THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2013/0005

In the Matter of Sections 26(1) & (2), 36, 64, and 80 of the Constitution of St. Christopher and Nevis.

And in the Matter of an Application for Declaratory, Injunctive and Other Relief by the Hon. Sam Condor and the Hon. Shawn K. Richards, the Members of Parliament for St. Christopher 3 and 5 respectively pursuant to Sections 36 and 96 of the Constitution of St. Christopher and Nevis.

BETWEEN:

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Appellant

and

[1] HON. SAM CONDOR
[2] HON. SHAWN K. RICHARDS

Respondents

CONSOLIDATED WITH

SKBHCVAP2013/0006

In the Matter of Sections 26(1) & (2), 36, 64, and 80 of the Constitution of St. Christopher and Nevis.

And in the Matter of an Application for Declaratory, Injunctive and Other Relief by the Hon. Sam Condor and the Hon. Shawn K. Richards, the Members of Parliament for St. Christopher 3 and 5 respectively pursuant to Sections 36 and 96 of the Constitution of St. Christopher and Nevis.

BETWEEN:

THE RT. HON. DR. DENZIL L. DOUGLAS – PRIME MINISTER

Appellant

and

[1] HON. SAM CONDOR
[2] HON. SHAWN K. RICHARDS

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Mr. Anthony Astaphan, SC on behalf of the Attorney General, with him, Mr. Sylvester Anthony (instructed by Ms. Angelina Sookoo of Law Offices of Sylvester Anthony) for the Appellant in Civil Appeal No. 5 of 2013

Ms. Violet Williams, led by Dr. Henry Browne, QC and Mr. Delano Bart, QC for the Appellant in Civil Appeal No. 6 of 2013

Mr. Douglas Mendes, SC, leading Mr. Vincent Byron Jr. and Ms. Talibah Byron (instructed by Mr. DeLara MacClure Taylor) for the Respondents in both appeals

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2014: October 30;
2015: April 17.

Civil appeal – Appointment of fourth Senator by Governor General on advice of Prime Minister at time when maximum of three Senators provided for by s. 26(2) of Saint Christopher and Nevis Constitution Order 1983 – Whether appointment valid – Senators (Increase of Number) Act, 2013 subsequently passed in National Assembly by one vote with newly appointed fourth Senator voting in favour of passage of Act – Whether passage of Act valid – Whether learned trial judge erred in finding that appointment of fourth Senator by Governor General on advice of Prime Minister justiciable – Whether learned judge failed to properly consider that s. 116(2) of Constitution operates as unequivocal ouster of jurisdiction of High Court to enquire into or review any act done or decision made by Governor General in exercise of his constitutional and prerogative powers under s. 52 of Constitution – Whether learned trial judge erred in making finding that s. 44(2) of Constitution does not save validity of Senators (Increase of Number) Act, 2013

On 28th January 2013, the Governor General, on the advice of the Prime Minister of the Federation of Saint Christopher and Nevis, purported to appoint Mr. Jason Hamilton as a Senator and the Attorney General. At the time of the purported appointment of Mr.

Hamilton, there was a vacancy in the office of Attorney General, but there were already three appointed Senators, that being the maximum number provided for by section 26(2) of the Saint Christopher and Nevis Constitution Order 1983 ("the Constitution"). Subsection (2) did however, contain the following proviso: 'Provided that at any time when a person who is a Senator holds the office of Attorney-General the number of Senators shall be increased by one'. The following day, the Senators (Increase of Number) Act, 2013[1] was passed in the National Assembly by one vote, with Mr. Hamilton having cast a vote in favour of the passage of the Act.

The respondents filed an originating motion in the High Court, challenging the appointment of Jason Hamilton as a fourth Senator and the Attorney General, and also, the passage of the Senators (Increase of Number) Act, 2013. The learned trial judge found in their favour and granted the following declarations which had been sought by them: (1) that the appointment of Jason Hamilton as a fourth Senator was in contravention of the provisions of section 26 (1) and (2) of the Constitution and as such, is null, void and of no effect; (2) that the appointment of Jason Hamilton as Attorney General was contrary to section 52(4) of the Constitution and accordingly, is invalid, null and void and of no effect; and (3) that the Senators (Increase of Number) Act, 2013 is unconstitutional and/or invalid, it being in contravention of sections 26 and 41 of the Constitution.

