report at intervals is directory but the period of such submission for the purposes of Section 50 (2) is 9th May, 1979, and the requirement to submit a Report to the Governor General before any other person is also directory.

4. There can be no enforcement of rights under Section 3 and 10 of the Constitution by way of a constitutional motion instituted under Section 96 of the said Constitution.

5. In this context, the Commission not being a judicial, quasi judicial or administrative body, the matter of protection of the law does not arise.

6. The effect of Section 50 (7) of the Constitution is to oust the jurisdiction of the Court provided that the question of *vires* or violation of constitutional rights does not arise in relation to the Commission.

7. Contrary to the restrictions contained in the injunction granted by this Court on 2nd July, 2009, use was made of the Commission's Report and, with the injunction being still in force, the Proclamation which purported to give effect to the said Report is null and void and of no legal effect.

8. The National Assembly is incompetent to enact a Resolution styled SRO 18 of 2006 on the basis that there is no enabling legislation, which Section 37 of the Constitution, is not.

9. SRO 18 of 2006 is unconstitutional, null and void and consequentially the Boundaries Technical Committee, derived therefrom, is also unconstitutional, null and void on the further ground of purporting to exercise the function of the Commission, given the import of the supreme law clause.

10. Generally, the Claimants have made generalized allegations and, in particular, the pleadings and affidavit evidence with respect to bias, bad faith, and improper purposes are insufficient; but there is a prima facie sufficiency in the pleadings with respect to the other heads of judicial review claimed.

11. The Commission in considering and accepting the recommendations contained in the Report of the Boundaries Technical Committee, which it had no obligation to do, took into account irrelevant considerations especially since the Committee was purporting to exercise the function of the Commission which render the Commission's Report an illegality, and as such null and void and of legal effect.

12. The Commission in accepting the recommendations of the Boundaries Technical Committee abdicated in favour of that body.

13. The Commission, in the exercise of its function under Section 50 of the Constitution and in submitting a Report to the Governor General based on the acceptance of the Boundaries Technical Committee's recommendations failed to exercise its function in accordance with the rules prescribed in this regard by Schedule 2 to the Constitution.

14. The Claimants have no right to be heard or consulted in the making of recommendations by the Commission; and even if they had, it was waived by their refusal to take part in the Electoral Reform Process, the precursor to the making of the said recommendations.

15. The onus of proof in these proceedings rests on the Claimants.

16. The injunction granted on 2nd July, 2009, and confirmed on 8th July, 2009, is discharged.

17. With respect to Claim No. SKBHCV 2009/0159 the 1st Defendant must pay the Claimant costs in accordance with Part. 65.5 (2) (b) (iii) of CPR 2000.

18. With respect to Claim No. SKBHCV 2009/0179 the 1st and 4th Respondents must each pay the Claimants costs in accordance with Part 65.5 (2) (b) (iii) of CPR 2000.

Appreciation

The importance and gravity of these proceedings undoubtedly demanded tremendous research, scholarship and advocacy of the highest order from Learned Counsel on both sides. They did not disappoint, and our jurisprudence is the better for it. Accordingly, the Court wishes to record its deep appreciation in this regard to all.

Errol L. Thomas
Judge (Ag.)