

EASTERN CARIBBEAN SUPREME COURT  
THE FEDERATION OF SAINT CHRISTOPHER AND NEVIS  
NEVIS CIRCUIT

IN THE COURT OF APPEAL

HCVAP 2012/003

BETWEEN:

JOSEPH PARRY

Appellant

and

MARK BRANTLEY

Respondent

HCVAP 2012/004

BETWEEN:

[1] LEROY BENJAMIN  
(The Supervisor of Elections)  
[2] BERNADETTE LAWRENCE  
(Registration Officer for the  
Constituency of St. John's)

Appellants

and

MARK BRANTLEY

Respondent

HCVAP 2012/005

BETWEEN:

HENSLEY DANIEL

Appellant

and

MARK BRANTLEY

Respondent

**Before:**

The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

**Appearances:**

Dr. Henry Browne, Mr. Oral Martin with him, for Mr. Joseph Parry and Mr. Hensley Daniel  
Mr. Anthony Astaphan, SC, Mr. Sylvester Anthony with him, instructed by Ms. Angela Sookoo of Sylvester Anthony & Associates for Mr. Leroy Benjamin and Ms. Bernadette Lawrence  
Mr. Douglas Mendes, SC, Mr. Dane Hamilton QC, Mr. Keithley Lake, Ms. Jean Dyer, Ms. Dahlia Joseph, and Mr. Brian Barnes with him for Mr. Mark Brantley

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2012: July 5, 6;  
August 27.

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*Election petition appeal – Whether Constitution establishes a special Constitutional Court – Whether Elections Act establishes a special Elections Court of limited jurisdiction – 203 registered voters removed from the Register – List of objections not published by Returning Officer as required by Regulations - Notice of objection not given to objectees – Notice of hearing of objection sent by registered post – Objectees not receiving notices within the 5 days minimum time required by the Regulations – Objectees disenfranchised on objections made by ruling party – Returning Officer a supporter of ruling party – Supervisor of Elections failing to publish Revised Monthly Lists – Supervisor of Elections ignoring request from opposition party to publish Revised Monthly Lists - Supervisor of Elections ignoring direction from Electoral Commission to restore removed names – Election eventually contested on a List published just 5 days before election – Persons removed from List not having opportunity to appeal - Whether duty to ensure receipt of notice of a hearing at which a person's rights may be affected – Whether proceedings such as hearing of objections to voters which do not come to the notice of the objectee are not a nullity – Whether failure to communicate an administrative decision which is adverse to an individual is not without legal effect – Whether failure to give notice of right of appeal invalidates the decision against which an appeal may be brought - Apparent bias – Bad faith and misfeasance in public office – Whether judge right to find election invalid and void – Government Radio Station only covering campaign events of ruling party – Opposition party political campaign not covered by Government media – Right to freedom of expression – Right not to be discriminated against on basis of political opinion – Right of the opposition to equal time on state media – Whether costs should have been ordered*

This is an appeal from a decision of a trial judge in Nevis in which he granted some of the reliefs sought by Mark Brantley who lost the July 2011 election to the Nevis Island Assembly seat in District St. John's 2 constituency to Hensley Daniel by a margin of 14

votes. The evidence accepted by the judge was that the Registration Officer removed 203 registered voters from the Register of Voters in the months prior to the election. These were all removed on objections made by the governing party led by Joseph Parry and of which Mr. Daniel is a member. The Registration Officer did not ensure the objectees received notice of the making of the objections and of the date, time and place at which the objections would be considered. The Registration Officer was a party supporter of Mr. Parry's party, the party in power. The election to St. John's 2 was eventually contested on the basis of a revised list which was published just 5 working days before the election.

Bernadette Lawrence, the Registration Officer, did not post a List of Objections as required by the Regulations. She served notices of the objections on the voters by delivering the notices to the Post Office for posting by registered post. Some 114 of those notices were registered by the Post Office less than 5 days before the date of the hearing, or, in some cases, after the hearing date itself. She considered that the requirement for 5 days applied only to cases where the notice was served in writing and not to registered post. She took the view that she was not required by the law to be satisfied that the notices had been served. The result was that she heard the objections in the absence of the persons objected to, and she ordered the removal of their names from the Register.

Leroy Benjamin, the Supervisor of Elections and Chief Registration Officer, did not publish the Revised Monthly Lists for Nevis as required by the Elections Act. Such publication would have publicised the removal of the names from the Register. He took the view that Mr. Brantley was aware that it had never been the practice to publish the Revised Monthly Lists, and had in fact previously won elections under this system without complaint. Both Mr. Brantley and the leader of Mr. Brantley's party wrote Mr. Benjamin some months prior to the election requesting that he publish the Revised Monthly Lists, but he did not respond. The Electoral Commission, which is charged with supervising the Supervisor of Elections, directed Mr. Benjamin and Ms. Lawrence to restore to the List the names removed by Ms. Lawrence without notice to the objectees after hearing a complaint from Mr. Brantley, but Mr. Benjamin sought legal advice and, based on that advice, neither he nor Ms. Lawrence responded to the Commission or complied with the direction.

The trial judge also found that the decisions of Ms. Lawrence were tainted by apparent bias, but he did not hold that there was apparent bias because of her relationship with Mr. Parry's party. She had acted previously as polling agent for Mr. Daniel and she had attended executive party meetings at which she advised on financial matters.

The trial judge declared the election invalid on the ground that the principles of natural justice had not been followed in the process of upholding the objections. The trial judge also found that the Government's Radio Station's failure to carry any of Mr. Brantley's party's political events during the election campaign violated Mr. Brantley's fundamental constitutional right not to be discriminated against on the grounds of his political beliefs. The judge ordered each party to bear their own costs.

On the appeal, Mr. Parry and Mr. Daniel submitted that the trial judge had erred in making findings of a constitutional nature in dealing with an election petition. As an "Elections Court" he was limited to the jurisdiction granted by the statute governing elections. He

erred in hearing objections to the registration process because as an Elections Court he was limited to dealing with errors in the election process. The proper forum for appeals against decisions of the Registration Officer was the appropriate appeal tribunal, and not the judge sitting in an Elections Court on the hearing of an election petition.

Mr. Parry and Mr. Daniel submitted that the trial judge erred in granting Mr. Brantley the constitutional declaration he sought. The sole function of an Elections Court is to determine the validity of membership in the Assembly. Constitutional relief is to be sought in a section 18 "Constitutional Court", which is a court peculiar unto itself.

Mr. Benjamin and Ms. Lawrence submitted that the trial judge misconstrued the law governing objections and failed to consider that the vast majority of the notices were returned by the Post Office on the basis that the addressees were not resident in St. John's, and were therefore not qualified to be registered. On the assumption the Registration Officer erred in not giving adequate notice to the objectees, the judge should either have sent the matter back to the Registration Officer for determination after proper notice, or the judge should have decided the matter of the residence qualification himself on the basis of the evidence. It was not open to him to have set the election aside.

On his cross-appeal, Mr. Brantley urged that the trial judge erred in failing to find, as he should have, that the List of Voters used for the election in the Constituency of Nevis 2 (Parish of St. John) was not the list required by section 48(1) of the Act to be used at the election. He also urged that, having found that the disenfranchised voters were not notified of the date and place for the hearing of objections to their registration, nor were they notified of the results of the objection hearings, and that the Registration Officer had failed to publish the List of Objections, the learned judge was wrong not to have found that as a consequence of any or all of these failures, the removal of the disenfranchised voters from the List was unlawful, null and void and of no effect. He also urged that, having found that the Registration Officer was in breach of the Regulations in not immediately sending out the notices of objection, the trial judge was wrong not to find that the Registration Officer acted in breach of Regulation 19 and was wrong not to find that the removal of the disenfranchised voters from the List was, on this additional basis, unlawful, null and void and of no effect. He also urged that the learned trial judge's failure to find that the decision of the Registration Officer to uphold the objections in all the circumstances was tainted with bias was wrong.

**Held:** (1) dismissing the appeals of Leroy Benjamin, Bernadette Lawrence, Joseph Parry and Hensley Daniel and upholding the decision of the trial judge (i) to declare the election for the constituency of Nevis 2 (St. John's) invalid and void and that Hensley Daniel was not validly elected or returned for that electoral district; and (ii) to grant the declaration that Mark Brantley's right of freedom of expression and his right not to be treated in a discriminatory manner by reason of his political opinions had been contravened by the failure of the Nevis Island Administration on its nightly Nevis News Cast to cover any of the political events organised by Mr. Brantley's political party during the campaign leading up to the election of 11 July 2011; and (2) allowing the cross-appeal of Mr. Brantley and holding that the learned trial judge erred in failing to hold that the names of the voters who were unlawfully removed from the Register of Voters should be restored, that:

1. Section 18 of the Constitution of St. Kitts and Nevis does not establish a special Constitutional Court but rather vests in the High Court the jurisdiction to deal with claims of breaches of constitutional rights which claim may properly arise on an election petition.

**The Saint Christopher and Nevis Constitution Order 1983, Statutory Instrument No. 881 of 1983** considered; **Ferdinand Frampton v Ian Pinard et al** Commonwealth of Dominica Claim No. 0149-0154 of 2005 (delivered 28<sup>th</sup> October 2005) approved.

2. Section 36 of the Constitution does not establish a special Elections Court but rather vests in the High Court the jurisdiction on an election petition to deal with questions of the validity of membership in the Assembly.

**Edison Lewis v Reuben Harris et al** Antigua and Barbuda Civil Appeal No. 2 of 1976 (delivered 22<sup>nd</sup> October 1976) distinguished.

3. The right of enfranchisement has a constitutional pedigree and, in applying the law and the regulations, preference must be given to recognition of the right to vote, and the legislation must be construed in a manner which promotes enfranchisement and guards against disenfranchisement.

**Russell v Attorney-General of Saint Vincent and the Grenadines** (1995) 50 WIR 127 followed;  
**Quinn-Leandro v Jonas** (2010) 78 WIR 216 followed.

4. The requirement at Regulation 23, that the Registration Officer shall give at least five days notice (of the date, time and place for consideration of objections) of which there is evidence that it has been received by the addressee, applies both to a notice in writing that is personally served on the addressee and to a notice that is sent by registered post. Where a notice of a hearing at which a person's rights may be affected is involved the burden on the person sending the notice is to be very careful to see that the person is fully apprised of the proceedings before making an order against him.

**The Election Registration Regulations 1984**, as amended, considered; **R v London County Quarter Sessions Appeals Committee Ex parte Rossi** [1956] 1 QB 682 followed.

5. Proceedings such as the hearing of objections to registration on the Voters' List which ought to have been served but which did not come to the notice of the objectee are a nullity. This is the normal result of a failure to comply with the requirements of natural justice.

**Re Pritchard** [1963] Ch 502 followed.

6. The failure of the Chief Registration Officer to publish the Revised Monthly Lists as required by section 46 of the Act, despite being reminded of the obligation by both Mr. Brantley and the leader of his party in separate communications, had the effect of concealing the removal of the names of the objectees from the Voters' List by the Registration Officer. The failure to communicate an administrative decision which is adverse to an individual is without legal effect.

**The National Assembly Elections Act Cap 2.01** as amended, considered; **Regina (Anufrijeva) v Secretary of State for the Home Department and Another** [2004] 1 AC 604 followed.

7. The failure of the Chief Registration Officer and the Registration Officer to communicate the removal of their names from the Register of Voters to the persons objected to either by notice or by publication of the Revised Monthly Lists deprived those persons of an opportunity either to appeal the decision or to apply for re-registration. The failure to give notice of a right of appeal invalidates the decision against which an appeal may be brought.

**Rayner v Corporation of Stepney** [1911] 2 Ch 312; **Agricultural Horticultural and Forestry Industry Training Board v Kent** [1970] 2 QB 19; **London & Clydeside Estates Ltd v Aberdeen District Council** [1980] 1 WLR 182 followed.

8. The list used for the July 2011 election was not the list required to be used by section 48 of the **National Assembly Elections Act** ("the Act"). The list was to comprise the Register of Voters (or January 2011 List) and the Revised Monthly Lists published under sections 43 and 45 of the Act together with the May Monthly List. The election was accordingly held on the basis of a defective list and on this basis alone the petition ought to have succeeded.
9. The learned trial judge was justified on the evidence in finding bias on the part of Ms. Lawrence on the basis of her deliberate proceeding to hold hearings in the absence of the objectees when it would have been obvious that some 113 of them would have received their notices less than 5 days before, or on or after, the dates of hearings. He found it to be a deliberate act of disenfranchisement on the part of Ms. Lawrence for the benefit of the party of which she was a supporter, from which any reasonably well-informed and fair minded observer would conclude there was a real possibility she acted with bias. The evidence before the learned trial judge clearly supported the inference that Ms. Lawrence had allowed her party affiliation to come before her statutory duties and her constitutional and common law duties of fairness to all the voters of the constituency of which she had been given charge. There was abundant evidence which established not only bias but, worse, bad faith and misfeasance on the part of Ms. Lawrence. The learned trial judge ought not to have held that a finding of bad faith and misfeasance on the part of Ms. Lawrence would not take the matter much further as it was a finding that was required by the evidence to be made.

10. Mr. Benjamin's conduct in failing to comply with his statutory duty to publish the Revised Monthly Lists, despite being reminded in writing separately by Mr. Brantley as leader of the opposition and by Mr. Brantley's party leader, his failure even to acknowledge receipt of the correspondence, despite knowing that persons whose names were being removed from the list would be injured by his failure to publish as they would not know their names had been removed until a few days before the election when he published the July List, was evidence of reckless indifference as to whether he was breaking the law and causing injury. This was enough for the judge to have found bias and bad faith and misfeasance in public office on the part of Mr. Benjamin and it was similarly a finding that was required by the evidence to be made.

**Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)** [2003] 2 AC 1; **Watkins v Secretary of State for the Home Department** [2006] 2 AC 395 followed.

11. The learned trial judge was justified in granting a declaration that Mr. Brantley's right to freedom of expression and his right not to be treated in a discriminatory manner by reason of his political opinions had been contravened.

**Sections 12 and 15 of the The Saint Christopher and Nevis Constitution Order 1983, Statutory Instrument No. 881 of 1983** applied; **Benjamin and others v Minister of Information and Broadcasting and another** [2001] UKPC 8 applied.

12. Costs awarded against Mr. Parry, Mr. Daniel, Mr. Benjamin and Ms. Lawrence jointly and severally to be paid to Mr. Brantley in the Court below, to be assessed if not agreed, within 21 days and in the Court of Appeal two-thirds of the amount awarded in the Court below.

## JUDGMENT

- [1] **MITCHELL JA [AG.]:** St. Christopher, more familiarly St. Kitts, and Nevis are a Federation of two islands. There is a federal government which sits in Basseterre in St. Kitts, and a local government, the Nevis Island Administration, which sits in Charlestown in Nevis. There is a National Assembly in Basseterre and a Nevis Island Assembly in Charlestown. St. Kitts electors elect representatives only to the National Assembly. Nevisian electors elect representatives to both the National Assembly and the Nevis Island Assembly. These elections do not take place simultaneously. The last federal elections were in the year 2010, when Mr. Mark Brantley won the federal seat for District 9 in Nevis, and sits in the

National Assembly in Basseterre as the Leader of the Opposition. The local election for the Nevis Island Assembly, which he contested, and which gives rise to this dispute, took place on 11<sup>th</sup> July 2011.

[2] During the 2011 Nevis Island Assembly elections, two main parties contested the five seats available. They were the Nevis Reformation Party ("NRP"), of which Mr. Joseph Parry is the leader, and the Concerned Citizens Movement ("CCM") of which Mr. Brantley is a member. The NRP, of which Mr. Hensley Daniel is a member, won three seats. Mr. Daniel won the constituency of St. John's Nevis with 1,358 votes as compared to the 1,344 votes for Mr. Brantley. Mr. Parry won the seat he contested and, as the leader of the party with the majority of seats in the Nevis Island Assembly, was appointed the Premier of the Nevis Island Administration. The CCM won the other two seats, and its members form the opposition in the Nevis Island Assembly.

[3] Mr. Brantley is a lawyer by profession and has been a nominated member of the Nevis Island Assembly since the year 2006 when he was appointed a Senator on the Opposition benches. In 2007 he contested and won a National Assembly by-election to fill a seat in Electoral District 9 made vacant by the death of the incumbent. Electoral District 9 is a constituency for the National Assembly elections. The two National Assembly constituencies in Nevis are subdivided into 5 constituencies for elections to the Nevis Island Assembly. Electoral District 9 is divided into Nevis 1 and Nevis 2 for elections to the Nevis Island Assembly. Nevis 2 consists of the Parish of St John's. The Register used for elections for Nevis 2 is a part of the Register for Electoral District 9. In the 2007 National Assembly by-election Mr. Brantley beat Mr. Daniel by 30 votes. In the National Assembly general elections of 2010 he again contested Electoral District 9 against Mr. Daniel and again won, increasing his margin of victory to 148 votes. At both those National Assembly elections, Mr. Daniel was the incumbent for the St John's Nevis constituency in the Nevis Island Assembly. When the Nevis Island Assembly elections were called for 11<sup>th</sup> July 2011, Mr. Brantley went up



against Mr. Daniel and lost, as we have seen, by a margin of 14 votes. This is the disputed election.

- [4] Among the other parties to this appeal is Mr. Parry who, as has been mentioned, is the leader of the NRP and the Premier of Nevis. Mr. Leroy Benjamin is a Pastor by calling and was appointed the Supervisor of Elections and is ex-officio Chief Registration Officer for the Federation. Ms. Bernadette Lawrence holds a Diploma in Teaching Science and a BSc in Economics and Accounting from the UWI. She has been a Certified General Accountant (CGA) for over 10 years. She is currently the Marketing Director of the Nevis Financial Services Department. She was, in May 2010, appointed the Registration Officer for the disputed constituency of St John's Nevis 2 in the Nevis Assembly Elections of July 2011.
- [5] One major difference between the January 2010 National Assembly Election and the July 2011 Nevis Island Assembly elections is that, in the period between January 2011 and the date of the July 2011 elections, Ms. Lawrence as Registration Officer for the constituency of St John's Nevis 2 expunged 203 registered voters from the Register of Voters as a result of objections lodged against their registration by agents of the NRP on the ground that they no longer resided in the constituency.
- [6] In an election petition brought by Mr. Brantley and determined by Lionel Jones J, the learned trial judge determined that the names of the 203 voters were removed from the Register of Voters as a result of numerous violations of the law on the part of Mr. Benjamin as Supervisor of Elections and Ms. Lawrence as Registration Officer. Of the 203 disenfranchised voters, 39 testified that had they been permitted to vote, they would have voted for Mr. Brantley. Of this number, 29 testified that they were in fact resident in the constituency of St John's or were resident abroad in circumstances which entitled them to be registered in St John's. The trial judge held that Mr. Benjamin and Ms. Lawrence had deliberately disenfranchised those voters and had subverted their rights as

voters. Their removal from the Register of Voters he found was the result of a reckless disregard of the importance of observing the rules of natural justice. The learned trial judge accordingly declared the election of Mr. Daniel invalid. It is against these findings that Mr. Parry, Mr. Benjamin, Ms. Lawrence and Mr. Daniel appeal. There is also a cross-appeal by Mr. Brantley.

## The Legal Scheme for Elections in the Federation of Saint Christopher and Nevis

- [7] The **Saint Christopher and Nevis Constitution Order 1983** (“the Constitution”)<sup>1</sup> establishes the constituencies for the National Assembly and for the Nevis Island Assembly, and provides at section 29 for the election of representatives.<sup>2</sup> Section 104 provides for section 29 to be read appropriately to apply to elections to the Nevis Island Assembly. The Constitution provides that the manner of election is to be prescribed by an Act of Parliament. Section 36 of the Constitution provides for the High Court to have jurisdiction to hear and determine any question whether any person has been validly elected a representative. An application to the High Court may be made by any person entitled to vote in the election or who alleges that he was a candidate at that election, or by the Attorney-General, and if made by any person the Attorney-General may intervene and appear or be represented at the proceedings.<sup>3</sup>

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<sup>1</sup> Statutory Instruments No. 881 of 1983.

<sup>2</sup> Section 29 – **Election of Representatives.**

(1) Each of the constituencies established in accordance with the provisions of section 50 of this Constitution shall return one Representative to the National Assembly who shall be directly elected in such manner as may, subject to the provisions of this Constitution, be prescribed by or under any law enacted by Parliament.

(2) Every Commonwealth citizen of the age of eighteen years or upwards who possesses such qualifications relating to residence or domicile in Saint Christopher and Nevis as Parliament may prescribe shall, unless he or she is disqualified by Parliament from registration as such, be entitled to be registered as a voter for the purpose of electing Representatives in one (but not more than one) constituency in accordance with the provisions of any law in that behalf and no other person may be registered as such.

(3) Every person who is registered under subsection (2) in any constituency shall, unless he or she is disqualified by Parliament from voting in any election of Representatives or of members of the Nevis Island Assembly, be entitled so to vote in that constituency in accordance with the provisions of any law in that behalf and no other person may so vote.

<sup>3</sup> Section 36 – **Determination of questions of membership.**

(1) The High Court shall have jurisdiction to hear and determine any question whether

(a) any person has been validly elected as a Representative;

[8] The **National Assembly Elections Act as amended** ("the Act")<sup>4</sup> is the relevant Act, and it is buttressed by the **Election Registration Regulations**<sup>5</sup> ("the Regulations") made under it. They establish the process governing the registration of eligible voters and the compilation of the Register of Voters to be used in an election. Also provided for is the process governing the removal of voters from the Register. In the year 2007 the Act was amended to provide for an electoral reform exercise. The period 27<sup>th</sup> December 2007 to 4<sup>th</sup> October 2008

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- (b) any person has been validity appointed as a Senator;
  - (c) any person who has been elected as Speaker from among persons who were not members of the National Assembly was qualified to be elected or has vacated the office of Speaker; or
  - (d) any member of the Assembly has vacated his seat or is required, by virtue of section 31(4), to cease to perform his functions as a member of the Assembly.

(2) An application to the High Court for the determination of any question under subsection (1)(a) may be made by any person entitled to vote in the election to which the application relates or by any person who was, or who alleges that he was, a candidate at that election or by the Attorney-General and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

(3) An application to the High Court for the determination of any question under subsection (1)(b) or (1)(c) may be made by any Representative or by the Attorney-General and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

(4) An application to the High Court for the determination of any question under subsection (1)(d) may be made

- (a) by any Representative or by the Attorney-General; or
- (b) in the case of the seat of a Representative, by any person registered in some constituency as a voter in elections of Representatives,

and, if it is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear and be represented in the proceedings.

(5) There shall be such provision as may be made by Parliament with respect to

- (a) the circumstances and manner in which and the imposition of conditions upon which any application may be to the High Court for determination of any question under this section; and
- (b) the powers, practice and procedure of the High Court in relation to any such application.

(6) An appeal shall lie as of right to the Court of Appeal from any final decision of the High Court determining any such question as is referred to in subsection (1).

(7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) and no appeal shall lie from any decision of the High Court in proceedings under this section other than a final decision determining any such question as is referred to in subsection (1) of this section.

(8) In the exercise of his functions under this section, the Attorney-General shall not be subject to the direction or control of any other person or authority.

<sup>4</sup> Cap 2.01 as amended by The National Assembly Elections (Amendment) Act, 2007, No. 22 of 2007; and The National Assembly Elections (Amendment) Act, 2008, No. 2 of 2008 and The National Assembly Elections (Amendment) Act, 2009, No. 16 of 2009.

<sup>5</sup> The Election Registration Regulations 1984, (located at the Fourth Schedule to the Act) as amended by The Election Registration (Amendment) Regulations 2008, SRO 9 of 2008.

was designated as the period during which all persons registered as voters for a constituency could confirm their registration and be issued with a National Identification Card. Those electors who embraced the opportunity to confirm their registration were issued with National Identification Cards and were included on the new Register of Voters. They remained so registered unless their names were removed for one of the reasons set out at section 39 of the Act.

[9] The Electoral Commission is established by section 33 of the Constitution. Its function is to oversee the Supervisor of Elections in the performance of his functions under sections 34(1), 38(9) and 113(5).<sup>6</sup> Section 34 of the Constitution provides for a Supervisor of Elections and gives him general control of the registration of voters and the conduct of elections,<sup>7</sup> and power to issue directions

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<sup>6</sup> Section 33 – **Electoral Commission.**

(1) There shall be for Saint Christopher and Nevis an Electoral Commission...

...

(4) The function of the Commission shall be to supervise the Supervisor of Elections in the performance of his or her functions under sections 34(1), 38(9) and 113(5).

(5) 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 an authority of the Government for the purpose of the discharge of its functions.

(6) 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 of 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.

<sup>7</sup> Section 34 – **Supervisor of Elections**

(1) There shall be a Supervisor of Elections whose duty it shall be to exercise general supervision over the registration of voters in elections of Representatives and over the conduct of such elections.

...

(4) For the purposes of the exercise of his or her functions under subsection (1), the Supervisor of elections may give such directions as he or she considers necessary or expedient to any registering officer, presiding officer or returning officer relating to the exercise by that officer of his or her functions under any law regulating the registration of voters or the conduct of elections, and any officer to whom any such directions are given shall comply with those directions.

(5) The Supervisor of Elections may, whenever he considers it necessary or expedient to do so and shall whenever so required by the Commission, report to the Electoral Commission on the exercise of his functions under subsection (1); he or she shall also submit every such report to the Minister for the time being responsible for matters relating to the election of Representatives; and that Minister shall, not later than seven days after the National Assembly first meets after he has received the report, lay it before the Assembly together with such comments thereon as he may have received from the Commission.

...

(7) In the exercise of his or her functions under subsection (1), the Supervisor of Elections shall act in accordance with such directions as he or she may from time to time be given by the Electoral Commission but shall not be subject to the direction or control of any other person or authority.

to any elections officer relating to the exercise of that office. The Supervisor of Elections is himself subject to directions from the Electoral Commission, but not from any other person or authority.

[10] Section 37 of the Act<sup>8</sup> provides for the qualification of voters.<sup>9</sup> The entitlement to registration in a particular constituency is based primarily on residence within the geographical boundaries delineated for that constituency. Once a person is registered he or she is entitled to remain on the Register until his or her name is deleted for one of a variety of reasons.<sup>10</sup> There are also provisions for the issuing of National Identification Cards to voters and for them to be required to produce their card at a Poll.

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(8) The Supervisor of Elections shall exercise such other functions in relation to elections (whether to the National Assembly or to local government authorities) as may be prescribed by or under any law enacted by Parliament.

<sup>8</sup> As amended by the (Amendment) Act No 22 of 2007, which appears erroneously to refer to section 37 as section 42.