The appellants appealed to this Court, arguing, inter alia, that the learned trial judge erred in finding that the proviso to section 26(2) of the Constitution in its natural and ordinary meaning meant that the Senate does not increase in number from three to four until a person who is already a Senator also holds the Office of Attorney General; that the learned trial judge erred in finding that the appointment of a fourth Senator by the Governor General on the advice of the Prime Minister was justiciable; that the learned trial judge failed to properly consider that section 116(2) of Constitution operates as an unequivocal ouster of the jurisdiction of the High Court to enquire into or review any act done or decision made by the Governor General in the exercise of his constitutional and prerogative powers under section 52 of the Constitution; and that the learned trial judge erred in making the finding that section 44(2) of the Constitution does not save the validity of the Senators (Increase of Number) Act, 2013.

Held: dismissing the appeal, affirming the findings of the learned trial judge, and making no order as to costs, that:

1. At the time of the purported appointment of Mr. Hamilton as the fourth Senator, Parliament had prescribed that there be no more than three senators. Jason Hamilton – not being an elected representative and not being appointed Attorney General as a public officer on the advice of the Judicial and Legal Services Commission – could only have been appointed as Attorney General if he was a Senator at the time that he was appointed Attorney General, and the number of Senators could only increase to four when Mr. Hamilton, as a Senator, was appointed Attorney General. It is therefore not possible for him to have been appointed as the fourth Senator when a fourth Senator only comes about as a

[1] Act No. 1 of 2013, Laws of Saint Christopher and Nevis.

result of a person who is a Senator, meaning one of the three already existing Senators, is appointed Attorney General.

2. The court below did not enquire into the question of whether the Governor General exercised the function of appointing the Attorney General in accordance with the advice of the Prime Minister, which was beyond question, but rather, it enquired into whether the appointment of Jason Hamilton as Attorney General was permitted by the Constitution. The learned trial judge determined that the court was indeed permitted to enquire into that question and upon enquiry it was determined that the Governor General was not in fact permitted to do so because section 52 of the Constitution, which empowered him to appoint someone as Minister, permitted him only to appoint someone who was a member of the National Assembly and also, that Jason Hamilton was not, at the date of his purported appointment, a member of the National Assembly.

   Re Blake (1994) 47 WIR 174 distinguished.

3. The words 'the presence or participation of any person not entitled to be present at or participate in the proceedings of the Assembly' used in section 44(2) of the Constitution should be interpreted narrowly so that the section would apply only to proceedings of the Assembly as constituted in accordance with the provisions of the Constitution itself. Section 44(2) would, therefore, apply to the Assembly provided for in section 26, consisting of such number of Representatives as corresponds with the number of constituencies for the time being established in accordance with section 50 (which at the material time was eleven) and such number of Senators as is specified in section 26(2) (which at the material time was three). Accordingly, on 29th January 2013, the body comprising, four Senators rather than three, would not have been the 'Assembly' referred to in section 44(2). As a result, this section could not apply to and protect from invalidation the proceedings held on that date. Consequently, the **Senators (Increase of Number) Act, 2013** purportedly passed by the National Assembly on 29th January 2013, by virtue of the presence of and participation by Mr. Jason Hamilton in the proceedings of the Assembly on that date, including by casting the deciding vote leading to the passage of the Act, is unconstitutional and/or invalid as being in contravention of sections 26 and 41 of the Constitution.

   Regina v Hughes [2002] 2 AC 259 applied; **Anisminic Ltd. v Foreign Compensation Commission and Another** [1969] 2 AC 147 applied.

JUDGMENT

[1] **MICHEL JA**: This is an appeal against the judgment of Mr. John Benjamin, QC, acting as a judge of the High Court in the Federation of Saint Christopher and Nevis. In his judgment dated 28th February 2013, the learned judge granted the

following declarations sought by the respondents (who were the claimants in the court below):

(1) A Declaration that the appointment of a 4th Senator by the Governor General on the advice of the Prime Minister or whosoever is in contravention of the provisions of section 26(1) and (2) of the **Saint Christopher and Nevis Constitution Order 1983** ("the Constitution") and as such, the said appointment is null, void and of no effect.