<sup>9</sup> Section 37 – **Qualification of Voters.**

(1) Subject to this Act and any enactment imposing any disqualifications for registration as a voter, a person is qualified to be registered as a voter for a constituency if, on the registration date, he is

- (a) a citizen of Saint Christopher and Nevis of eighteen years or upwards who is domiciled in Saint Christopher and Nevis or is ordinarily resident in Saint Christopher and Nevis;
- (b) a citizen of Saint Christopher and Nevis of the age of eighteen years or upwards whose name appears in the register of voters for a constituency and who is ordinarily resident overseas and has a domicile in Saint Christopher and Nevis in accordance with section 42B(1) and;
- (c) a citizen of Saint Christopher and Nevis of the age of eighteen years or upwards who is ordinarily resident overseas and has a domicile in Saint Christopher and Nevis in accordance with section 42B(2);
- (d) a Commonwealth citizen (not being a citizen of Saint Christopher and Nevis) of the age of eighteen years or upwards who has been ordinarily resident in Saint Christopher and Nevis for a continuous period of at least twelve months immediately before the registration date.

(2) A person is not qualified to be registered as a voter for more than one constituency.

(3) Where a person who is registered as a voter for a constituency has ceased to reside in that constituency, he or she shall not on that account cease to be qualified to be registered as a voter for that constituency until her or she has become qualified to be registered as a voter for another constituency.

<sup>10</sup> Section 39 – **Right to remain registered.**

A person registered pursuant to this Act shall remain registered unless and until his or her name is deleted from the Register because

- (a) he or she has died;
- (b) an objection to his or her registration has been allowed; or
- (c) he or she has become disqualified for registration as a voter under this Act or any other enactment imposing disqualifications for registration as a voter.

[11] Section 45 provides the mechanism for registration of voters. Persons may make a claim to be registered as a voter, and persons may object to the names of persons appearing on the Register.<sup>11</sup> The Registration Officer having dealt with all claims and objections is to transmit the resulting record of her determination to the Chief Registration Officer, who is to then revise the Monthly List and publish it.<sup>12</sup> The January Lists of the Register of Voters together with the published Revised Monthly Lists is the Register of Voters to be used in any election held in the particular constituency.<sup>13</sup>

[12] Regulation 3 sets out the procedure to be followed by prospective voters and by the Registration Officer in the matter of the registration of voters.<sup>14</sup> They must apply on a form setting out their qualifying address, and the Registration Officer must give the applicant a Certificate of Registration once the process is complete.

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<sup>11</sup> Section 45 – **Claims and objections.**

(1) All claims for registration made by a person whose name does not appear in the register or the appropriate monthly list and all objections to the registration of persons whose names appear in the registers of voters and in the monthly lists, as the case may be, shall be determined in accordance with the regulations by the appropriate registration officer acting with respect to the constituency to which the register or list in question relates.

(2) When a claim thereunder has been disallowed or an objection thereunder has been allowed, the registration officer shall transmit a record of his or her determination to the Chief Registration Officer.

<sup>12</sup> Section 46 – **Revised monthly lists.**

The Chief Registration Officer shall make all additions to the appropriate monthly lists and shall make removals therefrom in consequence of any action taken under section 39 or 45 and shall publish as soon after the fifteenth day of the next succeeding month (and in any case not later than the last day of each such month) the corrected monthly lists as the revised monthly list of voters.

<sup>13</sup> Section 48 – **Register and supplementary register to constitute the register for any election.**

(1) The register of voters and the revised monthly lists of voters published for each constituency under sections 43 and 45 respectively in any year shall constitute the register of voters for that constituency and shall be used for any election held in that constituency after the publication thereof until it is superseded by the register of voters published and constituted for that constituency in the next succeeding year in accordance with this Act.

(2) Whenever a writ is issued between the publication of the last revised monthly list and any other revised monthly list, the last revised monthly list shall be used for the purposes of the conduct of the Poll.

<sup>14</sup> Regulation 3 - **Registration of Voters.**

(1) Every person who is qualified to be registered as a voter for a constituency shall apply in person to the Registration Officer for that constituency to have his or her name entered in the Monthly List for that constituency under a qualifying address, and every application under this subsection shall be in writing and shall be in Form No. 1 as set out in the Schedule.

(2) Upon completing the registration of any person, the Registration Officer shall complete Form No. 2, the Certificate of Registration and shall give it to the person registered.

(3) Agents of political parties or candidates or persons likely to be nominated as candidates shall be entitled to inspect the Certificates of Registration issued under subsection (2) prior to the posting of any list.

These certificates are to be available to political parties prior to the publication of any revised list, presumably for the purpose of filing any objection.

- [13] The general qualification to vote in a particular constituency depends on ordinary residence in the constituency. Ordinary residence is defined in the same terms both in section 42A of the Act<sup>15</sup> and in regulation 5.<sup>16</sup> It is generally the place of his or her habitation or home. However, one of the unique features of the system of voter registration in St. Kitts and Nevis is that it permits the registration as voters of persons who are resident abroad.<sup>17</sup> The constituency in which overseas voters

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<sup>15</sup> Section 42A – **Ordinary Residence**

(1) For the purpose of registration under this Act a person shall be deemed to reside in the constituency where he was ordinarily resident on the registration date.

(2) A person shall not, for the purposes of this Act, be deemed to be ordinarily resident in any constituency to which he has come for the purpose of engaging temporarily in any employment of a seasonal character and for the purposes of this subsection, "seasonal" means temporary employment of not more than six months at any one time.

(3) Subject to subsections (1), (2), (4) and (5), the question whether a person is or was ordinarily resident in a constituency for any material period shall be determined by reference to all the facts of the case.

(4) The place of ordinary residence of a person is, generally the place which has always been or which he has adopted as, the place of his habitation or home, whereto when away from there he intends to return.

(5) Where it appears by reference to all the facts of the case that a person has more than one place of ordinary residence, such person shall elect in respect of which place he desires to be registered.

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<sup>16</sup> Regulation 5 - **Ordinary Residence.**

(1) The place of ordinary residence of a person is, generally, that place which has always been, or which he or she has adopted as, the place of his or her habitation or home, whereof when away from there he or she intends to return.

(2) The question as to whether a person is ordinarily resident or domiciled in any constituency at any material period shall be determined by reference to all the facts of the case.

<sup>17</sup> Section 42B – **Domicile**

(1) A person to whom section 42(1)(b) applies whose name appears in the register of voters for a constituency is only eligible to vote in the constituency in which that person had been registered immediately prior to leaving Saint Christopher and Nevis to reside overseas.

(2) For the purpose of registration under the Act a person to whom section 42(1)(c) applies may apply to be registered as a voter in the constituency:

(a) where that person had been ordinarily resident immediately prior to leaving Saint Christopher and Nevis to reside overseas; or

(b) where that person's mother is or was but for migration or death, ordinarily resident provided that where that person's mother has never been ordinarily resident in Saint Christopher and Nevis, that person may apply to be registered in the constituency in Saint Christopher and Nevis where that person's father is or was but for migration or death ordinarily resident.

are to be properly registered is determined by a combination of the place where they may have been registered before emigration to reside abroad, the place where they were residing before such emigration, and, where they were never registered or resided in any constituency in St. Kitts or Nevis, the place where one of their parents resided before emigration.

- [14] Another feature of the St. Kitts and Nevis system of voter registration, though one that is not unique to that country, is that a person is entitled to vote in the constituency in which he or she is registered, even though he or she no longer resides in that constituency. A person registered in one constituency but residing in another is entitled to exercise his or her franchise until his or her registration is cancelled or transferred to another constituency.
- [15] Section 43 of the Act provides for the preparation of the Register of Voters and for the making of claims and objections. The Register is required to be prepared and published in every year not later than 31<sup>st</sup> January.<sup>18</sup> It is called variously the January List and the Register of Voters.
- [16] The Act and the Regulations provide for addition to and subtraction from the January List. The names of persons wishing to be included in the Register for a particular constituency are placed on what is called a Monthly List which is required to be published.<sup>19</sup> The Act provides that objections may be made to the

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<sup>18</sup> Section 43 – **Register of Voters.**

(1) The Chief Registration Officer shall cause to be prepared and shall publish not later than the thirty-first day of January in every year a register of voters for each constituency.

(2) The registers of voters required by subsection (1) shall consist of

(a) all persons who were registered in the register of voters last published for that constituency; and

(b) all persons whose names appear in the revised monthly list of voters prepared and published under section 46 for the constituency since the date of publication of the registers mentioned in paragraph (a), and qualified under this Act as voters, but shall not include any person who, in the opinion of the Chief Registration Officer, appears since the publication of the registers mentioned in paragraphs (a) and (b)

(i) to have died; or

(ii) to have become ordinarily resident in another constituency.

<sup>19</sup> Section 44 – **Monthly Lists.**



registration or proposed registration of persons on the January List<sup>20</sup> or Monthly List respectively. The Regulations explain how such objection is to be made.<sup>21</sup> Any notice of objection must be lodged with the Electoral Office within 10 days of publication of the January List or the Monthly List as the case may be.<sup>22</sup>

[17] The Registration Officer is required thereafter immediately to send out a notice of objection to any person whose registration has been objected to, informing him or her of the fact of the objection and the date and time when the objection will be heard.<sup>23</sup>

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(1) The Governor-General shall, by Notice published in the *Gazette*, appoint a day in every month (hereinafter called "the appointed day") for the purposes of subsection (2).

(2) Not later than the appointed day in every month in each year, the Chief Registration Officer shall cause to be prepared and shall publish as soon as possible thereafter (and in any case not later than the fifteenth day of the next following month) a list of voters for each constituency which shall consist of all persons

- (a) whose names appeared on the register for another constituency who have notified the Chief Registration Officer of a change of address in accordance with the regulations and who appear to be ordinarily resident in the constituency;
- (b) whose names appeared in the register for the constituency who have effected a change of address within the constituency and have notified the Chief Registration Officer in accordance with the regulations;
- (c) who have reached the age of eighteen years and who appear to the Chief Registration Officer to be otherwise qualified; and
- (d) who have otherwise become qualified to be registered as a voter and entitled to vote as such.

(3) The names of those persons referred to in subsection (2) shall, if possible appear

- (a) in the case of those persons mentioned in paragraphs (a) and (b), in the monthly lists prepared for the month in which the notification was made.
- (b) in the case of those persons mentioned in paragraphs (c) and (d), in the monthly lists prepared for the month in which a claim to be registered has been made.

<sup>20</sup> Section 39 – **Right to Remain Registered.**

A person registered pursuant to this Act shall remain registered unless and until his or her name is deleted from the Register because

- (a) he or she has died;
- (b) an objection to his or her registration has been allowed; or
- (c) he or she has become disqualified for registration as a voter under this Act or any other enactment imposing disqualifications for registration as a voter.

<sup>21</sup> Regulation 14 - **Notice of Objection to Registration.**

Any person whose name appears on the Register of Voters or Monthly List for a constituency may object to the registration of any person whose name is included in those lists by sending to the Registration Officer notice of objection in the form set out as Form No 8 in the Schedule or such other form as may be prescribed.

<sup>22</sup> Regulation 16 - **Date for Making Objections.**

The objection to any name included in the Register of Voters or Monthly List shall be sent not later than ten days after the posting of such Register of Voters or Monthly List.

<sup>23</sup> Regulation 19 - **Notice to Persons Affected by Objection.**

[18] Thereafter, the Registration Officer is required to publicly post a list of objections of the persons to whose registration or claim an objection has been lodged.<sup>24</sup>

[19] The Registration Officer is required to give the person whose registration is the subject of objection five days' notice of hearing of the objection.<sup>25</sup> None of the process takes place in secret. The Regulations make provision for members of the public to have access to any document that is required to be published.<sup>26</sup> Additionally, the public are entitled to inspect and to take copies of claims and objections.<sup>27</sup>

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The Registration Officer shall immediately after receiving any notice of objection send by registered post or in writing of which there is evidence that it has been received by the addressee, a notice in the form set out as Form No. 12 in the Schedule to the person in respect of whose registration the notice of objection is given and a notice in the form set out as Form No. 13 in the Schedule to the person making the objection.

<sup>24</sup> Regulation 21 - **Publication of Objections to Registration.**

It shall be the duty of the Registration Officer, not later than fifteen days after the posting up of the Register of Voters or Monthly List to cause to be affixed on each of two conspicuous buildings in the polling division in the constituency in the form as set out as Form No. 15 in the Schedule, a list of names of persons for the polling division to whose registration notice of objection has been given and such list shall remain posted for a period of five days.

Regulation 22 - **Publication of Objections to Claims.**

It shall be the duty of the Registration Officer, not later than ten days after the posting up of the list of claimants in accordance with Regulation 20, to cause to be affixed on each of two conspicuous buildings in the polling division in the form set out as Form No. 16 in the Schedule, a list of names of persons for the polling division to whose claims notice of objection has been given and such list shall remain posted up for a period of five days.

<sup>25</sup> Regulation 23 - **Consideration of Claims and Objections.**

(1) The Registration Officer shall consider all claims and objections of which notice has been given to him or her in accordance with these Regulations and for that purpose shall give at least five days notice in writing, of which there is evidence that it has been received by the addressee, or notice by registered post, to the claimants or objectors and the persons in respect of whose registration or claims notice of objection has been given of the time and place at which the claims or objections will be considered by him or her.

(2) Agents of political parties or candidates shall be entitled to be present at any consideration of claims or objections.

<sup>26</sup> Regulation 29 - **Publication of Documents.**

(1) Where the Chief Registration Officer is by these Regulations required to publish any document he or she shall publish the document by making the proper entries in the prescribed forms and a copy of the document shall be made available for inspection by the public in his or her office, and if he or she thinks fit in any manner which he or she considers desirable for the purpose of bringing the contents of the document to the attention of the public.

(2) Any failure to publish a document in accordance with these Regulations shall not invalidate the document.

<sup>27</sup> Regulation 32 - **Inspection of Copies of Claims and Objections.**

The Registration Officer shall on the application of any person allow that person to inspect and take extracts from the list of voters for any polling division, any constituency and any claim or notice of objection made under these Regulations.

[20] Regulation 34 provides the procedure to be followed by the Registration Officer in the hearing of claims and objections.<sup>28</sup> The person objected to and the person objecting are required to be present, though the Registration Officer can proceed in their absence if satisfied from the evidence before her. Political parties are entitled to be present and to participate.

[21] Having made her determinations on the notices of objection, the Registration Officer is required to report her findings to the Chief Registration Officer,<sup>29</sup> who is then required to publish what is called a Revised Monthly List.<sup>30</sup> Once the Revised Monthly List for a constituency has been published, it and the Register of Voters constitute the Register of Voters for any election held in that constituency.<sup>31</sup>

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<sup>28</sup> Regulation 34 - **Hearing of Claims and Objections.**

(1) Any person who has made a claim in the prescribed form for inclusion or in correction to the Register of Voters, Monthly List or Revised Monthly List or whose claim has been objected to and any person who objects to the inclusion of any name or claim of any person shall appear in person before the Registration Officer to show cause why the claimant's name or the name of the person whose inclusion has been objected to should be included therein or deleted therefrom.

(2) The Registration Officer shall disallow the claim of any person to be included in the Register of Voters or Monthly List or Revised Monthly List or the inclusion of any person in the list whose inclusion has been objected to, if the person so claiming or objected to has not appeared personally before the Registration Officer for the consideration of the claim or objection.

(3) Where the Registration Officer is satisfied from the evidence available to him or her that any person is entitled to remain registered, even if the person objected to or making the claim does not appear at the hearing, the Registration Officer may determine the matter accordingly.

(4) Agents of political parties or candidates or a representative of any person required to attend any hearing shall be entitled to attend any hearing and to make representations thereto.

<sup>29</sup> Section 45 - **Claims and objections.**

(1) All claims for registration made by a person whose name does not appear in the register or the appropriate monthly list and all objections to the registration of persons whose names appear in the registers of voters and in the monthly lists, as the case may be, shall be determined in accordance with the regulations by the appropriate registration officer acting with respect to the constituency to which the register or list in question relates.

(2) When a claim thereunder has been disallowed or an objection thereunder has been allowed, the registration officer shall transmit a record of his or her determination to the Chief Registration Officer.

<sup>30</sup> Section 46 - **Revised monthly lists.**

The Chief Registration Officer shall make all additions to the appropriate monthly lists and shall make removals therefrom in consequence of any action taken under section 39 or 45 and shall publish as soon after the fifteenth day of the next succeeding month (and in any case not later than the last day of each such month) the corrected monthly lists as the revised monthly lists of voters.

<sup>31</sup> Section 48 - **Register and supplementary register to constitute the register for any election.**

(1) The register of voters and the revised monthly lists of voters published for each constituency under sections 43 and 45 respectively in any year shall constitute the register of voters for that constituency and shall be used for any election held in that constituency after the publication thereof until it is

- [22] Section 52 provides for an appeal to a judge in Chambers from any decision of a Registration Officer on any claim or objection which has been considered.<sup>32</sup> Section 53 provides that Rules of Court for regulating the practice in respect of appeals may be made by the Chief Justice or such Puisne Judge as the Chief Justice may appoint.<sup>33</sup> No question of a section 52 appeal arises in this matter.
- [23] Section 99 of the Act provides that non-compliance with the Regulations will not necessarily invalidate an election.<sup>34</sup> What is required before an election may be invalidated is a non-compliance with the Regulations that is so serious that it amounts to the election not having been conducted in accordance with the principles laid down in the Act and that such non-compliance or mistake affected the result of the election.

### **The background to the dispute**

- [24] The first Register of Voters for Nevis after the re-confirmation process was completed was the one published in late 2008. Thereafter, the Chief Registration Officer published a revised Register of Voters in January 2010 and again in January 2011. As mentioned previously, the Act requires the Chief Registration Officer each year to publish the Register of Voters no later than 31<sup>st</sup> January. All of

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superseded by the register of voters published and constituted for that constituency in the next succeeding year in accordance with this Act.

(2) Whenever a writ is issued between the publication of the last revised monthly list and any other revised monthly list, the last revised monthly list shall be used for the purposes of the conduct of the Poll.

<sup>32</sup> Section 52 – **Appeal.**

(1) An appeal shall lie to a Judge of the High Court sitting in Chambers from any decision of a registration officer on any claim or objection which has been considered by him or her under this Act:

Provided however that no appeal shall lie where a claimant or objector has not availed himself or herself of his or her opportunity as provided by this Act, of being heard by the registration officer on the claim or objection.

<sup>33</sup> Section 53 – **Rules of Court.**

Rules of Court for regulating the practice in respect of appeals under this Part may be made by the Chief Justice or such Puisne Judge as the Chief Justice may appoint for that purpose.

<sup>34</sup> Section 99 - **Non-compliance with rules, etc., when not to invalidate an election.**

Notwithstanding anything in the Provisions of this Act no election shall be declared invalid by reason of non-compliance with the provisions of this Act or of the rules thereto or of the regulations made thereunder, or any mistake in the use of the forms prescribed under this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance or mistake did not affect the result of the election.

the persons in the St John's Nevis constituency whose names did not appear on the list published in July 2011, just before the Nevis Local Elections, appeared on the January List of the Register of Voters published in January 2011. The July List was the one prepared and used for the elections. It was published just 5 working days before the election in St John's. The evidence was that several of the voters whose names had been removed from the list without notice of the date of the hearing of the objection appealed to the High Court in the few days before the election. A High Court judge sitting as the Appeal Tribunal under section 52 reversed the removals of those who appealed. The evidence was that there had not been sufficient time in the 5 days prior to the election for Mr. Brantley's party to notify all the other voters who had been removed so that they could join in the section 52 appeal.

[25] The year 2011 was widely expected to be an election year in Nevis for the Nevis Island Assembly. The actual date of the election would depend on what Mr. Parry, as Premier of Nevis, would advise His Excellency the Governor General. In February 2011, the Elections Office in compliance with the Act commenced its standard series of monthly revisions of the Register of Voters.

[26] Mr. Brantley testified that at least starting from early in 2011 he and his campaign team regularly checked the usual spots where the Electoral Office posted various Lists and notices. No Revised Monthly Lists were posted. Indeed, the evidence before the learned trial judge was that for several years previously no Revised Monthly Lists for Nevis had been published. This was well-known to Mr. Brantley. He had previously won the 2007 and 2010 elections under the same circumstances. However, on 17<sup>th</sup> January 2011, Mr. Brantley as Leader of the Opposition wrote a letter to the Chairman of the Electoral Commission, copied to the Supervisor of Elections, questioning the matter of the non-publication of the Revised Monthly Lists. On 25<sup>th</sup> May 2011 the leader of the CCM raised the matter again by letter. This correspondence would have served to alert the Supervisor of Elections and Chief Registration Officer, and his supervisory body the Electoral Commission that the opposition in Nevis was not content any longer to put up with

the non-publication of the Revised Monthly Lists. But, there was no response to either of the letters.

- [27] It is not disputed that all of the persons whose names did not appear on the July 2011 List (and whose names were listed in the first schedule to the petition before the learned trial judge) appeared on the Register of Voters published in January 2011. As of that date they enjoyed a constitutional right to vote in any election called thereafter. There is no disputing that the Register of Voters can during the revision and registration process be the subject of objections on the ground that a voter whose name appears on the Register no longer resides in the constituency in which he or she is registered. There was evidence at the trial that some of the objectees no longer resided in St John's and it was proper for their names to be removed from the Register. Mr. Brantley's case was that there was a need to observe the due process of law in the processing of objections to registration, and that due process was not observed, and on that basis alone the names were not properly removed.
- [28] The two political parties made some 600 objections, an unusually large number, to names on the January 2011 Register of Voters for Federal Constituency 9. Some 400 of them were to names in the St John's Parish. Of the 400 objections, the CCM filed 198, which they subsequently withdrew, and the NRP filed 202. Added to this work were the February 2011 transfers and applications for first registration. In view of the sheer volume, the Registration Officer decided to send out the notices of objection in batches for different hearings at different dates.
- [29] Regulation 16 requires any such objection to be lodged within 10 days of the publication of the January List or the Monthly List as the case may be.<sup>35</sup> Regulation 21 requires the Registration Officer to publicly post a list of the persons to whose registration an objection has been lodged.<sup>36</sup> It is not disputed, and the trial judge so found, that the Registration Officer did not at any time post a List of

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<sup>35</sup> See fn. 22.

<sup>36</sup> See fn. 24.

Objections to the January list. The evidence indicated that the Registration Officer prepared the List of Objections but simply did not publish it. She gave no reason for this omission.

[30] Regulation 19 requires the Registration Officer immediately after receiving notice of an objection to send out a notice to the person, whose registration has been objected to, informing him or her of the fact of the objection and the date and time when the objection will be heard.<sup>37</sup> The Registration Officer chose the posting of the notices by registered post as the method of notifying the objectees of the date, time and place of the objection hearing.

[31] Having made her determination on the notices of objection, the Registration Officer is required to report her findings to the Chief Registration Officer.<sup>38</sup> The Chief Registration Officer is then required to publish what is called a Revised Monthly List.<sup>39</sup> It is not disputed, and the learned trial judge so found, that the Revised Monthly Lists were not published for the year 2011. It is not disputed that the Revised Monthly Lists are required to reflect the outcome of the objections to the Monthly Lists, but there is a difference of opinion as to whether they must also contain the results of the objections to the January List. The learned trial judge appears to have found that the results of such objections must appear in the Revised Monthly Lists, if only to notify the objectees that their names have been removed from the List. That remained a live issue on the appeal. Mr. Brantley also complained on his cross-appeal that the trial judge failed to hold that the removal of names from the List was invalid by reason of the failure to publish the Revised Monthly Lists.

[32] The evidence before the trial judge was that after it had become apparent that persons to whose registration objection had been made by the NRP were receiving notices of objection after the dates fixed for the hearing of the objections, Mr. Brantley's party raised the issue with the Electoral Commission. The

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<sup>37</sup> See fn. 23..

<sup>38</sup> See fn. 29.

<sup>39</sup> See fn. 30.

Commission by a letter of 26<sup>th</sup> May 2011 then directed the Supervisor of Elections that persons who had reconfirmed their registration under the Act and been issued with National Identification Cards were to remain on the Register of Voters. The Registration Officer was copied with this directive, but ignored it and proceeded with the objection hearings.

- [33] It is not disputed that the persons whose names were removed from the January List were not given notice of the Registration Officer's decision to uphold the objections against their registration. However, Mr. Brantley complains, the trial judge made no finding as to whether this by itself invalidated the deregistration of the disenfranchised voters, although he did refer with approval to the case law which establishes that an uncommunicated decision has no legal effect. This is also the subject of the cross-appeal.
- [34] Mr. Brantley also complained in the High Court that the List which was used in the July 2011 election was not compiled as required by the Act, with the result that the disenfranchised voters were left out. The trial judge did not rule on this issue at all, and refused to order that the names of the voters who were wrongfully removed from the list be restored. Mr. Brantley pursued this ruling on his cross-appeal.
- [35] The appellants argued in the High Court that Mr. Brantley was precluded from challenging the election on his stated grounds having contested the election on a List which he now says is flawed. He cannot approbate and reprobate, they say. The appellants place reliance on the judgment of Sir Morris Davis CJ in **Radix v Gairy**<sup>40</sup> to the effect that the removal of persons from the Register without notification was not sufficient to set aside the election; what was needed was proof of an election offence or irregularity during the election itself. The trial judge rejected this argument. The appellants repeat this argument at the appeal.

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<sup>40</sup> (1978) 25 WIR 553.



- [36] The learned trial judge also found that the decisions of the Registration Officer were tainted by apparent bias based on her removal of some 114 voters from the Register in circumstances where it would have been obvious to her that the persons in question would not have received notice of the hearing. He found that these decisions benefitted the party which Ms. Lawrence supported and that any reasonably well-informed and fair-minded observer would conclude that there was a real possibility that she acted with bias. But in that regard he did not also hold that there was apparent bias because of the Registration Officer's relationship with the NRP. He also did not find that the Chief Registration Officer or the Registration Officer were guilty of bad faith and misfeasance in office even though he found that they deliberately disenfranchised voters. These are also the subject of the cross-appeal.
- [37] In the end, the trial judge did invalidate the election, at least on the ground that the principles of natural justice were not followed in the process of upholding the objections. This is the subject of the appeal lodged by the election officials and Mr. Daniel. The judge also identified other irregularities which were committed, but Mr. Brantley complains it is not clear whether or to what extent these informed the outcome of his decision. Mr. Benjamin and Ms. Lawrence complain that the learned trial judge made so many errors of fact and law that they have not received a fair hearing. The judgment is so seriously flawed that it ought to be set aside by the Court of Appeal. They submit that the trial judge never considered whether the failure to notify led to the disenfranchisement of duly qualified voters. It was his duty to consider the evidence in relation to each objectee and to decide whether he or she was qualified by residence. This the judge had failed to do.
- [38] Mr. Brantley also complains on the cross-appeal that the learned trial judge having found that a number of persons were unlawfully removed from the List he yet declined to make a declaration to that effect, or to order that their names be restored to the List.

[39] The learned trial judge found that the Government Radio Station's failure to carry any CCM events during the election violated the respondent's Constitutional right of freedom of expression<sup>41</sup> and his right not to be discriminated against on the grounds of his political beliefs.<sup>42</sup> Mr. Parry appeals this finding.

[40] The trial judge ordered that the parties bear their own costs. Mr. Brantley challenges this decision in his cross-appeal.