(2) A Declaration that the appointment of Mr. Jason Hamilton as Attorney General is contrary to section 52(4) of the Constitution and is invalid, null and void and of no effect.

(3) A Declaration that the **Senators (Increase of Number) Act, 2013**[2] is unconstitutional and/or invalid as being in contravention of sections 26 and 41 of the Constitution.

[2] By notice of appeal filed on 5th April 2013 in Civil Appeal No. 5 of 2013, the appellant (the Attorney General of St. Christopher and Nevis) appealed against the judgment of the learned judge and sought an order (1) setting aside the judgment and (2) reinstating the **Senators (Increase of Number) Act, 2013**. The grounds of appeal are as follows:

(a) The learned trial judge erred in law and/or misdirected himself when he held at paragraph 23 of his judgment that the subject proceedings were not prerogative proceedings and therefore the Attorney General is a proper party to a section 36 claim in that the learned trial judge failed to properly consider that:

(i) these proceedings were in the nature of election proceedings which sought to challenge the appointment of a

[2] Act No. 1 of 2013, Laws of Saint Christopher and Nevis.

specific individual and were not civil or constitutional proceedings; and

(ii) section 36(3) of the Constitution precludes the Attorney General from being a defendant in a section 36 proceedings.

(b) The learned trial judge erred in law and/or misdirected himself when he found at paragraph 23 (iii) of the judgment that the court's jurisdictions under sections 36 and 96 of the Constitution could be merged and properly heard and determined together. In so finding the learned trial judge failed to properly consider that:

(i) the court's parliamentary or electoral jurisdiction under section 36 and its constitutional jurisdiction under section 96 are mutually exclusive and not the same jurisdiction;

(ii) the court's jurisdiction under section 96(7) expressly prohibits the court from hearing or determining any question concerning the validity of the **Senators (Increase of Number) Act, 2013**, as such a hearing or determination involved the court deciding on a question concerning the membership of the House, which was vested in the High Court under section 36 of the Constitution;

(iii) by exclusively excluding the parliamentary or election jurisdiction from the constitutional jurisdiction, section 97(6) ensures that the constitutional jurisdiction does not operate as:

I. a means of circumventing the strict rules which govern the parliamentary jurisdiction; or

II. as a means of gaining ultimate access to Her Majesty in Council under the guise of seeking to enforce a constitutional provision.

(c) The learned trial judge erred in law and in fact when he found at paragraphs 21, 35 and 47 of the judgment that the proviso to section 26(2) of the Constitution in its natural and ordinary meaning meant that the Senate does not increase in number from three to four until a person who is already a Senator also holds the Office of Attorney General in that:

(i) The learned judge failed to properly construe the language of section 26 in context and as a whole and/or failed to give effect to the true intent and purpose of section 26 and the proviso to section 26(2) of the Constitution.

(ii) Section 26 provides for the House to have a composition of seventeen members comprising eleven Representatives, three Senators, a Speaker, a Deputy Speaker and an Attorney General.

(iii) The Constitution and in particular section 64 thereof were drafted to ensure that at all times there is an Attorney General who shall be a member of the House. The Constitution also provides one of two avenues by which an Attorney General can be appointed, by public office or by the office of a Minister.

(iv) Regardless of the appointment avenue used, at all times the House must comprise three Senators and an Attorney General who is a member of the House pursuant to section

64 of the Constitution and section 2 of the **Attorney General's Act**.[3]

(v) On the face of the proviso to section 26(2) of the Constitution, the said proviso can mean one of two things:

I. That the Senate will only increase by one if an existing Senator holds the post of Attorney General; or

II. That the Senate will comprise four Senators at any time one of the four Senators also simultaneously holds the Office of Attorney General.

(vi) Further, the proviso to section 26(2) of the Constitution:

(a) is an enabling and/or permissive proviso thereby allowing for the Senate to increase from three to four in order to ensure that the composition of the House is at all times seventeen; and

(b) being an enabling and/or permissive proviso has to be construed to give effect to the purpose of section 26 of the Constitution to ensure that the House at all times has seventeen members.

(d) The learned trial judge erred in law and in fact when he found that the appointment of a 4th Senator by the Governor General on the advice of the Prime Minister is justiciable. The learned trial judge failed to properly consider that section 116(2) operates as an unequivocal constitutional ouster of the jurisdiction of the High Court to enquire or review any act or decision done by the Governor General in the exercise of his constitutional and prerogative powers under section 52.

[3] Cap. 3.02, Revised Laws of Saint Christopher and Nevis 2009.

(e) The learned trial judge erred in law and in fact when he found at paragraphs 37 and 38 of the judgment that section 44(2) of the Constitution does not save the validity of the **Senators (Increase of Number) Act, 2013** in that:

(i) section 44(2) states that the participation and presence of any person not entitled to be present at or to participate in the proceedings of the Assembly shall not invalidate those proceedings;

(ii) section 44(2) operates as an absolute and unequivocal constitutional ouster of the jurisdiction of the High Court to invalidate the passing of the **Senators (Increase of Number) Act, 2013** due to the participation and presence of Jason Hamilton in the Assembly.

(f) The judgment is, in the circumstances, wrong.

[3] By notice of appeal filed on 12th April 2013 in Civil Appeal No. 6 of 2013, the appellant (The Rt. Hon. Dr. Denzil L. Douglas – Prime Minister) also appealed against the judgment of the learned judge and also sought orders setting aside the judgment and reinstating the **Senators (Increase of Number) Act, 2013**. The grounds of appeal are as follows:

(a) The court was wrong in fact and/or law in finding that:

(i) It was not lawful to appoint Mr. Hamilton as a Senator and Attorney General because there was no vacancy among the three Senators.

(b) In finding as he did, the learned judge did not take any account of:

(i) The proper construction of the Constitution;

(ii) The absurdity of the interpretation which leads to a conclusion that the only procedure open in making the appointment was for the Prime Minister to revoke the appointment of one of his Senators, appoint Mr. Hamilton as a Senator and Attorney General, then re-appoint the former Senator whose instruments had just been revoked, again as Senator, or appoint another person as a Senator;

(iii) The absurdity of this interpretation is even more compounded when the two Government Senators hold Ministerial Office. This interpretation requires that not only there be the revocation of the instrument appointing the Senator as Senator, but also his Ministerial Instrument, only to have them re issued after the Senator Attorney General is appointed.

[4] On 3rd February 2014, application was made on behalf of the appellant in Civil Appeal No. 6 of 2013 and supported by the appellant in Civil Appeal No. 5 of 2013 for the two appeals to be consolidated and heard together. Although some of the documents filed in the appeals after that date were filed as in a consolidated appeal, no formal order had been made for the consolidation of the two appeals and for them to be heard together. At the hearing of this appeal, the court made the consolidation order and the appeals were heard together.

[5] For ease of reference, the appellant in Civil Appeal No. 5 of 2013 (the Attorney General) is referred to herein as the first appellant and the appellant in Civil Appeal No. 6 of 2013 (the Prime Minister) is referred to as the second appellant.

[6] The pertinent facts of the case leading to the judgment of Benjamin J are that on 28th January 2013, the Governor General, on the advice of the Prime Minister, purported to appoint Mr. Jason Hamilton as a Senator and as the Attorney General. At the time of the purported appointment of Mr. Hamilton, there was a

vacancy in the office of Attorney General, the previous holder, Mr. Patrice Nisbett – an elected member of the National Assembly – having demitted the office of Attorney General on or about 25th January 2013. As to whether there was at the material time a vacancy in the office of Senator, however, is a question which was in dispute between the parties in the court below and which is an issue for determination in this appeal.

[7] On 29th January 2013, the day after the purported appointment of Mr. Hamilton as a Senator and Attorney General, the **Senators (Increase of Number) Act, 2013** was passed in the National Assembly by one vote, with Mr. Hamilton having cast a vote in favour of the passage of the Act.

[8] Section 26(2) of the Constitution provides as follows:

> "The number of Senators shall be three or such greater number (not exceeding two-thirds of the number of Representatives) as may be prescribed by Parliament:
>
> Provided that at any time when a person who is a Senator holds the office of Attorney-General the number of Senators shall be increased by one."