### **A "Constitutional Court"**

[41] The argument before the Court of Appeal revealed a number of other issues between the parties. The first one that I shall deal with is the question of whether the High Court had the jurisdiction to grant relief to Mr. Brantley for the breaches of his constitutional rights complained of by him on this election petition. Dr. Browne argued that section 36 of the Constitution erects a barrier to a claim for constitutional relief in that it has set up an Elections Court with a limited jurisdiction.<sup>43</sup> The sole function of this Court is to determine the validity of membership in the National Assembly and to the Nevis Island Assembly. It is not the forum before which to originate complaints concerning fundamental rights contraventions. The Chief Justice is required to make regulations for its functioning. By contrast, constitutional relief is to be sought in a Constitutional

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<sup>41</sup> Section 12 – **Protection of freedom of expression.**

(1) Except with his or her own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

<sup>42</sup> Section 15 – **Protection from discrimination on grounds of race etc.**

(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either or itself or in its effect.

(2) Subject to subsections (6), (7), (8) and (9), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place or origin, birth out of wedlock, political opinions or affiliations, colour, sex or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such descriptions.

<sup>43</sup> See fn. 3.

Court established under section 18 of the Constitution.<sup>44</sup> An Elections Court established under section 36 of the Constitution is peculiar unto itself. A section 18 Constitutional Court is a court peculiar unto itself. The Elections Court created by section 36 was established in the year 1952 under the first **Elections Act** and remains in its pristine purity until this time. This was long before the first Constitutional Court was established by the Constitution to deal with fundamental rights. Parliament could not have contemplated that matters of fundamental rights could be dealt with by an Elections Court. If Parliament had intended that a contravention of fundamental rights could be dealt with by an Elections Court then section 18 would not have created a Constitutional Court to deal with fundamental rights.

[42] Mr. Mendes, SC responded that what Dr. Browne was asking the Court to do was to overrule the guidance given by Rawlins J in the case of **Ferdinand Frampton v Ian Pinard et al.**<sup>45</sup> No point had been taken in that case that it was improper to seek constitutional relief in an election petition, as was done in this case. The application was not entertained, but that was because the Attorney-General had not been named as a party. In any event, he submitted, if this was an application to strike out the relevant paragraphs of the petition, it was unusual in that no application had been made to the trial judge below. Directions had been given at case management for the parties to file all their applications by a certain date.

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<sup>44</sup> Section 18 - **Enforcement of protective provisions.**

(1) If any person alleges that any of the provisions of section 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 3 to 17 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

<sup>45</sup> Commonwealth of Dominica Claim No. 0149-0154 of 2005 (delivered 28<sup>th</sup> October 2005, unreported).

Had an application been made to the court below to strike out the paragraphs dealing with constitutional relief, and been either granted or refused, then the general rule would have been that there was no right of appeal against such an order, permission being required. No permission had been sought. Under the Constitution there is a right of appeal only in relation to final decisions in an election petition. Dr. Browne, he submitted, asks the Court of Appeal to circumvent the provisions of the Constitution which would otherwise have prohibited him from raising an interlocutory matter before the Court of Appeal.

### An "Elections Court"

[43] Dr. Browne also submits that a "Section 36 Elections Court" is carefully hedged in within its own peculiar jurisdiction. Questions concerning irregularities and illegalities in the conduct of the registration process are for a Review Tribunal under section 52.<sup>46</sup> The High Court sitting as an Elections Court has no jurisdiction to abrogate to itself the authority to revisit the decisions taken within the registration process. The High Court judge sitting as an Appeal Tribunal from the Registration Officer under section 52 is not the same High Court judge which sits as an Elections Court under section 36 of the Constitution. Parliament has created a process through which complaints about the registration process must be ventilated and those processes must be exhausted before one can reach the Elections Court.

[44] Mr. Mendes, SC's response is that Dr. Browne's submission does not find support from the authorities around the region. Richard Ground CJ of the Turks & Caicos Islands had no difficulty in the case of **McAllister Hanchell v Noel Skippings et al**<sup>47</sup> in coming to the conclusion that irregularities in the registration process, given the small margin of 3 votes, were such as may have affected the result, and he declared the election void. In **Hyacinth Walter v Hilroy Humphries et al**<sup>48</sup> Robotham J, on a complaint that the electoral register was not in accordance with

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<sup>46</sup> See fn. 32.

<sup>47</sup> Turks and Caicos Action CL No 25/2003.

<sup>48</sup> Antigua & Barbuda Suit No. 36 of 1980 (delivered 16<sup>th</sup> September 1980, unreported).

the newly defined boundaries of the constituency in question and that as a result certain persons who were not entitled to vote voted, and certain persons who were entitled to vote were not permitted to vote, had no difficulty in finding that the Regulations gave the Registration Officer not only a power but a clear duty to use the Register in question. In **Ferdinand Frampton v Ian Pinard et al**,<sup>49</sup> Rawlins J in dealing with a number of interlocutory applications including adding parties and amending the petitions, had to consider a petition which among other things sought to impeach the registration process. He noted the qualification made by Ground CJ in **McAllister Hanchell v Noel Skippings et al** to the principle set out by Davis CJ in the authority which was binding on him of **Radix v Gairy**.<sup>50</sup> This is that, while the issue whether persons who are listed on the Register are qualified to vote is not amenable to challenge by way of election petition after elections are held, however, an irregular or unlawful act or omission by a Chief Elections Officer in relation to the registration process can properly be the subject of an election petition. In **Eugene Hamilton v Cedric Liburd et al**,<sup>51</sup> Baptiste J in dealing with an application to strike out a petition on the ground that it disclosed no reasonable cause of action, considered a petition that complained of failures relating to objections to persons registered to vote. He found that the conclusiveness of the Register of Voters was not absolute and did not prevent the court from looking at whether any irregularity had occurred in the compilation of the List.

- [45] The description of the High Court as an Elections Court has some support in recent judgments from around the region.<sup>52</sup> A number of old authorities from our jurisdiction also refer to an Elections Court. So, the 1976 Court of Appeal decision from Antigua and Barbuda in the old case of **Edison Lewis v Reuben Harris et al**<sup>53</sup> refers to the court by this term. However, it is evident from a perusal of that

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<sup>49</sup> See fn. 45.

<sup>50</sup> See fn. 40.

<sup>51</sup> Suit No. SKBHCV2004/0183 (delivered 27<sup>th</sup> July 2005, unreported).

<sup>52</sup> See for example the judgment of Blenman J at paragraph 65 in the case of *Dean Jonas et al v Jacqui Quinn-Leandro et al* Antigua and Barbuda Claim No. ANUHCV2009/0141, ANUHCV2009/0143 and ANUHCV2009/0144 (30<sup>th</sup> June 2009) and the judgment of Thom J at paragraph 14 in the case of *Ronald A.K.A "Ron" Green v Petter Saint Jean et al* Dominica and *Maynard Joseph v Roosevelt Skerrit et al* Dominica High Court Civil Claim No. 6 and 7 of 2010, (unreported).

<sup>53</sup> Antigua and Barbuda Civil Appeal No. 2 of 1976 (delivered 22<sup>nd</sup> October 1976, unreported).

judgment that the use of the term in Antigua and Barbuda derived from section 12(3) of the **Representation of the People Act**<sup>54</sup> of the Associated State of Antigua and Barbuda. "Election Court" was a term expressly used in that Act. Neither the term nor the concept finds continuing support in the modern legislation of St. Kitts and Nevis. The term "Election Court" is not repeated in the modern legislation.

[46] Besides, as Mr. Mendes, SC submits, there is a useful analogy that can be made with other legislation. The **Companies Act** gave the High Court jurisdiction in company winding up petitions, and provided for Rules to be made for the determination of such matters by the High Court. The courts of this jurisdiction have held that **Civil Procedure Rules 2000** ("CPR 2000") does not generally apply to election petitions.<sup>55</sup> This carries the argument no further. Similarly, CPR 2000 do not apply in company winding up matters. No one considers that the High Court determining a company dispute is sitting as a special "Company Court". The **Divorce Act** gives jurisdiction in divorce cases to the High Court, and it makes provision for rules to be made by the Chief Justice governing divorce petitions. No one considers that a High Court judge hearing a divorce case is sitting as a "Divorce Court" with special or limited jurisdiction. Similarly, in our case, the **National Assembly Elections Act** gave jurisdiction to the High Court to determine election disputes. It is the High Court and not a special Elections Court that deals with election petitions in St. Kitts and Nevis.

[47] By analogy with the **Companies Act** and the **Divorce Act**, there is no logical reason for the continued existence of the concept of an Elections Court. The historical reasons for the use of the expression "Election Court" no longer have any application. What section 36 of the Constitution says is that, "The High Court shall have jurisdiction to hear..." I am satisfied that what the Constitution has done is to vest the jurisdiction to deal with election disputes in the High Court. It does

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<sup>54</sup> Cap. 379, Revised Laws of Antigua and Barbuda 1992.

<sup>55</sup> See for example, the judgment of Hariprashad-Charles J in the case of Lindsay Fitz-Patrick Grant v Glen Fitzroy Phillip et al Saint Christopher and Nevis Claim No. SKBHCV2010/0026 (delivered 4<sup>th</sup> November 2010).

not in my view thereby create an “Elections Court”. I see no merit in the submission that the learned trial judge did not have jurisdiction on hearing an election petition to entertain an application for constitutional relief on the basis that the right of freedom of expression and freedom from discrimination on the basis of political affiliation had been infringed.

- [48] Similarly, section 18<sup>56</sup> of the Constitution has not created a “Constitutional Court”. What it says is that, “If any person alleges that any of the [fundamental rights] provisions ... has been contravened in relation to him ... that person ... may apply to the High Court for redress.” Subsection (2) goes on to say that the High Court shall have original jurisdiction. The section does not create a “Constitutional Court.” I am satisfied that it is the ordinary High Court that has jurisdiction in matters of constitutional motions for relief in whichever proceedings they arise and I find no merit in this submission.

#### **The right of enfranchisement**

- [49] The constitutional right of enfranchisement is not in doubt. In **Russell v Attorney-General of Saint Vincent and the Grenadines**,<sup>57</sup> this Court underscored and explained the nature of the rights guaranteed by an almost identical provision in the St. Vincent and the Grenadines Constitution:

“The constitutional right conferred by section 27 is two-fold. The first is the basic right to be registered as a voter in the appropriate constituency. That basic right is granted to every Commonwealth citizen of the age of 18 years or upwards, if he possesses the prescribed qualifications relating to residence or domicile in St Vincent and is not disqualified by Parliament from registration as a voter. The second is the concomitant right to vote in the appropriate constituency. That concomitant right is granted to every citizen who is entitled to the basic right. That concomitant right is a right to vote ‘in accordance with the provisions of any law in that behalf’. This means that although the manner of voting is statutory or customary, the right to vote is inherently constitutional.”<sup>58</sup>

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<sup>56</sup> See fn. 44.

<sup>57</sup> (1995) 50 WIR 127.

<sup>58</sup> *Ibid* p. 138.

[50] The Canadian Supreme Court has emphasised the importance of the right to vote, not only as it relates to the system of democracy which it underpins, but also as an expression of the dignity of the individual.<sup>59</sup> The South African Constitutional Court has made the point that the vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.<sup>60</sup> The provisions of the Act governing the exercise of the right to vote may be said to have a constitutional pedigree.<sup>61</sup> In applying the law and the regulations, preference must be given to recognition of the right to vote, and the legislation must be construed in a manner which promotes enfranchisement and guards against disenfranchisement.<sup>62</sup> These concepts and principles apply to the states and territories of the Eastern Caribbean no less than they do in Canada and South Africa.

**The failure to notify the disenfranchised voters that an objection to their registration had been made and of the date of the hearing of the objections**

[51] The Chief Registration Officer and the Registration Officer testified that the 203 voters were removed from the January List of voters because objections made to their registration as voters were upheld. The notices of objection in question would have been received by the Registration Officer by the latest on 10<sup>th</sup> February 2011. She did not begin sending out the notices until sometime in late March 2011. The first way in which voters are notified of objections to their registration is the publication of the Regulation 21 List of Objections. Ms. Lawrence prepared the List of Objections, but did not publish it. One might ask, what is the point of preparing the list and not publishing it when the only use to which such a list is put by the Regulations is publication? The purpose of publication is to inform those affected of an upcoming adverse event. Non-publication could only have the effect of injuring those persons for whom knowledge of the existence of the objection would have value. The inevitable

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<sup>59</sup> Richard Sauve v The Attorney General of Canada et al [2002] 3 SCR 519.

<sup>60</sup> Arnold Keith August et al v The Electoral Commission et al [1999] ZACC 3.

<sup>61</sup> Quinn-Leandro v Jonas (2010) 78 WIR 216.

<sup>62</sup> See fn. 61.



consequence of the Registration Officer's failure to publish the list is that the objectees would be injured.

[52] The second way in which voters are notified of objections to their registration is the receipt of a Notice of Objection from the Registration Officer. This notice also serves to inform the objectee of the date, time and place of the hearing of the objection. The Registration Officer tendered in evidence the returned notices sent out which bore the Electoral Office's date stamp and the Post Office date stamp. She also tendered in evidence the postal lists which she sent to the Post Office. These also bear the Electoral Office's date stamp and the Post Office date stamp. It was therefore possible to determine when exactly the notice would have left the Post Office for the earliest. The evidence revealed that in more than 100 instances the notices were registered by the Post Office less than 5 days from the date fixed for the hearing of the objections and in numerous cases afterwards. In many cases the objectees either did not receive the notices at all or received them less than five days before the hearing. Some notices were received on the day of the hearing itself. Other notices were received after the hearing date. It is also undisputed that the Post Office registered the notices for 113 objectees either less than 5 days before the date of the hearing or, in some cases, after the hearing date itself. This fact was known to the Registration Officer at the time when she was making her determination as she testified that she had the list of registration dates from the Post Office before her when she made her determinations. Yet, still, she did not consider it necessary to reissue notices.