[9] At the time of the purported appointment of Mr. Hamilton as a Senator there was no greater number than three prescribed by Parliament – the **Senators (Increase of Number) Act, 2013** not having been passed by the National Assembly until the following day, 29th January 2013. At the time of the purported appointment of Mr. Hamilton as a Senator there was also no person who was a Senator holding the office of Attorney General so as to have increased the number of Senators to four; in fact, there was no person holding the office of Attorney General at all and, indeed, if there was any person then holding the office of Attorney General, Mr. Hamilton could not have been appointed to that office.

[10] The position advanced by the appellants that, by virtue of the proviso to section 26(2) of the Constitution, the number of Senators had been increased to four by reason of the appointment of Mr. Hamilton as Attorney General is simply an

untenable one. Mr. Hamilton – not being an elected representative and not being appointed Attorney General as a public officer on the advice of the Judicial and Legal Services Commission – could only have been appointed as Attorney General if he was a Senator at the time that he was appointed Attorney General, and the number of Senators could only increase to four when Mr. Hamilton as a Senator was appointed Attorney General, so it is not possible for him to have been appointed as the fourth Senator when a fourth Senator only comes about as a result of a person who is a Senator, meaning one of the three already existing Senators, is appointed Attorney General.

[11] As to the submission by the first appellant (contained in his written submissions filed on 31st January 2014) that the National Assembly must have seventeen members, this is completely baseless. Section 26 of the Constitution is quite clear and unambiguous in speaking to the composition of the National Assembly. It provides for the Assembly to have such number of Representatives as corresponds with the number of constituencies for the time being established; there being eleven constituencies it means that there are eleven elected Representatives in the Assembly. It provides for a Speaker to be elected either from among the elected representatives or from outside, but if elected from outside he then becomes a member of the National Assembly. It provides for there to be three Senators or such greater number as is prescribed by Parliament; at the material time there was no greater number prescribed by Parliament and so there would be three Senators. It provides that if a person who is a Senator is appointed Attorney General then the number of Senators is increased by one; at the material time there was no person who was a Senator who was appointed Attorney General. This means that the National Assembly of the Federation of Saint Christopher and Nevis can have fourteen, fifteen or sixteen members depending on whether the Speaker is or is not an elected representative and depending on whether or not a person who is a Senator is appointed Attorney General. The Assembly could never have had seventeen members, because the Deputy Speaker (who was referred to in the aforesaid submissions of the first appellant)

must always be an elected representative and so he cannot be counted twice. As at the date of the purported appointment of Mr. Hamilton as Attorney General, the National Assembly was made up of fifteen members – the eleven elected representatives, the Speaker and three Senators (Messrs Nigel Carty, Richard Skerritt and Vincent Byron Jr).

[12] This disposes of ground (c) of the first appellant's grounds of appeal, which was addressed as Issue No. 3 in the submissions filed on behalf of the Attorney General. It also disposes of both of the second appellant's grounds of appeal.

[13] I would now address the related ground, being ground (d) of the first appellant's grounds of appeal, which is Issue No. 2 in the submissions on behalf of the Attorney General in support of the appeal.

[14] In ground (d) the first appellant contends that the learned trial judge erred in law and in fact when he found that the appointment of a 4th Senator by the Governor General on the advice of the Prime Minister is justiciable. The learned judge, the first appellant contends, failed to properly consider that section 116(2) of the Constitution operates as an unequivocal ouster of the jurisdiction of the High Court to enquire into or review any act or decision done by the Governor General in the exercise of his constitutional and prerogative powers under section 52.

[15] Section 116(2) provides as follows:

> "Where by this Constitution the Governor-General is required to perform any function in his own deliberate judgment or in accordance with the advice or recommendation of, or after consultation with, any person or authority, the question whether the Governor-General has so exercised that function shall not be enquired into in any court of law."

[16] The simple answer to this contention by the Attorney General is that the court below did not enquire into the question of whether the Governor-General exercised the function of appointing the Attorney General in accordance with the advice of the Prime Minister, which was beyond question, but whether the appointment of Jason Hamilton as Attorney General was permitted by the

Constitution. The learned judge determined that the court was indeed permitted to enquire into that question and upon enquiry the court determined that the Governor-General was not in fact permitted to do so because section 52 of the Constitution which empowered him to appoint someone as Minister permitted him only to appoint someone who was a member of the National Assembly and that Jason Hamilton was not, at the date of his purported appointment, a member of the National Assembly.