[53] The Registration Officer had not served any notices "in writing". She had sent all the notices "by registered post". The Registration Officer's position was that the 5 days' notice was required only in the case of a notice in writing and not in the case of service by registered post. Mr. Brantley's position was that the evidence of service of the notice 5 days' prior to the hearing applied both to personal service of the notice and to service by registered post. The Registration Officer took the view that her only obligation in cases of service by registered post was to deliver the notices to the Post Office. In effect, she read Regulation 19 as meaning that

evidence of receipt by the addressee was required only if she had used the method of service of a "notice in writing". She understood the Regulation to mean that once she delivered the notice to the Post Office prior to the hearing, for service by registered post, then she was entitled to proceed with the hearing of the objection even in the absence of any evidence that the notice had been received by the addressee, and indeed with knowledge that the notice could not have been received by the addressee prior to the hearing.

[54] The **Post Office Act**<sup>63</sup> deals with the registration of documents for posting. Section 59 of the Second Schedule to the Act provides that:

"Every postal article duly handed in for registration shall be numbered with a consecutive number by the officer appointed to receive the same and a receipt bearing such number, the address on the article and an impression of the date stamp of the office at which the article is handed in for registration shall be given by such officer to the person who handed in the article and such receipt shall be prima facie evidence of the registration of such article."

[55] The evidence in this case is that the Registration Officer provided the Post Office with posting lists which contained the names of persons matching the notices which were to be registered. The posting lists were in the form of receipts from the Post Office and were signed at the bottom by a Post Office clerk. Each notice was numbered and the number was entered next to the name of the person on the posting list. The posting list was then stamped and dated by the Post Office in the top right hand corner as registered. As such, the notices were only registered when stamped by the Post Office. It is the Post Office dates on these posting lists which indicate when the notices were "sent by registered post". The dates on the lists made it impossible for the notices to reach the recipients with 5 days' notice of the hearing. The Registration Officer's evidence is that the returned notices were usually received 6 to 8 weeks after they were sent. Accordingly, they would not have been in her possession until after she made her decisions, the last such decision having been made on 30<sup>th</sup> May 2011.

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<sup>63</sup> Cap. 16.03, Revised Laws of Saint Christopher and Nevis 2002.

[56] The learned trial judge treated the Registration Officer's view of her statutory obligation in this way:

"To state that delivery to the Post Office is receipt by the voter is illogical and defies common sense. To hold such a view shows total disregard for the rights of voters and their entitlement to natural justice. In the exercise of her functions, the Registration Officer is expected to act in a procedurally fair manner. She chooses not to send fresh notices when it is obvious that the first notices were out of time. The reason given was that the law permits her to hear matters in the absence of the objectees."<sup>64</sup>

[57] The learned trial judge found that while one may want to be sympathetic with the burdens of the Registration Officer's job:

"where constitutional rights are involved, there can be no excuses. There are compelling reasons why the exercise should receive the highest priority. Depending on the terms of the objections, objectees must prepare themselves, having available all requisite material, documents, etc., to allow them to answer the allegations."<sup>65</sup>

Nevertheless, he did not make any finding one way or the other on this ground. Mr. Brantley cross-appeals that he should have found that the notices were not sent out immediately as required by Regulation 19 and were therefore defective and void.

[58] On the submission that the Registration Officer was permitted by the Regulations to send the notices by registered post and that when she chose to do so it was irrelevant that the intended recipient did not receive it, the learned trial judge found:

"The Regulation clearly gives a choice to the Registration Officer to select one or other of the methods. Either choice, having regard to the obligation on the Registration Officer, the intention must be that the addressee receives the notice. In modern society, there are a number of methods that can be used in communicating with persons other than oneself. The choice made would inevitably be the one which in the sender's view would achieve that purpose. Registered mail provides a chain of custody and more control than regular mail. Should registered mail not serve the purpose, there are always alternative methods. The Registration Officer should therefore choose the method which would give effect to the

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<sup>64</sup> See p. 109 of the judgment.

<sup>65</sup> See pp. 116-117 of the judgment.

fundamental right to vote, that is one which ensures receipt by the voter. The Regulation gives the officer a discretion only where the two methods are likely to produce a similar result. Where there is one that will produce a result favourable to the voter and the other a result unfavourable to the voter, there is no discretion."<sup>66</sup>

[59] Mr. Mendes, SC submitted that Regulation 23 added a further obligation on the Registration Officer. It provided that she shall consider claims and objections "and for that purpose shall give at least five days notice in writing, of which there is evidence that it has been received by the addressee, or notice by registered post, to the claimants or objectors ... of the time and place at which the claims or objections will be considered by her".<sup>67</sup>

[60] On the question of whether the Regulation required 5 days' notice of the date of the hearing when the notice was served by registered post, the learned trial judge held that:

"Furthermore, in this case the requirement was that the notice should not only be received by the objectee, but it must reach him five days before the date fixed for the hearing. I hold, therefore that the hearings held by the Registration Officer in respect of the 24 persons who had received no notice, the 14 persons who received notices after the date of hearing and the 76 persons whose notices were stamped April 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup> and May 4<sup>th</sup> and 5<sup>th</sup> who even if they had received notices would also have received the notices after the date fixed for hearing; a total of 114 persons were disenfranchised, their names having been removed from the Register without being afforded a hearing and without due process."<sup>68</sup>

The learned trial judge apparently read Regulation 19<sup>69</sup> as it is printed. He did not read the clause, "or in writing of which there is evidence that it has been received by the addressee" as having been placed in parenthesis. He found, in effect, that not only must the objectee have 5 days advance notice of the date of the hearing of the objection, but there must be evidence before the Registration Officer that the notice had been served, and this requirement applied whether the notice had

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<sup>66</sup> See p. 105 of the judgment.

<sup>67</sup> See fn. 25.

<sup>68</sup> See p. 114 of the judgment.

<sup>69</sup> See fn. 23.

been served personally or by registered post. There was no such evidence before the Registration Officer.

[61] Prior to the decision of the English Court of Appeal in **R v London County Quarter Sessions Appeals Committee Ex parte Rossi**,<sup>70</sup> the position taken by the English courts was that a document is taken to be “sent by post” to a party within a certain period of time before a particular event if it was posted at such a time that it would in the ordinary course of post be delivered to the person concerned in time, even if in fact it only reached the intended recipient afterwards.<sup>71</sup> That was so even if the failure to reach the recipient in time was due to the fault of the Post Office.

[62] What the Court of Appeal achieved in **Ex parte Rossi** was to establish that in a case where a notice of a hearing at which a person’s rights might be affected was involved, a requirement that a notice of the hearing be sent by post was designed to fulfill the very important function of giving the person adequate notice of that hearing so that he or she may be in a position to appear and defend his or her rights. In that context, the Court interpreted the phrase “sent by post” as not being satisfied where it is proved that the notice was not in fact received. This was held to be the effect of a particular provision of the English **Interpretation Act 1978** which is also found in the St. Kitts and Nevis **Interpretation and General Clauses Act**.<sup>72</sup> Lord Denning said:

“It is argued that it is sufficient to comply with section 3(1) if he sends a registered letter to the respondent, even though it is not received by him, and known not to be received. I do not think this is correct. When construing this section, it is to be remembered that it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the

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<sup>70</sup> [1956] 1 QB 682.

<sup>71</sup> See for example: *Browne v Black* [1912] 1 KB 316; *Retail Dairy Company, Limited v Clark* [1912] 2 KB 388; *Stanley v Thomas* [1939] 2 KB 462; *Stewart v Chapman* [1951] 2 KB 792; *Holt v Dyson* [1951] 1 KB 364.

<sup>72</sup> Section 2 – **Interpretation of certain terms**.

(1) ...“service by post”, where any law authorises or requires any document to be served by post, whether the expression “serve”, or the expression “give” or “send”, or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post;

proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes any order against him.”<sup>73</sup>

[63] Since **Ex parte Rossi**, English courts have accepted that the previous case law is not to be followed. Thus, in **Beer v Davies**,<sup>74</sup> the Divisional Court held, following **ex parte Rossi**, that the requirement of section 21(c) of the **Road Traffic Act** that notice of intended prosecution must be sent by post within 14 days of the commission of the offence was not satisfied by the mere sending of the notice by registered post, where there was evidence that the notice had not been delivered within the statutory period. And, in **Layton v Shires**,<sup>75</sup> it was held that the notice provision was not complied with “if the registered letter is not taken in at the address to which it is sent and is returned.”<sup>76</sup>

[64] The **Ex parte Rossi** line of authorities is restricted to those cases dealing with notices of upcoming events, such as hearings or intended prosecution, where the intended recipient requires to be given an opportunity to prepare himself for the hearing. In such a case, proof of service is necessary. In the case of other notices, such as enforcement notices issued by a Town and Country Planning Authority, proof of sending within the requisite time period is sufficient time as in the ordinary course of post would reach the target, is sufficient. Actual receipt within the time period is not necessary. This distinction was made in **Moody v Godstone Rural District Council**.<sup>77</sup> The authorities cited by Mr. Astaphan, SC on the question of sending by registered post all fall within this category. For example, the case of **Henry Bishop v Richard Helps**<sup>78</sup> and **Edward Bailey v The Overseers of the Township of Nantwich**<sup>79</sup> both concerned the service of notices of objection within a particular period of time. This was not notice of the hearing of the objection itself, but merely notice of the fact that an objection had been made

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<sup>73</sup> See fn. 71, p. 691.

<sup>74</sup> [1958] 2 QB 187.

<sup>75</sup> [1960] 2 QB 294.

<sup>76</sup> *Ibid.*, p. 298.

<sup>77</sup> [1966] 1 WLR 1085.

<sup>78</sup> (12845) 2 C&B 857.

<sup>79</sup> (1846) 135 ER 887.

to a person's registration. In any event the relevant legislation in those cases provided that the production by the party who posted such notice of such stamped duplicate, shall be evidence of the notice having been given to the person at the place maintained in such duplicate, on the date on which such notice would in the ordinary course of post have been delivered at such place. The need for receipt was accordingly expressly excluded.

[65] Similarly, the cases of **Finnegan v Cavan**<sup>80</sup> and **Moore v Forrest**<sup>81</sup> concerned notices of objection. The cases of **The King v The Westminster Unions Assessment Committee**<sup>82</sup> and **WX Investments Ltd v Begg**<sup>83</sup> did not concern notice of an upcoming event for which the intended recipient had to prepare to defend himself. The former concerned a notice of an increase in the ratable value of property and the latter concerned notice by a landlord of an increase in rent. Similarly, the decision of the Court of Appeal of Jamaica in **Phyllis Mae Mitchell v Desmond Gregory Mair et al**<sup>84</sup> did not concern the service of a notice of a hearing at which a person's rights could be adversely affected. It concerned the service of an election petition within the period prescribed in the legislation and in this regard the considerations are identical to those applicable to the service of a notice of objection. Like the service of a notice of objection, the obligation to serve a petition within a certain period, along with permission to do so by post, would be thwarted if, though posted on time, it is not delivered within the requisite period because of the fault of the Post Office. In such a case, a person's right to be heard on the petition is not yet engaged and actual receipt of the petition is of far less significance than the posting of it.

[66]] What "immediately" in Regulation 19 means is to be judged in the context of the timetable for the determination of objections set out in the Act and in the Regulations. The List of Objections is to be published 15 days after the

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<sup>80</sup> (1879) LR (Ire) 137.

<sup>81</sup> (1879) 6 LR (Ire) 142.

<sup>82</sup> [1917] 1 KB 832.

<sup>83</sup> [2002] 1 WLR 2849.

<sup>84</sup> Supreme Court Civil Appeal No. 125/2007.

publication of the Register,<sup>85</sup> that is to say 5 days after the cut-off date for the lodging of objections.<sup>86</sup> The Revised Monthly List containing the deletions from the Register is to be published no later than the end of the next succeeding month.<sup>87</sup> In other words, it is envisaged that the objection process in relation to the January Master List would be concluded with publication of the Revised Monthly List by the end of March. But, the Registration Officer did not publish the List of Objections and only began sending out the notices in late March. There was no reason why this process ought not to have been completed much earlier, even considering the number of objections which were filed. With sustained effort there was no reason why all 600 notices could not have been prepared and sent out within one or two weeks of the cut-off date for the lodging of objections. In the circumstances, the learned trial judge was justified in coming to the conclusion that the notice had not been sent out immediately as required.

[67] The need for the immediate sending out of the notices was patent. The year 2011 was an election year. An election might be called at any time and accordingly it was crucial that objection proceedings be commenced and concluded with due dispatch so that persons not entitled to vote could be removed from the list, those entitled to vote could have objections to their registration dealt with before the election was called, and where there was an adverse result, an appeal lodged to correct any errors made. Any delay in the sending out of notices would shorten the time span between conclusion of the objection process and the calling of the election and would create the real possibility that a decision to remove a name might be made and communicated with insufficient time to invoke the appeal process. In such circumstances, a person may be prevented from voting at an election, only to succeed in the appeal afterwards. Speed in the determination of objections is accordingly crucial and any failure to comply with the timetable must accordingly invalidate the process. The failure to send out the notices immediately

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<sup>85</sup> By Regulation 21 at Fn. 24.

<sup>86</sup> By Regulation 16 at Fn. 22.

<sup>87</sup> By Section 46 at Fn. 30.



means that the decision to remove the names from the List was unlawful and for this reason the disenfranchised voters were unlawfully excluded from the List.