[17] This is the short answer to the question posed by ground (d) of the first appellant's grounds of appeal and by Issue No. 2 of his submissions in support of the appeal and the case of **Re Blake**[4] cited by the Attorney General in support of his contention is clearly distinguishable from the present case.

[18] I will next address ground (b) of the first appellant's grounds of appeal, which is Issue No. 1 in the submissions of the first appellant.

[19] In ground (b) the first appellant contends that the learned trial judge erred in law and/or misdirected himself when he found at paragraph 23 (iii) of the judgment that the court's jurisdiction under section 36 and 96 of the Constitution could be merged and properly heard and determined together.

[20] Section 36 of the Constitution provides as follows:

> "(1) The High Court shall have jurisdiction to hear and determine any question whether
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> (a) any person has been validly elected as a Representative;
> (b) any person has been validly appointed as a Senator;
> (c) any person has been elected as Speaker from among persons who were not members of the National Assembly was qualified to be so elected or has vacated the office of Speaker; or
> (d) any member of the Assembly has vacated his or her seat or is required, by virtue of section 31(4), to cease to perform his or her 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

[4] (1994) 47 WIR 174.

in the election to which the application relates or by any person who was, or who alleges that he or she 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 made to the High Court for the 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 or her functions under this section, the

Attorney-General shall not be subject to the direction or control of any other person or authority."

[21] Section 96 of the Constitution provides as follows:

"(1) Subject to sections 23(3), 37(10)(b), 50(7) and 116(2), any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he or she has a relevant interest, apply to the High Court for a declaration and for relief under this section.

(2) The High Court shall have jurisdiction on an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened and to make a declaration accordingly.

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

(4) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on the court by or under this section, including provision with respect to the time within which any application under this section may be made.

(5) A person shall be regarded as having a relevant interest for the purpose of an application under this section only if the contravention of this Constitution alleged by him or her is such as to affect his or her interests.

(6) The rights conferred on a person by this section to apply for a declaration and relief in respect of an alleged contravention of this Constitution shall be in addition to any other action in respect of the same matter that may be available to that person under any law.

(7) Nothing in this section shall confer jurisdiction on the High Court to hear or determine any such question as is referred to in section 36."

[22] The thrust of the first appellant's argument in relation to this ground of appeal is that the matter of the validity of the appointment of Jason Hamilton as a Senator has to be addressed under section 36 of the Constitution and cannot be addressed under section 96, while the matter of the validity of his appointment as Attorney General and the validity of the **Senators (Increase of Number) Act,**

2013 have to be addressed under section 96 of the Constitution and not section 36 and that the two matters cannot be merged and heard and determined together.

[23] The learned judge found, and I can find no fault with his finding in that regard, that the issue of the validity of Mr. Hamilton's appointment as a Senator was addressed under section 36 of the Constitution, while the issue of the validity of his appointment as Attorney General and of the validity of the Act were addressed under section 96 and that there is nothing wrong with the two sets of issues, which arose from the same set of facts, being heard together. The learned judge also found, and again I can find no fault with his finding, that: (1) no provisions have been made by Parliament for challenges to the validity of the appointment of a Senator, so that the procedure which had to be followed is that laid down by rule 56.7(1)(c) of the **Civil Procedure Rules 2000** ("CPR"), which is the same procedure that had to be followed for the challenge to the validity of the appointment of a Minister and the validity of an Act of Parliament; (2) Part 56.8(1) of the CPR expressly provides for the joinder of claims; and (3) in **Joseph Parry et al v Mark Brantley**,[5] this Court found nothing incongruous in joining a claim for constitutional relief in an election petition. If there is nothing wrong in joining a claim for constitutional relief in an election petition then there can hardly be anything wrong with hearing a claim for constitutional relief under section 96 together with a claim under section 36 challenging the validity of the appointment of a member of the National Assembly.

[24] Ground (a) of the first appellant's grounds of appeal did not make it to the submissions in support of the appeal and did not therefore attract an issue number. This ground was not pursued by the first appellant in his written submissions and, in his oral submissions at the hearing of the appeal, lead counsel for the first appellant, Mr. Anthony Astaphan, SC, informed the court that

[5] SKBHCVAP2012/0003, SKBHCVAP2012/0004, SKBHCVAP2012/0005 (delivered 27th August 2012, unreported).

this ground had been abandoned. Ground (a) of the first appellant's grounds of appeal will not therefore be addressed in this judgment.