[68] If Ms. Lawrence had published the List of Objections required by Regulation 21,<sup>88</sup> or had delivered the notices to the Post Office for delivery by registered post as required by Regulation 19<sup>89</sup> “immediately on receipt” by her of the objections in the month of February, and had proceeded even several weeks later to hear the objections, and if the notices had in fact been posted by registered post, and if prior to the hearing she had received back from the Post Office the undelivered notices, then one might feel sympathy for Ms. Lawrence concluding that she was entitled to hear the objections in the absence of evidence of service. The evidence then might have been that such notices were incapable of service. However, the evidence in this case was that the List of Objections was not published and the notices were delivered to the Post Office so late that they could not have been served in time, and there was evidence that many of the persons who were objected to were alive and well and would have learned of the objections to their registration if proper publishing and notification had taken place.

[69] The learned trial judge was entitled to reject as he did Ms. Lawrence’s theory that all she was required to do was to deliver the notices to the Post Office, and that she was not responsible for the Post Office’s failure to register them until some days later. Her self-serving date stamp on the receipt she delivered to the Post Office for completion is not the relevant stamp. It is the date stamp on it of the Post Office showing when the letters with the notices were actually registered that is the proper stamp. That is the date on which the notices were registered.

[70] The consequence of failure to give proper notice of a hearing was considered by Upjohn LJ in **Re Pritchard**.<sup>90</sup> He held that proceedings which ought to have been served but did not come to the notice of a defendant are a nullity.<sup>91</sup> This is the

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<sup>88</sup> See fn. 24.

<sup>89</sup> See fn. 23.

<sup>90</sup> [1963] Ch 502.

<sup>91</sup> *Ibid*, pp. 523-524.

normal result of the failure to comply with the requirements of natural justice. I am satisfied that the learned trial judge was entitled to have come to the conclusion that failure to comply with Regulation 23<sup>92</sup> and to notify the voters of the date of their hearing rendered the decisions of no legal effect and the disenfranchised voters were never lawfully removed from the list. Penalties which are issued following upon proceedings which the person adversely affected had no adequate notice of are fundamentally flawed and cannot stand. The removal of the names of persons pursuant to such objections is invalid and those persons who suffered this fate were unlawfully disenfranchised.

#### **Failure to give notice of the deregistration of voters**

[71] The 203 voters were de-registered as a result of objections made under section 39(1)(b).<sup>93</sup> The Regulations flesh out the procedure to be followed in processing and determining such objections. Not only can the January List be affected by deletions, there may also be additions in respect of newly registered or re-registered voters. The Act accordingly provides for the publication by the Chief Registration Officer of Revised Monthly Lists. It is not disputed that the Chief Registration Officer did not publish the Revised Monthly Lists as required by section 46 of the Act.<sup>94</sup> The evidence before the learned trial judge was that the Chief Registration Officer published the January List and thereby confirmed and acknowledged the right of each person named therein to vote at the next elections to be held in Nevis unless their names were properly deleted.

[72] When the Registration Officer has determined all objections to the registration of persons whose names appear on the Register she is required to transmit a record of her determinations to the Chief Registration Officer.<sup>95</sup> The purpose of this requirement is no doubt to enable the Chief Registration Officer to publish such results in the Revised Monthly List. There is no other provision in the Act or the

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<sup>92</sup> See fn. 25.

<sup>93</sup> See fn. 10.

<sup>94</sup> See fn. 30.

<sup>95</sup> See fn. 29.

Regulations for the publication to the public of the deregistration of erstwhile registered voters. It is to be expected that there would be provision for some public notification that an objection has been successful so that, in the case of the individual voter who may not have been aware of the objection, the appeal process may be invoked, or an application for re-registration made. It would also serve the purpose of advising political representatives in a suitable case that a supporter has been struck off so that steps may be taken to encourage the individual to appeal or apply for re-registration. The only provision which provides for such early notification is section 46 by way of publication of the Revised Monthly Lists.<sup>96</sup>

- [73] There is no specific provision in the Act for communication of the decision to remove a voter from the list to the voter concerned. It was not disputed that none of the persons listed in Mr. Brantley's election petition were notified of the decision to remove their names from the list. In light of the other failures dealt with in other parts of this judgment, it is not surprising that a number of disenfranchised voters turned up to vote on polling day, only to learn for the first time that their names had been struck from the list. The law is now well established that an administrative decision which is adverse to an individual must be communicated to him or her before it could have the character of a determination with legal effect, thereby enabling him or her to challenge it in the courts if he or she so wished: **Regina (Anufrijeva) v Secretary of State for the Home Department and Another**.<sup>97</sup> As Lord Steyn said, this is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system. Where decisions are published and notified to those concerned accountability of public authorities is achieved. He described the suggestion that an uncommunicated administrative decision can bind an individual as an astonishingly unjust proposition. In our system of law surprise is regarded as the enemy of justice. Fairness is the guiding principle of our public law. Elementary fairness therefore supports a principle that a decision takes effect only upon

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<sup>96</sup> See fn. 30.

<sup>97</sup> [2004] 1 AC 604.

communication. In this case, the first occasion on which the voter would have discovered that an adverse decision had been made to remove his or her name from the list was when the July 2011 list was published, only 5 working days before the election. Mr. Daniel accordingly won the election by the slender margin of 14 votes in circumstances where 203 registered voters were removed from the list without any notice, 39 of whom testified that they would have voted for Mr. Brantley if they had been given the opportunity to do so.

[74] The question is, what is the effect of the failure to publish the Revised Monthly Lists?. Mr. Benjamin and Ms. Lawrence relied in the court below on Regulation 29(2)<sup>98</sup> and section 99 of the Act.<sup>99</sup> Regulation 29(2) provides that any failure to publish a document in accordance with the Regulations shall not invalidate the document. This does not assist Mr. Benjamin or Ms. Lawrence. First, Regulation 29(2) exempts failure to publish in accordance with the Regulations, but this is a failure to publish in accordance with section 46 of the Act. Second, the Revised Monthly Lists were not just not published; they were never brought into being. The learned trial judge found that there had been neither issue of the List nor publication of it for the year 2011. More significantly, the consequence of failure to publish was a failure to give the persons adversely affected by the removal of their names the opportunity to learn from the publication of the removal of their names and to give them another opportunity to appeal the decision or to apply for re-registration. Section 99 provides that non-compliance with the Regulations will not necessarily invalidate an election. Non-compliance with a Regulation will invalidate an election if the non-compliance is so serious that it amounts to the election not having been conducted in accordance with the principles laid down in the Act, and such non-compliance affected the result of the election.

[75] The Chief Registration Officer's failure to publish the Revised Monthly Lists contributed yet another blow to the disenfranchised voters' right to be notified of the decisions adverse to them that had been taken by the Registration Officer. All

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<sup>98</sup> See fn. 26.

<sup>99</sup> See fn. 34.

of the 203 persons on the January 2011 Register of Voters were constitutionally entitled to vote in accordance with the provisions of the Act. The Act provided a procedure whereby their constitutional right to vote could be taken away. The individuals affected, who either because they got no notice that an objection to their registration had been made, or got such notice too late, were deprived of another opportunity of challenging their removal from the Register which publication in the Revised Monthly Lists would have provided. The contesting political parties were deprived of the opportunity of taking whatever timely steps were available to rectify any errors which the Registration Officer may have made. Given that nothing less than the exercise of a fundamental democratic right is involved, and given the constitutional pedigree of the provisions of the Act, strict compliance with the procedure for the extinguishment of the right to vote is called for. There is ample authority for the proposition that the failure to give notice of a right of appeal invalidates the decision against which an appeal may be brought.<sup>100</sup> The consequence must be that the decisions to remove the names of the 203 persons had no legal effect and the 203 disenfranchised voters continued to be entitled to vote.

[76] From all the above, it is apparent that the list used for the July 2011 election was not the list required to be used by section 48 of the Act.<sup>101</sup> The list was to comprise the Register of Voters (or January 2011 List) and the Revised Monthly Lists of Voters published under sections 43 and 45 of the Act.<sup>102</sup> For the purpose of the July 2011 election the Chief Registration Officer had no choice but to use the published January 2011 Master List, subject to what is said below about the May Monthly List. The list actually published and used for the July election was not one compiled in accordance with section 48 in that names which appeared on the January Register were unlawfully removed. The election was accordingly held on the basis of a defective list which excluded the names of the 203

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<sup>100</sup> See *Rayner v Corporation of Stepney* [1911] 2 Ch 312; *Agricultural Horticultural and Forestry Industry Training Board v Kent* [1970] 2 QB 19; *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182.

<sup>101</sup> See fn. 31.

<sup>102</sup> Section 45 of the Act does not require publication of any list. It is clear that the intended reference is to section 46 which requires the publication of the Revised Monthly Lists.

disenfranchised voters. On this basis alone the petition ought to have succeeded, and I would uphold Mr. Brantley's appeal on this issue.

### **The failure to include the May Monthly List**

[77] It appears that the Chief Registration Officer correctly included in the list of voters actually used for the July 2011 election the names of persons added by the Registration Officer in the months of January, February, March and April 2011. These names were added as a result of, e.g., claims for first registration. He published these Monthly Lists in accordance with section 44 of the Act.<sup>103</sup> He also published a May Monthly List, which was required to be published by 15<sup>th</sup> June 2011, well in time for inclusion in the July 2011 List of Voters used for the July 2011 election. He took it on himself to cease processing all registration matters on 22<sup>nd</sup> June 2011 when the Governor-General's proclamation was published. It is not disputed that he omitted all the persons on the May Monthly List from the July 2011 List. The trial judge found that once there were no objections to any name on the May Monthly List by 25<sup>th</sup> May, the names of the persons there listed ought to have been included on the July Elections List. The judge was therefore correct in finding that persons omitted therefrom were all disenfranchised, and the List used in the election was not complete. The evidence is that an additional 21 persons otherwise entitled to vote were disenfranchised.

### **Whether the trial judge should have determined the residence qualification himself**

[78] Mr. Benjamin and Ms. Lawrence submitted on the appeal that in view of the evidence that many of the voters may not have been in fact ordinarily resident or domiciled in St John's, the learned trial judge was obliged either to refer the matter back to Ms. Lawrence or to judicially determine the issue of residence himself. They point to this procedure being followed by Ground CJ in *Misick v Forbes*.<sup>104</sup>

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<sup>103</sup> See fn. 19.

<sup>104</sup> TC 1999 SC 1.

In that case, Ground CJ sitting at first instance was faced with 10 electors who had been removed without the correct procedure being followed. He found that he had two choices. He could send the matter back and require the registration officer to follow the correct procedure and afford the electors a hearing to see whether they were entitled to be reinstated. Or, he could determine the issue himself. Since he had heard evidence from or concerning the residence of 8 of the 10 and it was clear they did not reside in the constituency he considered it more appropriate to determine the matter himself. The remaining 2 persons would not have affected the outcome of the elections, and he therefore dismissed the petition. There are many instances of an identical procedure being followed by judges in our region. In this case the learned trial judge did not consider the evidence of qualification and residence in any way. Mr. Astaphan, SC urged that the trial judge should therefore have dismissed the petition.

[79] This submission arises for the first time on the appeal. It was not made in the court below. There was no suggestion at the trial that the learned trial judge should go through the exercise of determining whether the voters resided in St John's. The issue before the trial judge was not the merits of the decision on the residence of the voters. The case was not about whether the Registration Officer had been right or wrong in making the determination without notice to the persons affected. The question was whether an uncommunicated decision in these circumstances had any legal effect. The learned trial judge was called on to consider whether he should set the election aside on the evidence produced. I therefore do not propose to treat as bearing any merit the suggestion that the learned trial judge erred in not determining for himself the question of the residence qualification of each of the disenfranchised voters.

### **Bias and Misfeasance**

[80] Mr. Brantley argued before the learned trial judge that the conduct of Mr. Benjamin and Ms. Lawrence was such that they were both guilty of bad faith and misfeasance and that Ms. Lawrence's decisions to uphold the objections lodged

by the NRP were tainted by apparent bias. The learned trial judge was of the view that in one respect at least there was evidence of bias on the part of Ms. Lawrence. But he made no findings on the question of bad faith and misfeasance which he did not consider would "take the matter much further".<sup>105</sup>

On the question of bias the learned trial judge made the following findings:

"Even assuming there was a misunderstanding or wrong interpretation of the process of sending by registered mail, the statistics taken from the records produced by [Ms. Lawrence] reveals that in the case of some (114) voters, notices were deposited at the Post Office just before, that is, less than 5 days before, on or after the dates of hearings. It would have been obvious that persons who received notices in such circumstances could not have attended. However, [Ms. Lawrence], notwithstanding, proceeded to hold hearings on the scheduled dates and made determinations thereat in the absence of the voters. It is difficult to comprehend that a person of the status and intelligence of Ms. Lawrence would proceed in that fashion. This was no accident nor negligence on the part of [Ms. Lawrence]. This was deliberate disenfranchisement. These decisions benefitted the NRP of which [Ms. Lawrence] was a supporter and any reasonably well informed and fair minded observer would conclude that there was a real possibility that she acted with bias."<sup>106</sup>

[81] Mr. Astaphan, SC has argued that the particulars of bias pleaded and proved by Mr. Brantley were not clear and precise. The rule was, he urged, that there must be no vagueness or ambiguity, and a cause of action or allegation cannot be left to be inferred. The fullest particulars must be given. This is especially so where allegations of bias, misfeasance and bad faith, which border on fraud, are pleaded. The learned trial judge had before him the pleadings in the petition and the witness statements concerning the circumstances surrounding the removal of the names of voters, many of whom testified they intended to vote for Mr. Brantley, without notice to them of the objections to their registration, the failure to notify them of the date, time and place of the hearing of the objection, the failure to send out the notices immediately as required by the Regulations, the hearing of the objections in the face of knowledge that the persons objected to would not have had notice of the hearing, the failure to include the names from the May Monthly List, the failure

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<sup>105</sup> See p. 123 of the judgment.

<sup>106</sup> See p. 122 of the judgment.



to publish the Revised Monthly Lists, the fact that Ms. Lawrence had acted as an election agent for Mr. Daniel in 2007, the disputed confrontation with Mr. Brantley during the objection hearings, the failure to comply with the directive from the Electoral Commission, and finally, the post-election refusal to supply Mr. Brantley with the information he sought for the purpose of his petition. I am satisfied that the particulars pleaded by Mr. Brantley were more than adequate for the learned trial judge to be able to deal with the issue of bias.

[82] There was an abundance of evidence before the learned trial judge from which he was entitled to find bad faith and misfeasance on the part of Ms. Lawrence. First there was the non-publication of the List of Objections. It is usually a reasonable inference that a person intends the inevitable consequences of their actions. The inevitable consequence of Ms. Lawrence's decision not to publish the List of Objections was that the objectees would be injured. In the absence of an explanation, therefore, it can be inferred that Ms. Lawrence intended to harm the objectees in this way. Secondly, Ms. Lawrence knew that scores of persons would not receive the notices of hearing on time. She knew this because the notices were not registered (as evidenced by the Post Office stamps) until it was too late to receive proper or any notice at all. Yet, she still proceeded with the hearings. She did not send out fresh notices. She herself took no steps to engage with the Chief Registration Officer or the Commission to find a solution to the obvious problem. She knew that people would be injured, but she forged ahead relentlessly. This is evidence from which the learned trial judge might have found an intention to harm those persons who were objected to. Thirdly, there was evidence that Ms. Lawrence was associated with the political party making the objections. She had been Mr. Daniel's polling agent at the 2007 election. She had attended executive meetings of the NRP and participated in its internal affairs to give expert financial advice. The CCM had objected to her presiding over the objection hearings, but nothing had been done. Fourthly, as a result of complaints made to it by the CCM concerning persons receiving notices of objections after the dates fixed for the hearings, the Electoral Commission had issued a directive to Mr. Benjamin that persons who had re-confirmed their registration under the Act

and had been issued with National Identification Cards, were to remain on the Register of Voters. Ms. Lawrence was aware of this directive but simply ignored it and proceeded with the objection hearings. Her explanation was that she had legal advice that she was entitled to ignore the directive. Acting on legal advice does not excuse a wrongful act. Fifthly, but this was contested, there was evidence that Ms. Lawrence had displayed hostility to the CCM and Mr. Brantley calling all CCM members "liars". Sixthly, the evidence was that Ms. Lawrence had refused to provide Mr. Brantley with the notice of objections that he requested in July 2011 after the elections simply because he had transposed the information concerning the address and occupations of the persons whose notices of objection he wanted to see for the purpose of completing his election petition.

[83] The tort of misfeasance in public office is committed when a public officer exercises his or her power specifically intending to injure someone, or when he or she acts in the knowledge of, or with reckless indifference to, the illegality of his or her acts and in the knowledge of, or with reckless indifference to, the probability of causing injury to someone. Subjective recklessness is established by proof that the public officer did not care whether the act was illegal or whether the circumstances happened. A deliberate omission involving an actual decision not to act might also give rise to liability.<sup>107</sup>

[84] The evidence before the learned trial judge clearly supported the inference that Ms. Lawrence had allowed her party affiliation to come before her statutory duties and her constitutional and common law duties of fairness to all the voters of the constituency of which she had been given charge. There was abundant evidence which established not only bias but, worse, bad faith and misfeasance on the part of Ms. Lawrence. I would uphold Mr. Brantley's appeal against the learned trial judge's holding that a finding of bad faith and misfeasance on the part of Ms. Lawrence would not take the matter much further. It was a finding that was required by the evidence to be made.

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<sup>107</sup> See *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1; *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395.

[85] As for Mr. Benjamin, despite the fact that he was reminded in January 2011 by Mr. Brantley acting in his capacity as Leader of the Opposition of his duty as Supervisor of Elections to publish Revised Monthly Lists, he steadfastly refused to do so, even though he knew he was so required by law. Nor did he condescend to respond to the subsequent letter from the leader of Mr. Brantley's party protesting the omission to publish the Revised Monthly Lists. He was responsible for ensuring the publication of the Revised Monthly Lists. He must have known that persons whose names were being removed from the list would be injured by his failure to publish. They would not know their names had been removed until a few days before the election. In the event, they were thereby denied the opportunity to appeal the adverse decision. He, too, therefore at least acted with reckless indifference as to whether he was breaking the law and thereby causing injury. This is sufficient to establish bias and bad faith and misfeasance in public office on his part. In this case we are confronted with senior public servants who have acted in bad faith, who have intentionally or at least recklessly broken the law, and who have intentionally or at least recklessly caused harm to a large number of voters, resulting in their disenfranchisement. The entire process was tainted and was properly set aside by the learned trial judge. But, additionally, I would uphold Mr. Brantley's appeal against the learned trial judge's failure to find bias and bad faith and misfeasance in public office on the part of Mr. Benjamin. It was similarly a finding that was required by the evidence to be made.

### **Equal Access to State Media**

[86] The evidence adduced before the learned trial judge established that during the pre-election period, the state-owned and financed radio station on its daily, "Nevis News Cast," carried only news items and reports about the political events of the ruling NRP. The Permanent Secretary in Mr. Parry's Ministry testified as to the policy of the Department to cover only the events of the ruling party. Not one of the opposition CCM's political events was given exposure. The trial judge accepted this evidence and found that the:

“Government Information Service must exist for the use of all political parties and not limited to the activities of the ruling party alone. In the premises, [Mr. Brantley’s] right to free expression and the freedom to campaign on equal terms and without [un]reasonable<sup>108</sup> restrictions were infringed.”<sup>109</sup>

He granted a declaration that Mr. Brantley’s right to freedom of expression and his right not to be treated in a discriminatory manner by reason of his political opinions guaranteed under sections 12<sup>110</sup> and 15<sup>111</sup> of the Constitution of Saint Christopher and Nevis had been contravened by the failure of the Nevis Island Administration’s radio station on its nightly Nevis News Cast to cover any of the political events organised by Mr. Brantley’s political party during the campaign leading up to the election of 11<sup>th</sup> July 2011. Mr. Parry has appealed against the orders on the ground that the learned trial judge was wrong in fact and/or in law.

[87] Dr. Browne submits that the Nevis Island Administration is an emanation of the Crown, and that either the Administration or the Attorney-General ought to have been the proper party. In the circumstances of this case, and from the evidence before the judge, it is apparent that he was satisfied that it was the political directorate of Nevis of which Mr. Parry is the head that was responsible for influencing the Nevis government radio station not to cover the election campaign fairly and evenly. The **Crown Proceedings Act**<sup>112</sup> does not apply, and the Crown, represented by the Attorney-General, would not be a necessary party. This was a case of Mr. Parry’s Ministry using state funds to benefit his own party. There is much merit in Mr. Mendes, SC’s submission that it was no different than if Mr. Parry’s party had taken out an advertisement in a newspaper or a private radio station and signed a government cheque to pay for it. I do not see any merit in the submission made by Dr. Browne.

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<sup>108</sup> The judgment has the word “reasonable”, but “unreasonable” seems to be required by the context and for the sentence to make sense.

<sup>109</sup> See p. 135 of the judgment.

<sup>110</sup> See fn. 41.

<sup>111</sup> See fn. 42.

<sup>112</sup> Cap. 5:06, Revised Laws of Saint Christopher and Nevis 2002.

[88] Nor was there any need for Mr. Brantley to have pleaded or proved, as urged by Dr. Browne, that he had demanded free or equal access or had sought to purchase access to the Government media and been refused before he could be entitled to claim political discrimination by the Nevis Island Administration headed by Mr. Parry. It is not a requirement for an opposition political party in a general election campaign to request the government-owned media to cover their political events to an equal extent as they cover the governing party's campaigning. When they give unfair coverage to the governing party's campaign events in their programming the likely explanation is political bias or, more insidiously, fear of victimisation if they do not show political bias in favour of the ruling party. There was a burden on Mr. Parry, as there is on the leader of any political party in power, in Nevis as he instructs the Governor-General to dissolve the Assembly and to call elections, to ensure that the government-owned media execute or perform their important constitutional role in an election campaign of giving equal time to all major political parties, thus giving sustenance to the democratic process.<sup>113</sup> Failure to do so runs the risk, as in this case, of the Premier being justifiably accused of being responsible for a breach of the opposition's fundamental right not to be discriminated against.

### **Conclusion**

[89] For the reasons given above I would dismiss the appeal brought by Mr. Parry, and I would uphold the findings of the learned trial judge that Mr. Brantley's right to freedom of expression and his right not to be treated in a discriminatory manner by reason of his political opinions under sections 12<sup>114</sup> and 15<sup>115</sup> of the Constitution of Saint Christopher and Nevis have been contravened by the failure of the Nevis Island Administration on its nightly Nevis News Cast to cover any of the political

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<sup>113</sup> The duty of the government-owned media to work in support of and not to obstruct the public's right to freedom of information and freedom from discrimination on the basis of political affiliation has been established in our region since at least the decision of Justice Saunders in the first-instance decision Suit No. 56 of 1997, (decided 8<sup>th</sup> January 1998), in the Talk Your Mind case from Anguilla: Benjamin and others v Minister of Information and Broadcasting and another [2001] UKPC 8.

<sup>114</sup> See fn. 41.

<sup>115</sup> See fn. 42.

events organised by Mr. Brantley's political party during the campaign leading up to the election of 11<sup>th</sup> July 2011.

[90] I would similarly dismiss the appeal brought by Mr. Daniel. I would uphold the findings of the learned trial judge that the local election held on 11<sup>th</sup> July 2011 for the Constituency of Nevis 2 (Parish of St John's) is invalid, and that Mr. Daniel was not validly elected or returned for that electoral district. I would also similarly dismiss the amended appeal brought by Mr. Benjamin and Ms. Lawrence and I would uphold the declaration of the learned trial judge that the Nevis Island Assembly Election for the Constituency of Nevis 2 (Parish of St John) held on the 11<sup>th</sup> July 2011 is invalid and void on the basis that the appellants failed to act in accordance with the principles laid down in the law and acted improperly and unlawfully, and, as a result, the election was not substantially conducted in accordance with the law and that the irregularities affected the result of the election.

[91] For the reasons stated above, I would allow the counter appeal brought by Mr. Brantley in relation to the restoration of the names to the Register of Voters. I am satisfied that the learned trial judge failed to find, as he should have, that the List of Voters used for the election in the Constituency of Nevis 2 (Parish of St John) was not the list required by section 48(1) of the Act to be used at the election. I am also satisfied that, having found that the disenfranchised voters were not notified of the date and place for the hearing of objections to their registration, nor were they notified of the results of the objection hearings, and that the Registration Officer had failed to publish the List of Objections, the learned judge was wrong not to have found that as a consequence of any or all of these failures, the removal of the disenfranchised voters from the list was unlawful, null and void and of no effect. Similarly, having found that the Registration Officer was in breach of the Regulations in not immediately sending out the notices of objection, the trial judge was wrong not to find that the Registration Officer acted in breach of Regulation 19 and was wrong not to find that the removal of the disenfranchised voters from the list was, on this additional basis, unlawful, null and

void and of no effect. Similarly, the learned trial judge's failure to find that the decision of the Registration Officer to uphold the objections in all the circumstances was tainted with bias was wrong. Additionally, I would allow the appeal and hold that the learned trial judge's failure in the face of overwhelming evidence to find that both Mr. Benjamin and Ms. Lawrence were biased and acted in their public office in bad faith, and deliberately sought to and in fact did disenfranchise voters, was wrong, and I would grant the declarations sought.

### **Costs**

[92] The normal rule in our jurisdiction in public law matters is that each party bears his own costs unless there is some special cause to order otherwise. The rule is based on the premise that meritorious public interest litigation is not to be unduly restrained by the fear of being burdened personally by an order for costs. The learned trial judge followed that rule in this case, and he ordered each party to bear his own costs. Mr. Brantley appeals this order and asks that he not be made to bear the financial burden of redressing a public wrong that affected many persons. Having found that the learned trial judge, in the light of the facts found by him, was wrong not to have found Mr. Parry and Mr. Daniel, Mr. Benjamin and Ms. Lawrence guilty of bad faith and misconduct in the preparation of the list used for the election, the normal rule should not have applied. The only proper order for him to have made was that Mr. Parry, Mr. Daniel, Mr. Benjamin and Ms. Lawrence should have paid costs in the court below to Mr. Brantley. I would order that Mr. Parry, Mr. Daniel, Mr. Benjamin and Ms. Lawrence be jointly and severally liable for the costs of Mr. Brantley in the High Court to be assessed if not agreed within 21 days of the date of this decision. As regards costs in the Court of Appeal, I would order that Mr. Parry, Mr. Daniel, Mr. Benjamin and Ms. Lawrence be jointly and severally liable to pay Mr. Brantley's costs assessed at two thirds of the costs in the court below, as I consider their appeals to have been entirely without merit while Mr. Brantley's cross-appeal has succeeded.

[93] May I finally express my appreciation to all counsel for the excellent quality of their written and oral submissions which greatly facilitated the timely delivery of this decision.

**Don Mitchell**  
Justice of Appeal [Ag.]

I concur.

**Janice M. Pereira**  
Chief Justice [Ag.]

I concur.

**Davidson Kelvin Baptiste**  
Justice of Appeal