[25] The final ground of appeal to be addressed therefore and the final issue to be resolved is ground (e) of the first appellant's grounds of appeal, which is addressed in part under Issue No. 1 of the first appellant's submissions and, more particularly, in his supplementary submissions filed on 23rd October 2014.

[26] In ground (e), the first appellant contends that the learned trial judge erred in law and in fact when he found at paragraphs 37 and 38 of the judgment that section 44(2) of the Constitution does not save the validity of the **Senators (Increase of Number) Act, 2013**.

[27] Section 44(2) of the Constitution provides as follows:

> "The National Assembly may act notwithstanding any vacancy in its membership (including any vacancy not filled when the Assembly first meets after any general election) and the presence or participation of any person not entitled to be present at or participate in the proceedings of the Assembly shall not invalidate those proceedings."

[28] The first appellant argues that section 44(2) operates as an absolute and unequivocal constitutional ouster of the jurisdiction of the High Court to invalidate the passing of the **Senators (Increase of Number) Act, 2013** due to the presence and participation of Jason Hamilton in the proceedings of the Assembly on 29th January 2013 leading to the passage of the Act. He further contends that the sanction imposed by the Constitution for the participation in the proceedings of the Assembly of someone who was not entitled to do so (including participation by voting) is not the invalidation of the proceedings, but a criminal sanction against the person who so participates.

[29] The respondents, on the other hand, argue that provisions which seek to limit the reach of the fundamental rights and freedoms ought to be narrowly interpreted,

citing the case of **Regina v Hughes**[6] in support, and that a provision which seeks to oust the jurisdiction of the court to review the acts of tribunals ought to be interpreted narrowly, citing the case of **Anisminic Ltd. v Foreign Compensation Commission and Another**[7] in support.

[30] Although there are, on the facts of this case, no fundamental rights and freedoms in issue here (meaning the rights and freedoms protected under sections 3 to 17 of the Constitution) and although there is no act of any tribunal in issue here, the **Hughes** and **Anisminic** cases still come into play here. In essence, what these cases provide for is the narrowing of the interpretation of ouster clauses, like section 44(2) of the Constitution, such as to limit their reach only to those circumstances which the words used in the clauses are clearly intended to cover.

[31] I accordingly agree with the submission of the respondents that the words 'the presence or participation of any person not entitled to be present at or participate in the proceedings of the Assembly' used in section 44(2) should be interpreted narrowly so that the section would apply only to proceedings of the Assembly as constituted in accordance with the provisions of the Constitution itself. Section 44(2) would, therefore, apply to the Assembly provided for in section 26 consisting of such number of Representatives as corresponds with the number of constituencies for the time being established in accordance with section 50 (which at the material time was eleven) and such number of Senators as is specified in section 26(2) (which at the material time was three). Section 44(2) could not therefore apply to and protect from invalidation the proceedings of a body comprising say five persons purporting to be Senators or twelve persons purporting to be Representatives when the Constitution only provides for three Senators and eleven Representatives.

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[6] [2002] 2 AC 259.
[7] [1969] 2 AC 147.

[32] As was earlier determined in this judgment, in accordance with section 26 of the Constitution and in accordance with the relevant legislative provisions as at 29th January 2013, the National Assembly of Saint Christopher and Nevis was a body comprising eleven Representatives, three Senators and a Speaker, and a body comprising four Senators, eleven Representatives and a Speaker was not at that date the Assembly referred to in section 44(2). Consequently, the **Senators (Increase of Number) Act, 2013** purportedly passed by the National Assembly on 29th January 2013, by virtue of the presence of and participation by Mr. Jason Hamilton in the proceedings of the Assembly on that date, including by casting the deciding vote leading to the passage of the Act, is unconstitutional and/or invalid as being in contravention of sections 26 and 41 of the Constitution.

[33] Although the outcome of this appeal has been rendered merely academic by subsequent events, the fact is that the appeal was heard by the Court and a decision on it must be given by the Court. In accordance with my findings made above, therefore, I would dismiss the appeal and affirm the findings of the learned trial judge, including as to costs. There is accordingly no order as to costs.

Mario Michel
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal