TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. 1735 of 2005

IN THE MATTER OF THE INTEGRITY IN PUBLIC LIFE ACT, 2000 AS AMENDED

AND

IN THE MATTER OF THE CONSTRUCTION OF PARAGRAPHS 8 AND 9 OF THE SCHEDULE TO THE INTEGRITY IN PUBLIC LIFE ACT, 2000 AS AMENDED

BETWEEN

THE INTEGRITY COMMISSION

PLAINTIFF

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. D. Mendes S.C. and Mrs. D. Peake S.C. instructed by Mr. D. Ramkissoon for the Plaintiff.

Mr. M. Daly S.C. and Mr. E. Prescott S.C. instructed by Ms. D. Jean-Baptiste for the Defendant.

Mr. P. Deonarine for the Board of Film Censors

Mr. S. Marcus S.C., instructed by Ms. Glenda Edwards for the Law Reform Commission.

Mr. D. Bhagoutie for the Law Revision Commission

Dr. C. Denbow S.C. and Mr. D. Allahar instructed by Ms. D. Denbow for National Flour Mills Limited and T.S.T.T.

Mr. R. Martineau S. C. and Mr. N. Bisnath instructed by Ms. L. Mendonca for the Judges and Magistrates

Mr. A. Ramlogan instructed by Mr. N. Lalbeharry for U.N.C. Opposition

JUDGMENT

1. By an Originating Summons filed on the 22nd July 2005 the Plaintiff, the Integrity Commission ("the Commission") seeks the determination of the following questions of law:

(1) Whether having regard to the provisions of the Constitution of the Republic of Trinidad and Tobago ("the Constitution") and the Integrity in Public Life Act as amended ("the Act") Judges and Magistrates are persons in public life subject to the provisions of the Integrity in Public Life Act as amended?

(2) What is the meaning of the expression "Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest" in paragraph 9 of the Schedule to the Integrity in Public Life Act as amended?

The Attorney General has been named the Defendant to the application.

History of the Proceedings

2. By consent of the parties, on the 28th October 2005, leave was granted for a notice of the application to be published in the newspapers inviting persons with a sufficient interest an opportunity to be heard.

3. In response to the notice the following persons or bodies sought to be heard on the application:

(i) the Board of Film Censors;

(ii) the Law Reform Commission;

(iii) the Law Revision Commission;

(iv) the National Flour Mills Ltd ("NFM");

(v) the Telecommunications Services of Trinidad and Tobago Ltd.("TSTT");

(vi) the Judges and Magistrates;

4. Leave was granted to these persons to be heard on the application and directions given for the filing of written submissions by them.

5. In addition, an application was made for me to recuse myself on the grounds of bias. I refused the application citing the doctrine of necessity. A separate written ruling was delivered in this regard

6. As well, applications were made by certain members of the Senate to have the Court consider their position with respect to the Act; certain individuals who represented

that they were current members of the local chapter of Transparency International and civic minded citizens of Trinidad and Tobago to be heard and the United National Congress ("the UNC"), the official party in opposition in Parliament to be joined as a party to the action.

7. After hearing submissions by these persons, as well as the Commission and the Attorney General, the application on behalf of the members of the Senate was refused on the ground that what was sought was outside the remit of the proceedings as filed. With respect to the application by certain members of the local chapter of Transparency International, it was conceded by Attorney for those persons that the persons were not representative of the local chapter but that the application was in reality an application by those persons as public minded citizens. That being the case the application was refused on the ground that these persons showed no particular interest over and above the interests of any other citizen of Trinidad and Tobago nor were they in any special position to assist the Court with the legal issues for determination.

8. Upon the undertaking given by Counsel for the Commission and the Attorney General that if, upon the determination of the matter before me, an application was made by the UNC for leave to be joined as a party for the purpose of an appeal they would not object. I refused the application by the UNC to be joined as a party and granted them leave to be heard on the application

9. On the 29th March 2006 after the time limited for all the parties to file their submissions had expired, but before the actual filing of submissions by the Attorney General an application was made by the Attorney General to have the proceedings amended to include the following questions for the Court's determination:

(1) Whether in circumstances where the Integrity Commission is uncertain or has conflicting views as to the interpretation and/or application of any provision of the Integrity in Public Life Act to the persons listed in the schedule to the Act:

(a) has the Integrity Commission the power to require persons or category of persons to comply or has the power to exclude persons or categories of persons from complying with the provisions of the Act? or

(b) should the Integrity Commission seek an interpretation by the High Court of the relevant provisions of the Act?

(2) Whether the Integrity Commission is given the power in any circumstances by the Integrity in Public Life Act to decide that it will not require a person or category of persons listed or referred to in the schedule to that Act to file declarations of income, assets and liabilities?

10. After hearing submissions from those persons who wished to be heard on this application to amend I refused the application with a promise to state my reasons at a later date. I now give my reasons.

11. The amendment sought raises issues that, in my opinion, although peripheral to the application, are not appropriate to a construction summons. Of even more importance is the timing of the application, it coming at a time when all submissions ought to have been filed. To accede to the Attorney General's application at this stage would cause undue delay in the determination of these proceedings. In my opinion, the application was made at too late a stage of these proceedings In any event, it would seem to me that procedurally the Attorney. General as the defendant to the application could not seek to amend same but rather ought to have filed an application and sought to have the Court hear both applications together.

Factual Basis

12. The application is supported by an affidavit deposed to by the Registrar of the Commission, which has not been challenged. In this affidavit he refers to the relevant statutory provisions of the Act and the difficulties experienced by the Commission in ascertaining the persons who, from time to time, are persons in public life and subject to the Act. According to the affidavit, a number of individuals and organisations have written seeking advice from or furnishing the Commission with legal opinions on the question of whether they or its members are persons in public life required to file declarations under the Act. These persons include Judges and Magistrates and members of Statutory Boards and State Enterprises.

13. According to the affidavit, as a result several questions of law, including the question of the validity of certain sections of the Act in the light of provisions of the

Constitution, have arisen. In particular, the affidavit refers to the stated position of the Judges and Magistrates and annexes a statement made by the Attorney General read in the House of Representatives in December 2004 in which he discloses his advice to Cabinet on that issue and the intention of his government to seek to have the Act amended. Also annexed to the affidavit is a list compiled by the Commission of some 103 Statutory Bodies the members of which it states may be subject to the Act.

14. No other affidavits have been filed in support of or in opposition to the substantive application.

Submissions

15. The submissions of the parties who were granted leave to be heard can be divided into three categories: those submissions that deal with the validity of the application before the Court; those which deal with the first question to be determined and those which deal with the second question to be determined.

16. For the purposes of convenience, I propose to deal with the submissions as to the validity of the application before the Court first before embarking on the questions to be determined.

Validity of the Application before the Court

17. In essence, the submissions are:

(i) the Court has no jurisdiction to deal with the constitutionality of an Act of Parliament on the application before the court;

(ii) there being no issue or matter in dispute between the Attorney General or the State and the Commission the Court has no jurisdiction to pronounce upon a hypothetical question;

(iii) the Attorney General is not a proper party to this suit, as a result it is an abuse of process and in the circumstances the Court ought to use its power under order 15 rule 6 of the Rules of the Supreme Court to remove the Attorney General as a party to the action.

18. In a nutshell the effect of these submissions seem to be that: the Court has no jurisdiction to make pronouncements on the constitutionality of an Act on an interpretation application; in the absence of any "live" issue before the court it has no jurisdiction to interpret an Act of Parliament; and since there is no issue or dispute between the Commission and the Attorney General not only is the Attorney General not a proper party but it is possible that the positions of the Plaintiff and the Defendant are the same.

19. These proceedings were brought pursuant to the **Orders and Rules of the Supreme Court of Judicature of Trinidad and Tobago 1975** ("the Rules"). **Order 5** of the Rules deals with the manner in which civil proceedings are to be brought in the High Court. **Order 5 Rule 3** specifies the type of proceedings that must be commenced by Originating Summons that is proceedings by which application is to be made to the Court

under an Act or Ordinance unless that statute specifically provides for some other mode of commencing the proceedings.

20. Further **Order 5 Rule 4** provides that unless specified by the rules or a statute, proceedings may be commenced by either Writ or Originating Summons. Further where the sole or principal question at issue is one of construction of an Act, some other question of law, and there is unlikely to be any substantial dispute of fact it is appropriate to begin the proceedings by Originating Summons.

21. In this matter the only questions to be answered are questions of the construction of a statute and law. There are no issues of fact that require my determination.

22. Further, in my opinion, by **Order 7** of the Rules it was open to the Commission to make the application by way of ex parte originating summons leaving it to the Court to order service on or the joinder of such parties as it deemed appropriate.

23. Therefore, the fact that the Attorney General has been joined as a defendant cannot invalidate the proceedings. In any event, given the nature of the questions posed by the Application, the obvious defendant if there is to be a defendant, in my view, would be the Attorney General as the representative of the State.

24. The Commission is not by this application seeking remedies pursuant to section 14 of the Constitution nor is the Commission seeking a declaration of constitutionality or

unconstitutionality of the Act. Accordingly this Court is not being called upon to determine the constitutionality of the Act, what this Court is called upon to determine by one of the questions posed is, the interpretation to be placed on an amendment to the Act in the light of the provisions of the Constitution. This to my mind is a perfectly legitimate use of a construction summons.

25. Further, **section 36 (1) of the Act** provides that:

"(1) A person in public life or a person exercising a public function may, by application in writing, request the Commission to give an opinion and make recommendations on any matter respecting his own obligations under this Act". **By section 36(2)**: "The Commission may make such enquiries as it considers appropriate and provide the person making the application with a written opinion and recommendations." **Section 37** allows the Commission "on its own initiative to consider any matter with respect to the duty or obligation of a person under this Act, where in its opinion it is in the public interest to do so."

26. Whereas at first blush section 37 may be interpreted to deal only with the Commission's investigatory or inquisitional powers when the section is looked at in conjunction with section 36, in my view, it allows the Commission, on its own initiative, to consider whether a person has any duty or obligation to it under the Act and in that regard make the appropriate enquiries including, in my view, enquiries of the Court.

27. It is clear from the evidence before the Court that, pursuant to section 36 of the Act, the Commission had been swamped with requests from members of the public for the opinion of the Commission as to whether they are persons with obligations under the Act. In addition the Commission had received opinions, on its own initiative and provided by interested parties, on the questions now for the Court's determination.

28 As well, the Commission would have been faced with the statement of the Attorney General in Parliament in which, after referring to the uncertainty expressed to him by the Commission as to its powers and authority with respect to judicial officers, he states inter alia:

> "…In my capacity as Attorney General I have advised the Cabinet that the relevant provisions are in fact unconstitutional and that the constitution, properly interpreted, intended that only the Judicial and Legal Service Commission would have oversight over Judicial Officers.
>
> Mr. Speaker, in these circumstances, it would be irresponsible of the Government to ignore fundamental constitutional principles and to allow the law to stand as it is currently drafted.
>
> That is not to say Mr. Speaker that Cabinet is in any way endorsing the position that judicial officers are a law unto themselves or that they should not be subjected to the most rigorous scrutiny in respect of which all other significant public office holders and politicians are held. Cabinet has

concluded however, that the reporting requirements in the present law are not the way to call judicial officers into account.

The Executive proposes now to move quickly to repeal the offending provisions of the legislation and of the Constitution..."

29. Faced with this situation and given the Commission's duty to make such enquiries as it considers appropriate it is not surprising that some 7 months after the Attorney General's statement the Commission took the proactive step of applying to the court for guidance.

30. It would seem to me therefore that the issue is a 'live' one and the questions appropriate for the determination of the Court.

31. The Commission has come to the Court in circumstances where it is under a duty to give opinions and recommendations as to a person's obligations under the Act and where it is of the view that, given the relevant legislation, it is unable to do so. In my opinion, this is the sensible and proper approach. The application in my view raises an important point of law, the determination of which must be in the public interest.

32. The sting in the tail of these submissions as I understand them is the fear that the positions of the parties to the action are the same, at least in relation to the first question, "himself suing himself". The fact that the application is to be determined by a Judge who

herself is one of the persons affected by the application, a person to whom the Act may or may not apply, seeks only to heighten such concern. A concern not unfounded by any means.

33. I have in a ruling given earlier in these proceedings made reference to the doctrine of necessity in so far as the involvement of the Judges of the Supreme Court in these proceedings are concerned. In any event, in this particular case, events have overtaken the submission to some extent.

34. In the first place, by an order made on the 28th October 2005, at the request of both the Plaintiff and the Defendant, notice of this application was ordered to be published in both the Sunday and Daily newspapers of general circulation in Trinidad and Tobago. The notice provided for any person with a sufficient interest to apply to be heard on the application.

35. In the second place, the submissions of the Defendant before this court were not in accordance with the Attorney General's Statement referred to above. Rather the Attorney General placed, before this court, arguments in support of the constitutionality of a construction including the Judges and Magistrates under ambit the Act.

36. Thirdly, rather than proffer an opinion the Commission, quite properly in my view, in its submissions, was at pains to place before the court all the possible arguments and opinions received by it on both questions.

37. Fourthly, persons with sufficient interest were given an opportunity to be heard by the filing of written submissions in this regard.

38. Finally, in the course of the UNC's application to be joined as a party, both the Plaintiff and the Defendant undertook not to oppose an application for it to be joined as a party to an appeal if it became necessary. It would seem to me that the integrity of the proceedings before the court is protected by the employment of these safeguards.

QUESTION NO. 1.

Whether having regard to the provisions of the Constitution of the Republic of Trinidad and Tobago and the Integrity in Public Life Act 2000 as amended Judges and Magistrates are persons in public life subject to the provisions of the Integrity in Public Life Act as amended?

39. As with all constitutions patterned on the Westminster Model, the concept that there are three distinct functions of government: legislative, executive and judicial, discharged by three separate agencies- the Legislature in the form of the parliament, the Executive in the form of the ministers and the government departments and agencies for which they are responsible and the Judiciary in the form of the judges and the courts is the cornerstone of our Constitution. In accordance with this principle of the separation of powers our Constitution makes provision for a Legislature, an Executive and a Judicature, each with its particular role and function.

40. This principle is not one created by these written constitutions neither are the provisions contained in these constitutions to be considered exhaustive with respect to the width and depth of the principle.

> "The new constitutions, particularly in the case of the unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that been exercised by the corresponding institution that it had replaced.
>
> Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes for a Legislature, an Executive and a Judicature. It is taken for granted that the basic principle of the separation of powers will apply to the exercise of their respective functions by these three organs of government…":

Lord Diplock in Hinds v R [1975] 24 W.I.R. 326 at page 330 letters F and H.

41. Indeed there maybe situations, as in the Hinds case, where despite the fact that a constitution does not expressly prohibit the exercise of legislative powers by the

executive or judicial powers by either the executive or the legislature, a court is bound to read into the constitution basic principles of constitutional law.

42. Inherent in and inseparable from the separation of powers is the principle of the rule of law integral to which are the concepts of the supremacy of Parliament, and its corollary, the independence of the Judiciary.

> "Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive on the other is totally or effectively so. Such separation based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837. 890-891 para 50"

per Lord Bingham of Cornwall in **DPP of Jamaica v Mollison [2003] 2 AC 411 at page 424**.

43. With respect to its legislative powers, while it cannot be doubted that in our jurisdiction Parliament is supreme it is equally true that such legislative powers may only be exercised in accordance with the Constitution. It is the Constitution that provides the framework within which Parliament can legitimately exercise its powers. This framework includes the method by which Parliament may alter the Constitution: **section 54**, or pass

laws inconsistent with the human rights provisions: **section 13**. The Constitution therefore, while describing the foundation upon which our society is to function, is not static but rather provides a means by which it can itself evolve to meet the changing needs of society through the legislature.

44. The rule of law requires that the exercise by Parliament of its supreme legislative powers, whether by way of alteration of the Constitution or by the creation of new laws, be always subject to the scrutiny of and review by the Judicature. With respect to the Constitution such scrutiny is two-fold, firstly, it ensures that fundamental principles of constitutional law and the provisions of the Constitution have not impermissibly been violated and secondly, that if the Constitution is to be altered or legislation passed contrary to its provisions such legislation has been passed in accordance with the formula prescribed by the Constitution.

45. In this regard it is the Judiciary that is the watchdog of the Constitution. In order to function as such the principle of the separation of powers recognizes that what is required is a Judiciary insulated from and independent of the other arms of Government. The framework to ensure the Judiciary's continued independence is prescribed in the Constitution.

46. By its provisions therefore the Constitution establishes the basis for both the individual and institutional independence of the Judicature. Individual, insofar as it deals with the insulation of the individual judge from the interference by the executive or the

legislature in an arbitrary and capricious manner and institutional, insofar as it deals with the establishment of a Supreme Court of Judicature and regulates its relationship to those branches of government exercising its legislative and executive functions.

> "The rationale for this two pronged modern understanding of judicial independence is recognition that the courts are not charged solely with the adjudication of individual cases. That is of course, one role. It is also the context for the second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it—rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies."

Dickson CJ in **Beauregard v Canada [1986] 2 SCR 56 at paragraph 24**

47. In our Constitution Chapter 7 and sections 136 and 137 identify and establish the parameters of judicial independence determined necessary by our society to preserve the rule of law. To this end, sections 102, 104, 106, 107, 136 and 137 deal with the appointment to and tenure in office of Judges of the Supreme Court. These sections are entrenched in the Constitution requiring for its alteration the support through Parliament of the votes of not less than two-thirds of all the members of each House.

48. By the Constitution Judges of the Supreme Court are appointed by the President and hold office until they reach the age of retirement subject only to removal by the President on the advice of the Judicial Committee of the Privy Council ("the Judicial Committee") and only as a result of inability to perform the functions of office or for misbehaviour.

49. **Section 106 (1)** provides that a Judge shall hold office in accordance with sections 136 and 137 of the Constitution. **Section 106(2)** specifies that no office of Judge shall be abolished while there is a substantive holder of that office.

50. **Section 136** deals with the tenure of a Judge. Subsection (1) provides that a Judge shall vacate office on attaining the age of sixty-five or any other age as may be prescribed by Parliament. Subsection (2) allows the President acting on the advice of the Chief Justice to extend the time for a Judge to continue in office past the retirement age for the limited purpose of delivering a judgment or completing proceedings commenced before the Judge attained retirement age.

51. By **section 136 (5)** the salaries and allowances of Judges are a charge on the Consolidated Fund. Section 136(6) provides that the salary and allowances payable to a Judge as well as the other terms of service shall not be altered to the Judge's disadvantage after appointment.

52. The Constitution, as well, by **section 137**, provides a specific procedure to be followed for a Judge's removal or suspension from office. In this regard, in the case of the Chief Justice, the procedure for removal is initiated by the President acting on the advice of the Prime Minister, with respect to all other Judges of the Supreme Court it is initiated by the President acting on the advice of the Judicial and Legal Service Commission (the "JLSC"). Similarly with respect to suspension a Judge may only be suspended by the President acting, on the advice of the Prime Minister in the case of the Chief Justice, or on the advice of the JLSC in the case of the other Judges and only where the question of the removal of that Judge, including the Chief Justice, has been referred to a tribunal of Judges, appointed by the President under **section** 137(3): **section 137** of the Constitution.

53. In addition to the above-mentioned sections, sections 110 and 111 of the Constitution establish the JLSC. The composition of the JLSC is prescribed by section 110 of the Constitution. Unlike section 111, which deals with the appointment of persons to offices required by Parliament to be held by persons holding legal qualifications and does not require any special majority for its alteration, section 110 is an entrenched section requiring a vote of not less than two-thirds of the members in both Houses of Parliament for its alteration.

54. The JLSC is comprised of:

(i) the Chief Justice who functions as the Chairman,

(ii) the Chairman of the Public Service Commission, appointed by the President after consultation with the Prime Minister and the Leader of the Opposition: **section 120(2)** of the Constitution; and

(iii) such other persons appointed by the President in consultation with the Prime Minister and the Leader of the Opposition: one of which shall have held office as a judge of unlimited jurisdiction in civil and criminal matters in the Commonwealth or in a court having jurisdiction in appeal from such a court and, after consultation by the President with such organisations as he shall think fit, two persons with legal qualifications at least one of whom is not in active practice.

55. By the Constitution members of the JLSC shall hold office for a period of between three to five years as specified by the President at the date of their appointment: **section 126(3)(a)**, and in accordance with sections 136(5) to (11) of the Constitution.

56. With respect to Judges, with the exception of the Chief Justice, the role of the JLSC is limited to advising the President to appoint to office and, with respect to a Judge's removal from office, to representing to the President that the question of the removal of a Judge ought to be investigated and assisting the President with respect to the composition of the investigating tribunal in this regard.

57. By the Constitution therefore the independence of the individual Judge is preserved by providing that:

(i) Judges be appointed by the President on the advice of an independent body whose composition is established by the Constitution and whose members are insulated from political interference by the said Constitution or, in the case of the Chief Justice, by the President after consultation with the Prime Minister and the Leader of the Opposition;

(ii) Judges hold office for a fixed period, to be extended only by the President on the advice of the Chief Justice and only for a specific purpose;

(iii) While in office a Judge's terms of service, including salary and allowances, not be altered to the Judge's disadvantage;

(iv) a Judge not be subject to the control of anyone in the performance of the Judge's duties or subject to any disciplinary procedure except in so far as steps may be taken for the Judge's removal;

(v) such disciplinary procedure shall be instituted only by the President acting on the advice of the Prime Minister, with respect to the Chief Justice, and the JLSC, with respect to the other Judges and the ensuing enquiry conducted only by persons who hold or have held office as a Judge of a court of unlimited jurisdiction in the Commonwealth or a court with jurisdiction in appeal from such a court;

(vi) a Judge may only be removed by the President acting on the advice of the Judicial Committee following the strict procedure as set out in the Constitution;

(vii) a Judge may only be suspended by the President acting on the advice of the Prime Minister, in the case of a Chief Justice, or the JLSC and only where the question of that Judge's removal has been referred to the tribunal of Judges;

58. It must be noted that whereas the above are all facets of the office of a Judge not all of these facets are established by express provisions of the Constitution. Rather, some of these are arrived at by necessary implication from the provisions of the Constitution and principles of constitutional law established long before this Constitution came into existence. For example, there is no provision of the Constitution which specifically states that a Judge shall not be subject to the control of anyone in the performance of the Judge's duties, yet it cannot be disputed that this is inherent in the office of a Judge and fundamental in maintaining the Judge's independence. Indeed such a conclusion can only be arrived at by an interpretation of sections 106, 136 and 137 of the Constitution rendered necessary by those very principles of Constitutional law that demand such independence for the preservation of the rule of law.

59. While no express mention is made of Magistrates in the Constitution, there can be no doubt that Magistrates also discharge judicial functions and have a role to play in the judicial function of government.

> "The distinction between the higher judiciary and the lower judiciary is that the former are given a greater degree of security of tenure than the latter. There is nothing in the Constitution to protect the lower judiciary

> against Parliament passing ordinary laws (a) abolishing their office, (b) reducing their salaries while they are in office, or (c) providing that their appointments to judicial office shall be only for a short fixed term of years, Their independence of the good-will of the political party which commands a bare majority in Parliament is thus not fully assured. The only protection that is assured to them by section 112 is that they cannot be removed or disciplined except on the recommendation of the Judicial Service Commission."

Lord Diplock in Hinds v DPP at page 336 paragraphs B and C.

60. If the last sentence of that quotation is reworded to read, 'The only protection that is assured to them by section 111 of the Constitution is that they cannot be removed or disciplined except by the Judicial and Legal Service Commission' the quotation describes exactly the position of Magistrates in this jurisdiction.

61. By **section 111 of the Constitution** and **section 3 of the Judicial and Legal Service Act** ("the JLS Act"), the power to appoint, transfer, promote and discipline Magistrates vests in the JLSC. **Section 127(1)(a)** of the Constitution permits the JLSC, with the approval of the Prime Minister, to delegate those powers to any of its members or a Judge. A Magistrates' security of tenure is ensured under the Constitution therefore by those provisions that protect the JLSC from unwarranted intrusions by the Executive or the Legislature.

62. The question for consideration requires the examination of both the procedure adopted by Parliament to pass the Act as well as the changes in the substantive law wrought by the Act.

63. Briefly, in order to pass the Act in its present form Parliament first amended the Constitution to increase the ambit of the Commission as established by the Constitution and to enlarge the power of Parliament to make laws in respect of the Commission. The amendment to the Act that sought to make Judges and Magistrates appointed by the Judicial and Legal Service Commission subject to the Act was passed in both Houses at the same time as the amendment to the Constitution.

64. The question posed by this application arises from the fact that, while those sections specifically dealing with the Commission and Parliament's powers to legislate with respect to the Commission were amended, Parliament failed to amend those sections of the Constitution which dealt with the Judiciary and which, as we have seen, were designed to ensure an independent judiciary.

65. In order to answer the question posed, in my view, it is necessary first to examine both the legislative history of the Act and those provisions of the Constitution dealing with the Commission, that is **sections 138 and 139** of the Constitution.

Sections 138 and 139 of the Constitution

66. When first enacted, **sections 138 and 139** of the **Constitution of the Republic of Trinidad and Tobago, 1976** ("the Constitution") provided as follows:

"138. (1) There shall be an Integrity Commission (in this section and in section 139 referred to as "the Commission") for Trinidad and Tobago consisting of such number of members qualified and appointed in such manner and holding office upon such tenure as may be prescribed.

(2) The Commission shall be charged with the duty of-

(a) receiving, from time to time, declarations in writing of the assets, liabilities and income of members of the House of Representatives, Ministers of Government, Parliamentary Secretaries, Permanent Secretaries and Chief Technical Officers;

(b) the supervision of all matters connected therewith as may be prescribed."

139. Subject to this Constitution, Parliament may make provision for-

(a) the procedure in accordance with which the Commission is to perform its functions;

(b) conferring such powers on the Commission and imposing such duties on persons concerned as are necessary to enable the Commission to carry out effectively the purposes of section 138;

(c) the proper custody of declarations and other documents delivered to the Commission;

(d) the maintenance of secrecy in respect of information received by the Commission in the course of its duties with respect to the assets, liabilities and income of any member of Parliament and any other person; and

(e) generally to give effect to the provisions of section 138."

67. Thereafter two Acts amending the Constitution, insofar as it dealt with the Commission and Parliament's power to enact legislation in this regard, were passed,: Constitution Amendment No. 2 and Constitution Amendment No.4. Both Acts sought to amend sections 138 and 139. Both these sections together with other sections of the Constitution comprise what are commonly referred to as "entrenched provisions" in that they, together with other sections of the Constitution, require a vote of more than a simple majority for their alteration: section 54(2) and (3) of the Constitution. With respect to both sections 138 and 139 of the Constitution what is required is a vote of not less than three-fourths of all the members of the House of Representatives and two-thirds of all the members of the Senate.

68. Following the usual procedure for Acts seeking to alter the Constitution the preamble of both amending Acts refer to section 54 of the Constitution, the votes required to effect an alteration to that section of the Constitution and declares that it is an Act intended to alter the Constitution. Indorsed on both amending Acts are certificates of the Clerk of the Senate and the Acting Clerk of the House certifying that the Act has

received the votes of not less than two-thirds of all the members of the Senate and not less than three- fourths of the members in the House of Representatives.

69. The first amendment, **Constitution Amendment No.2, Act No 81 of 2000 ("Constitution Amendment No. 2")** was assented to on the 20th October 2000. With respect to section 138, this amendment deleted the words "Permanent Secretaries and Chief Technical Officers" from the list of persons identified in section 138 (2) (a) and replaced them with the words 'members of the Tobago House of Assembly, members of Municipalities, members of those Local Government Authorities, members of those statutory boards and state enterprises and the holders of such other offices as may be prescribed'. The Act also introduced two new paragraphs to section 138(2) thereby charging the Commission with:

(i) "the supervision and monitoring of standards of ethical conduct prescribed by Parliament to be observed by the holders of the offices referred in paragraph (a) as well as Senators, members of the Diplomatic Service, Advisers to the Government and any person appointed by a Service Commission or the Statutory Authorities' Service Commission.": **section 138(2)(c)**;

(ii) "the monitoring and investigating of conduct, practices and procedures which are dishonest and corrupt": **section 138(2)(c)**.

70. With respect to section 139, this amendment also empowered Parliament to make provision for the preparation by the Commission of a Register of Interests for public inspection.

71. **Constitution Amendment No.4, Act No. 89 of 2000 ("Constitution Amendment No.4")** was assented to on the 2nd November 2000. By this amendment section 138 (2)(a) was repealed and replaced by the following paragraph:

> "(a) in paragraph (a) by deleting the words "Permanent Secretaries and Chief Technical officers" and substituting the words "Senators, Judges, Magistrates, Permanent Secretaries, Chief Technical Officers, Members of the Tobago House of Assembly, Members of Municipalities, Members of Local Government Authorities and members of the Boards of all Statutory Bodies, State Enterprises and the holders of such other offices as may be prescribed".

The word "Senators" in section 138 (2)(c) was also deleted. No amendment was made to section 139.

72. The effect of these amendments is that sections 138 and 139 of the Constitution now reads:

> "138 (1) There shall be an Integrity Commission (in this section and in section 139 referred to as "the Commission") for Trinidad and Tobago consisting of such number of members qualified and appointed in such manner and holding office upon such tenure as may be prescribed.
>
> (2) The Commission shall be charged with the duty of:
>
> (a) in paragraph (a) by deleting the words "Permanent Secretaries and Chief Technical Officers" and substituting the words "Senators, Judges, Magistrates, Permanent

Secretaries, Chief Technical Officers, Members of the Tobago House of Assembly, Members of Municipalities, Members of Local Government Authorities and members of the Boards of all Statutory Bodies, State Enterprises and the holders of such other offices as may be prescribed.

(b) The supervision of all matters connected therewith as may be prescribed;

(c) the supervision and monitoring of standards of ethical conduct prescribed by Parliament to be observed by the holders of offices referred to in paragraph (a) as well as, members of the Diplomatic Service, Advisers to the Government and any person appointed by a Service Commission or Statutory Authorities' Service Commission;

(d) the monitoring and investigating of conduct, practices and procedures which are dishonest or corrupt."

"139. Subject to this Constitution, Parliament may make provision for-

(a) the procedure in accordance with which the Commission is to perform its functions;

(b) conferring such powers on the Commission and imposing such duties on persons concerned as are necessary to enable the Commission to carry out effectively the purposes of section 138;

(c) the proper custody of declarations and other documents delivered to the Commission;

(d) the maintenance of secrecy in respect of all information received by the Commission in the course of its duties with respect to the assets , liabilities and income of any member of parliament and any other person and

(da) the preparation by the Commission, of a Register of Interests for public inspection.

(e) generally to give effect to the provisions of section 138."

The Integrity in Public Life Act

73. In 1987 Parliament enacted **The Integrity in Public life Act 1987 ("the 1987 Act"). T**he preamble to the 1987 Act states that it was passed pursuant to section 13 of the Constitution and that it shall have effect even though it is inconsistent with sections 4 and 5 of the Constitution. On the face of the Act there is certified the fact that it was passed with the relevant majorities in accordance with section 13 of the Constitution.

74. The 1987 Act applied to all persons in public life, defined by section 2 and the first schedule to be members of the House of Representatives, Ministers of Government, Parliamentary Secretaries, Permanent Secretaries and Chief Technical Officers.

75. **The Integrity in Public Life Act, No 83 of 2000** ("**the 2000 Act**") assented to on the 27th October 2000 repealed and replaced the 1987 Act. This Act was passed in both

Houses of Parliament at the same time as Constitution Amendment No 2. By its preamble, like the 1987 Act, this Act recited section 13 of the Constitution and declared that it shall have effect even though inconsistent with sections 4 and 5 of the Constitution. The 2000 Act, like the 1987 Act contains a certification by the Clerk to the Senate and the House of Representatives that it was passed with votes of the majorities in Parliament necessary to pass an Act in accordance with section 13 of the Constitution, not less than three-fifths of all the members of both Houses.

76. By the 2000 Act the words " Members of Boards of Statutory Bodies and State Enterprises as prescribed in accordance with section 138(2) of the Constitution" were included in the definition of persons in public life.

77. The **Integrity in Public Life (Amendment) Act No.88 of 2000 (" Act No. 88 of 2000")** was passed in both Houses of Parliament on the same day as Constitution Amendment No. 4 and assented to on the 2nd November 2000. As in the 1987 Act and the 2000 Act reference is made to section 13 of the Constitution. The Act declares that it shall have effect even though inconsistent with sections 4 and 5 of the Constitution and has the certificates of the Clerk of the Senate and the House of Representatives with respect to the proportion of members whose votes supported the Bill in both the House of Representatives and the Senate.

78. In this case the certificate reads, with respect to the House of Representatives, that at the final vote the Bill "has been supported by the votes of not less than three-fifths of

all the members of the House, that to say the votes of twenty-seven members of the House." With respect to the Senate the certificate reads that at the final vote the Bill "has been supported by the votes of not less than three-fifths of all the members of the Senate that is to say the votes of twenty-nine Senators."

79. Act No. 88 of 2000 amended the schedule to the Act to include "Judges and Magistrates appointed by the Judicial and Legal Services Commission". The schedule to the Act now reads:

"PERSONS IN PUBLIC LIFE

1. Members of the House of Representatives
2. Ministers of Government;
3. Parliamentary Secretaries
4. Permanent Secretaries
5. Chief Technical Officers
6. Members of Local Government Authorities
7. Senators
8. Judges and Magistrates appointed by the Judicial and Legal Services Commission
9. Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest
10. Permanent Secretaries and Chief Technical Officers."

The effect of the Amendments

80. As we have seen sections 138 and 139 of the Constitution set out both the jurisdiction and reach of the Commission and the legislation giving life to the Commission. Section 138 (1) establishes the Commission, section 138(2) the duties of the Commission and section 139 describes the parameters of Parliament's legislative powers with respect to the Commission. It is pursuant to section 139 therefore that Parliament is empowered by the Constitution to give life to the Commission by the enactment of Integrity legislation.

81. As originally drafted, section 138 charged the Commission with the duty of receiving declarations of assets and income from persons elected to hold parliamentary office and senior members of the executive. As well the Commission was charged with the supervision of all matters connected to the duty of receiving the declarations as prescribed by Parliament.

82. Similarly, section 139 permitted Parliament to make laws for:

(i) the procedure by which the Commission was to perform its function of receiving declarations and the supervision of all matters in connection therewith;

(ii) conferring such powers on the Commission and imposing duties on persons as necessary in order to enable the Commission to effectively carry out those purposes;

(iii) the proper custody of documents delivered to the Commission;

(iv) the maintenance of secrecy in respect of all information received by the Commission with respect to the assets, liability and income of any member of Parliament and any other person; and

(v) generally to give effect to section138

83. In 1987 the 1987 Act was passed presumably to give effect to these provisions of the Constitution.

84. By **Constitution Amendment No 2** the category of persons from which the Commission had the duty to receive declarations was widened to include "members of the Tobago House of Assembly, members of Municipalities and Local Government Authorities, members of those statutory boards and state enterprises and the holders of such offices as may be prescribed."

85. The amendment also enlarged the duty of the Commission to require it to:

(a) supervise and monitor standards of ethical conduct prescribed by Parliament with respect to those persons already specified as well as Senators, members of the Diplomatic Service, advisers to the Government and any person appointed by a Service Commission or the Statutory Authorities' Commission ;

(b) monitor and investigate dishonest or corrupt conduct, practices and procedures; and

(c) prepare a Register of Interests for public inspection

86. **Constitution Amendment No 2** therefore sought to further widen the ambit of persons from whom the Commission was required to receive declarations from senior members of the executive and the elected members of the legislature to include other persons performing functions on behalf of the executive. With respect to members of Statutory Boards and State Enterprises Parliament was given the ability to determine the members of which of those bodies would be subject to the jurisdiction of the Commission.

87. As well, the Commission was now charged with the additional responsibility of supervising and monitoring standards of ethics determined by Parliament of those persons as well as other specified office holders, a motley bunch comprising members of the upper house of the legislature, public servants, members of the diplomatic service, advisors to government and any other person who may be appointed by a Service Commission. The net with respect to standards of ethics was therefore widened to include persons exercising or advising with respect to both executive and legislative functions. The Commission was also endowed with the general duty of monitoring and investigating dishonest or corrupt conduct, practices and procedure. By this amendment Parliament was also empowered to enact legislation mandating the Commission to make public certain of the information received by it.

88. Simultaneously with the passing of Constitution Amendment No.2 Parliament acting under the mandate of the section 139, as enlarged by the amendment, repealed and replaced the 1987 Act by the 2000 Act. Up to October 2000 therefore, in neither the

Constitution or the Act, is any reference made to Judges and Magistrates coming under the jurisdiction of the Commission.

89. Thereafter Constitutional Amendment No 4 was passed. At the same time the 2000 Act was amended to include in the definition of persons in public life, and by extension persons to whom the Act applied, "Judges and Magistrates appointed by the Judicial and Legal Service Commission", and, "Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest". The Act now for the first time included persons exercising judicial functions as persons in public life.

90. Although strictly speaking this Court is not called upon to determine the construction to be placed on section 138 it is obvious that the construction to be placed on the section will have some relevance to both questions to be answered. Both the Commission and the Attorney General submit that the Court ought not to give section 138(2)(a) of the Constitution a literal meaning. To do so, they submit, would be contrary to the clear intention of Parliament. They submit that a purposive interpretation is more appropriate.

91. I accept that in this case the purpose of Constitutional Amendment No.4 could only have been to enable Parliament to enact legislation which would have the effect of making Senators, Judges, Magistrates, Permanent Secretaries and Chief Technical

Officers subject to the jurisdiction of the Commission with respect to financial disclosure as well as a code of conduct to be prescribed by Parliament.

92. Reference has been made to the Parliamentary debates in this regard. In my view it is not necessary here to go to the debates to assist in the construction to be placed on the section. Given the history of the legislation and the amendments to the Act and the Constitution, in this regard, it is reasonable to assume that the underlying intention of Parliament could only have been to include the holders of the offices described as persons from whom, by the passage of the necessary legislation, the Commission may be required to receive declarations. It would seem to me that rather than substantially narrow the ambit of the Commission Parliament was seeking, over the years, to gradually expand the category of persons over whom the Commission was able to exercise its jurisdiction.

93. It is clear to me that the actual wording of the subsection could only have been a drafting error. The real question here is whether this court ought to interpret the section so as to correct such an error.

94. There are no doubt circumstances where in interpreting legislation the courts can correct what is clearly a drafting mistake. In this regard the Commission referred the Court to the case of **Inco Europe v First Choice Distribution [2000] 2 All E R 109** and in particular the statement of **Lord Nicholls** found at **page 115 letters b to g.**

95. According to Lord Nicholls at letter f the power to correct drafting errors is to be confined to plain cases of drafting mistakes and only by exercising,

> "considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used had the error in the Bill been noticed."

96. I accept this as a general statement of the law. All three of the criteria identified by Lord Nicholls are present in this case. The underlying intention of Parliament must have been to widen the category of persons from whom the Commission had a duty to receive declarations to include the holders of offices specified in the subsection. By inadvertence the draftsman and Parliament failed to give effect to that purpose. In addition the substance of the provision Parliament would have made, if not the exact words, is abundantly clear.

97. The difficulty arises from the statement of Lord Nicholls immediately following that referred to above:

> "Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in

language may be too far reaching. In Western Bank v Schindler[1976] 2 All E.R. 393 at 404, [1977] Ch 1 at 18 Scarman LJ observed that the insertion must not be too big, or too much at variance with the strict interpretation of the statutory language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation."

98. It would seem to me that, these categories apart, another circumstance in which a court may consider itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament is where the statute concerned is contrary to provisions of the Constitution. In other words the presumption of constitutionality, which requires the Court wherever possible to construe statutory language in such a manner so as to avoid conflict with constitutional limitations: **Attorney General of The Gambia v Monodou Jobe [1984] AC 689; Hector v Attorney- General (1990) 37 WIR 216**, may militate against such an interpretation.

99. It may very well be that a purposive interpretation of the section may render the ambit of the Commission and the legislative reach of Parliament in this regard in conflict with other sections of the Constitution more particularly those sections that seek to preserve the independence of Judges and Magistrates. A literal interpretation, on the other hand, may avoid those conflicts.

100. On a purposive interpretation of section 138 (a), with respect to Judges and Magistrates, the effect of sections 138 and 139 is that Parliament may enact legislation

empowering the Commission to require Judges and Magistrates to submit to the Commission declarations of their assets, liabilities and income; supervise all matters in connection with such a requirement and supervise and monitor standards of ethical conduct as prescribed by Parliament.

101. On a literal interpretation of the subsection, with respect to Judges and Magistrates, the effect of sections 138 and 139 is that Parliament may only enact legislation that requires the Commission to supervise and monitor those standards of ethical conduct prescribed by Parliament with respect to those persons.

102. It seems to me therefore that, at this stage, rather than determine the interpretation to be placed on the section it may be more appropriate to examine the provisions of the Act in the light of those provisions of the Constitution that deal with Judges and Magistrates to determine whether the Act subjects Judges and Magistrates to legislation which, in relation to them, is inconsistent with the Constitution and if so,

(i) whatever the interpretation adopted, whether the provisions of the Act are inconsistent with the Constitution, and

(ii) whether this court finds itself inhibited from interpreting the statutory provision in accordance with what it is satisfied is the underlying intention of Parliament**.**

The Act

103. The Preamble to the Act identifies it as an Act which shall have effect although inconsistent with sections 4 and 5 of the Constitution.

The Act is divided into five Parts.

104. **Part I** is preliminary. It establishes that the Act complies with those provisions of the Constitution necessary to pass an Act inconsistent with sections 4 and 5; the definitions to be applied and that the Act is to apply to every person in public life and persons exercising public functions.

105. **Part II** establishes the Commission. It provides that the Commission shall comprise five members appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. The powers and functions of the Commission are set out in this Part in section 5.

106. The functions of the Commission, as identified by section 5, can be divided into two general categories, those that deal with the power to receive declarations and those that deal with its power to monitor and investigate corrupt and dishonest practices. With respect to the latter the functions are basically directed to an examination of the systems in place to deal with corruption within public bodies and advising on how those systems may be improved; public education and the receipt and investigation of complaints under the Prevention of Corruption Act and the investigation of "the conduct of any person falling under the purview of the Commission which, in the opinion of the Commission, may be considered dishonest or conducive to corruption."

107. **Section 5(2)** provides that in the exercise of its powers and the performance of its functions under the Act the Commission "shall not be subject to the direction and control of any other person or authority".

108. No term of office for members is specified by the Act however **section 8** deals with vacancies in membership and provides that:

> A vacancy in membership occurs on:
>
> (a) the death, resignation or revocation of the appointment of a member;
>
> (b) the absence of a member from three consecutive meetings unless such absence is approved by the President after consultation with the Chairman;
>
> (c) the expiration of the term specified in the member's instrument of appointment;
>
> **section 8(1)**.

109. A member may be removed from office by the President acting in his discretion for inability to discharge the functions of his office whether from infirmity of mind or body or any other cause, or for misbehaviour. It ought to be noted here that the procedure for such removal shall be in accordance with the procedure established by section 136 of the Constitution. The Constitution, as well, provides that the salaries and allowances paid to the Commission shall be a charge on the Consolidated Fund and that the salary, allowances and other terms of service shall not be altered to the member's disadvantage after appointment.

110. By **section 10** the Commission is required to make an annual report to Parliament on its activities. The report shall be tabled in the House of Representatives and the Senate but shall not disclose particulars of any declaration filed with the Commission.

111. **Part III** of the Act deals with financial disclosure and requires that a person in public life make:

(i) periodic financial disclosure to the Commission, by way of a declaration: **section 11(1)**. Such disclosure shall include, in so far as it may be known to the declarant, particulars of the income, assets and liabilities of a spouse and dependant children and of any property held by that person in trust for anyone: **section 12.**

(ii) a statement of registrable interests: **section 14**.

(iii) any further particulars with respect to the person's financial affairs as may be required by the Commission: **section 13**.

112. In particular section 14 provides that the contents of the statement of registrable interests shall contain:

(i) particulars of all directorships held in any company or other corporate body;

(ii) particulars of any contract with the State;

(iii) the name or description of any company , partnership or association in which the person is an investor;

(iv) any trust to which the person is a beneficiary or a trustee;

(v) the beneficial interest held in any land;

(vi) any fund to which the person contributes;

(vii) particulars of any political, trade or professional association to which the person belongs;

(viii) particulars relating to sources of income;

(ix) any other substantial interest, pecuniary or not, which that person considers may appear to raise a material conflict between the person's private interests and public duty;

and shall be made available to the public by way of a Register of Interests.

113. By **section 12(5)** if the declaration discloses an income which, in the opinion of the Commission, is insufficient to support the accretion in value of the net assets "so as to raise the inference that there must have been other income to account for the acquisition of such assets" the person in public life shall be deemed to have been in possession of income which has not been disclosed and the onus on that person to establish the source of such income. An offence is committed where such person fails to account for such further income or where upon an enquiry it is determined that such other income or assets existed and the person in public life deliberately omitted to disclose such information in the declaration: **section 21(2).**

114. By **section 13** the Commission is mandated to examine the declarations filed to ensure compliance with the Act. Thereafter the Commission may request further information or explanation and may request that the declarant furnish such particulars as

it considers necessary, attend the Commission's office to verify the declaration or require the declaration to be certified by a chartered or certified accountant. If the Commission is satisfied that the declaration has been fully made it shall issue a certificate of compliance.

115. Where a person in public life fails to file a declaration or statement of registrable interest or without reasonable cause fails to provide such further particulars as may be requested by the Commission**,** the Commission shall publish such fact in the Gazette and at least one daily newspaper and may after such publication make an ex parte application to the High Court for an order directing such person to comply with the Act. In addition to making such an order the Court may impose such conditions as it thinks fit: **section 11 (6) and (7)**. Breach of the order or any of the conditions imposed renders the person liable to conviction and a fine of $150,000.00, **section 11(8)**.

116. **Section 15** empowers the Commission to advise the President to appoint a tribunal comprising at least two members of the Commission to conduct an enquiry to verify the contents of the declaration or the statement of registrable interests in circumstances where it is of the view that there should be further inquiry into any declaration in order to ascertain whether there has been full disclosure.

117. A tribunal appointed under the Act has the power to:

(i) request that the person in public life or any other person, whom it reasonably believes has knowledge of the matters to be enquired into, attend before it and furnish such further information and documents as it may require;

(ii) require the Commissioner of Police or any public officer to make available any information received in the course of any investigation carried out into the subject matter of an enquiry under this Act, and may direct the Commissioner of Police or such other officer to make such further enquiries and investigations as it thinks necessary.

118. Save that the hearings shall be held in private a tribunal appointed under the Act shall have and exercise all the powers of a commission of enquiry under the Commissions of Enquiry Act: **section 16.**

119. Where, on the basis of that enquiry, the Commission is satisfied that:

(i) a breach of any of the provisions of the Act has been committed the Commission is empowered by the Act to take such action as it deems appropriate; or

(ii) an offence has been committed it shall refer the matter to the Director of Public Prosecutions and forward a report of its findings to the President.

section 17.

120. Where, in the opinion of the Commission, a breach of the Act has been committed or a conflict of interest has arisen **section 22** mandates the Commission to order a person in public life to place his assets or part of his assets in a blind trust on such terms and conditions as the Commission thinks appropriate.

121. Although the term "conflict of interest" has not been defined in section 2 of the Act **section 29** of the Act provides that:

> "(1) For the purposes of this Act, a conflict of interest is deemed to arise if a person in public life or a person exercising a public function were to make or participate in the making of a decision in the execution of his office and at the same time knows or ought to reasonably to have known, that in the making of the decision, there is an opportunity either directly or indirectly to further his private interests or that of his family or of any other person."

122. Part III also creates offences for the failure to comply with the provisions of the Act and the penalties for such failure: **section 21.** This section requires the Commission to obtain the written consent of the Director of Public Prosecutions for the prosecution of offences under the Act.

123. **Part IV** of the Act establishes a code of conduct applicable to persons in public life and persons exercising public functions. **Sections 24 to 30** comprise the code.

124. By **section 29(2)** where there is a possible or perceived conflict of interest, a person in public life or a person exercising public functions shall disclose his interest in accordance with prescribed procedures and disqualify himself from any decision making process.

125. By **section 31** the Commission is required to report any breach of Part IV to the appropriate Service Commission, Board or other Authority and to the Director of Public Prosecutions.

126. **Part V** of the Act deals with the Commission's powers of investigations. In particular **Section 32** allows a member of the public to complain to the Commission that a person in public life:

(i) is in contravention of the Act;

(ii) in relation to the register of interests, has a conflict of interest; or

(iii) is committing or has committed an offence under the Prevention of Corruption Act.

127. By **section 33** the Commission:

(a) may on its own initiative or

(b) shall upon the complaint of any member of the public

consider and enquire into any alleged breaches of the Act or any allegations of corrupt or dishonest conduct.

128. **Section 34** of the Act specifies the special powers of Commission with respect to such investigation and creates offences for the failure to disclose information or produce documents requested by the Commission, knowingly misleading the Commission or any officer employed by it or giving false information.

129. **Section 37** allows the Commission to consider on its own initiative any matter with respect to the duty or obligation of any person under the Act where it is of the opinion that it is in the interest of the public to do so.

130. **Section 39** protects the members of the Commission from liability for any matter or thing done pursuant to the Act.

131. By **the Schedule** persons in public life are identified to include 'Judges and Magistrates appointed by the Judicial and Legal Service Commission'.

132. Persons in public life are therefore required by the Act to:

(i) make annual disclosure of their assets as well as the assets of members of the person's spouse and dependant children which are known or held by such family member in trust for or as agent of the person in public life;

(ii) disclose all registrable interests as defined by the Act;

(iii) comply with the code of ethics;

to the satisfaction of the Commission.

133. A failure to comply with the provisions of the Act renders the person in public life liable to summary conviction the penalties for which range from a fine of $100,000.00 to a fine of $250,000.00 and 10 years imprisonment; the placing of all or some of their assets in a blind trust by the Commission or to such action as the Commission thinks appropriate.

134. Further, by the Act, with respect to the persons in public life,

(i) the issue of a Certificate of Compliance,

(ii) an order that assets be placed in a blind trust,

(iii) the commencement of an investigation for failure to make proper disclosure;

(iv) the conduct of an enquiry pursuant to section 15;

(v) the determination as to whether a breach of the Act, including a conflict of interest, has been committed; and

(vi) upon the obtaining of the consent of the DPP, the prosecution for an offence under the Act,

are in the sole discretion of the Commission.

135. Broadly speaking, and insofar as it is relevant to these proceedings the Act therefore mandates disclosure of assets, income and liabilities by persons in public life; empowers the Commission to investigate breaches of the Act which investigation includes the power to conduct a private enquiry with all the powers of a commission of enquiry appointed under the Commission of Enquiry Act; creates offences for the breach of the requirement of full disclosure; establishes a code of ethics applicable to both persons in public life and persons performing public functions and empowers the Commission to punish persons for breach of the duty to disclose as well as the code of ethics.

136. The first observation to be made is that, what ever the interpretation of section 138(a) employed, neither sections 138 or 139 of the Constitution empower Parliament to make provision for or give the Commission the power to punish for a breach of the Act.

137. Assuming for the moment the wider interpretation of section 138, then by the section the Constitution empowers the Commission to:

(i) receive declarations ;

(ii) supervise all matters connected with the receipt of declarations;

(iii) supervise and monitor of standards of ethical conduct prescribed by Parliament; and

(iv) monitor and investigate dishonest or corrupt, practices, procedures and conduct.

138. With respect to these functions, by section 139, Parliament is empowered, subject to the Constitution, to make provision for:

(i) the procedure by which the Commission is to perform those functions as well as confer on the Commission and persons concerned such duties and powers necessary for the performance of such functions;

(ii) the proper custody of the declarations and documents delivered to the Commission;

(iii) the maintenance of secrecy in respect of all information received by the Commission in respect of its duties with respect to the receipt of declarations;

(iv) the preparation by the Commission of a Register of Interest for public inspection; and

(v) generally to give effect to the provisions of section 138.

139. In other words by section 139, subject to the provisions of the Constitution, Parliament is empowered to enact legislation which will:

(a) with respect to declarations in writing of assets, liabilities and income of office holders described in section 138(2)(a):

(i) establish the procedure by which the Commission is to receive declarations in writing of assets, liabilities and income of those office holders under its purview;

(ii) establish the procedure by which the Commission is to supervise all matters connected with the receipt of such declarations;

(iii) confer on the Commission such powers as will enable it to carry out its duty to receive and supervise the receipt of such declarations; and

(iv) impose on persons concerned such duties as are necessary to enable the Commission to receive and supervise the receipt of such declarations.

(b) with respect to the office holders described in section 138(2)(a) and the additional office holders described in section 138(2)(b) provide for standards of ethical conduct to be observed by those office holders and:

(i) establish the procedure by which the Commission is to supervise and monitor those standards;

(ii) confer on the Commission such powers as will enable it to carry out its duty of supervising and monitoring those standards; and

(iii) impose on persons concerned, that is the office holders described in section 138(2)(a) and (c), such duties as are necessary to enable the Commission to carry out effectively its duty to supervise and monitor those standards;

(c) with respect to its duty to monitor and investigate conduct, practices and procedures which are dishonest or corrupt:

(i) establish the procedure by which the Commission is to monitor and investigate such practices;

(ii) confer on the Commission such powers as are necessary for it to monitor and investigate such conduct, practices and procedures; and

(iii) impose such duties on persons concerned, the public generally, as are necessary to enable the Commission to carry out the monitoring and investigation of such conduct, practices and behaviour.

140. By section 139 therefore legislation giving life to the Commission, integrity legislation, shall, subject to the Constitution empower the Commission in accordance with the powers and functions prescribed by section 138 of the Constitution and impose such duties on the persons subject to the integrity legislation as will enable the Commission to carry out its functions.

141. It is not, in my view, open to dispute that given the wording of section 138(2)(c), the power given to Parliament to enact provisions which would "give effect to the provisions of section 138" allows Parliament to prescribe standards of ethical conduct for the persons covered by the Act. In my view however neither those words nor the words "the supervision of all matters connected therewith" permit Parliament to confer on the Commission the power to punish for breaches of the Act or conflicts of interest. This is so whatever interpretation is placed on section 138(2)(a) of the Constitution.

142. Further it would seem to me that by the use of the words: "Subject to this Constitution, Parliament may make provision for" in section 139 the power of Parliament to legislate with respect to the Commission must be subject to the other provisions of the Constitution.

143. Accordingly, and in keeping with the question to be answered, it is now necessary to examine the other provisions of the Constitution insofar as Judges and Magistrates are concerned.

Is the Act inconsistent with the provisions of the Constitution in relation to Judges and Magistrates?

144. It may be appropriate here to first identify the persons covered by the phrase "Judges and Magistrates appointed by the Judicial and Legal Services Commission" These words, in my view, are capable of two conflicting interpretations. The words can

be interpreted as meaning: ‘Judges appointed by the JLSC and Magistrates appointed by the JLSC’ or ‘Judges, and Magistrates appointed by the JLSC’.

145. If the latter meaning is adopted then, since Judges of the Supreme Court are not appointed by the JLSC but by the President, Judges of the Supreme Court are not subject to the Act. The Commission submits that this is an interpretation open to the Court because there are other persons who are commonly referred to as Judges, that is Judges of the Tax Appeal Board and Judges of the Industrial Court. Of those two categories, it submits, Judges of the Tax Appeal are appointed by the JLSC. The fact that, like Magistrates, pursuant to section 111 of the Constitution, the duty to discipline these ‘Judges’ vests in the JLSC makes this interpretation even more attractive.

146. Two difficulties however arise. The first is that, nowhere in the statutes establishing the Tax Appeal Board or the Industrial Court are the members of the Court referred to as Judges. Both Acts refer to these persons as members of the Court. The use of the word therefore seems to have arisen from the function exercised by these persons that is rendering judicial decisions, judging.

147. The second is that, since there seems to be no other group of persons but the “Judges” of the Tax Appeal Board who fall into the category of Judges appointed by the JLSC. If that was the intention of Parliament it would have been far simpler and certainly clearer to state in the schedule ‘Judges of the Tax Appeal Board and Magistrates’.

148. Since it is open to the Court "where the expression of legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity and where the difficulty can be resolved by a clear statement directed to the matter in issue": **Pepper (Inspector of Taxes) v Hart [1992] 3 WLR 1032** to refer to the records of Parliamentary proceedings as an aid to the construction of a statute it is possible here to turn to the Hansard for assistance. In this regard it must be noted that both Acts, that is the amendment to the Constitution and the Act, were laid in Parliament at the same time. At that time what was stated in Parliament was that the category of persons in public life should be widened to include Judges. No limit was placed on this category by the mode of the appointment. In my view the intention of Parliament as divined by the use of the word Judges without the words of limitation placed by the Act could not have been to limit the category of Judges to those appointed by the JLSC.

149. It would seem to me, however, that in any event insofar as the Constitution and Act No. 88 of 2000 refers to Judges they ought not be interpreted to refer to persons who are not Judges properly so called, that is persons who are not termed Judges by the appointing legislation. In my view, to do so would be extending the meaning of the words 'Judges" to mean "persons who judge". This, to my mind, is too wide a meaning to be placed on the word. The word "Judges" in the Act must be taken to mean Judges properly so called and referred to as such by the appointing legislation.

150. In the circumstances I am of the opinion that the words "appointed by the Judicial and Legal Service" in the phrase "Judges and Magistrates appointed by the Judicial and

Legal Service" though superfluous relate only to Magistrates and the words should be read as 'Judges, and Magistrates appointed by the Judicial and Legal Services Commission.'

151. As we have seen the provisions in the law are not the same for Judges as they are for Magistrates it is therefore necessary to examine each category separately. Before doing so it is important to deal with one issue suggested rather that raised in the course of the submissions placed before the Court. The argument goes like this, Judges and Magistrates, like ordinary citizens, are subject to the laws of the land, criminal or otherwise. The Act is just one of these laws.

152. The fallacy of this argument is that, except insofar as the Act gives the Commission the general power to deal with offences under the Prevention of Corruption Act, the Act does not purport to be an Act of general application to all citizens. Rather the Act seeks to impose duties on Judges and Magistrates in their capacity as Judge or Magistrate and empower the Commission to enforce such duties. Insofar as it refers to Judges and Magistrates it is to be applicable to them in their capacity as a Judge or a Magistrate not in their capacity as an ordinary citizen. In their capacity as ordinary citizen, like other citizens, Judges and Magistrates are subject to the law, criminal or otherwise. It is when legislation, as the Act does, seeks to deal with the Judge or the Magistrate in the capacity of a Judge or a Magistrate, qua Judge or Magistrate, and not as an ordinary citizen that special considerations may arise, fueled by the Constitution and the concept of the separation of powers.

Judges

153. With respect to Judges, therefore, the question is whether by subjecting them to the provisions of the Act those provisions have the effect of:

(i) altering the Judge's terms of service to that Judge's disadvantage;

(ii) controlling the Judge in the performance of that Judge's functions of office;

(iii) providing a means by which Judges may be disciplined for misconduct other than misconduct recognized by the Constitution; or

(iv) empowering a body other than a tribunal established under section 137(3)(a) to conduct an enquiry with respect to a Judge with respect to a duty imposed on the Judge qua Judge.

(i) Alteration in the terms of service

154. The Constitution provides that the salaries and allowances and other terms of service of a Judge shall not be altered to the Judge's disadvantage after appointment. The submission on behalf of the Attorney-General is that the terms and conditions of service of Judges are contained in the Judges Salaries and Pensions Act and the Judges (Conditions of Service and Allowances) Regulations Nos.1 and 2 and that the Act does not purport to affect those terms and conditions.

155. **The Judges Salary and Pensions Act Chap. 6:02** states that it is an Act to provide for the salaries, pensions and other conditions of service of Judges of the Supreme Court of Judicature. This Act came into operation on the 31st August 1962 and deals only with salaries and pensions. By section 16 the President is empowered

to make regulations generally for the carrying out of the provisions of the Act and "without prejudice to the generality of the foregoing, may make Regulations relating to the conditions of service of, and the allowances payable to, a Judge".

156. The Regulations, the **Judges (Conditions of Service and Allowances) Regulation Nos. 1 and 2,** made under the Act deal with matters of vacation, housing, transport allowances, medical treatment and income tax. While it cannot be disputed that this legislation contains terms of service of Judges the question is whether these are the only terms of service.

157. The phrase "terms of service" has not been judicially defined. In the case of **Cory Lighterage Ltd. v Transport and General Workers Union and others [1973] 2 All E.R. 558** the phrase 'terms and conditions of employment' was thought to be a reference only to contractual terms and conditions: per **Lord Denning MR** at **page 566b** and **Orr LJ** at **page 573c**.

158. In the later case of **British Broadcasting Corporation v Hearn and others [1977] 1 WLR 1004 at 1010** however Lord Denning MR had this to say about the words 'terms and conditions of employment':

> "It was suggested that those words related only to the contractual terms and conditions. Some of us said as much in Cory Lighterage Ltd v Transport and General Workers' Union [1973] 1WLR 792, 814,

821. But that, I think, would be too limited. Terms and conditions of employment may include not only the contractual terms but those terms which are understood and applied by the parties in practice, or habitually, or by common consent, without ever being incorporated into the contract."

159. In my view the phrase 'terms of service' is far wider than the contractual terms with respect to salary and pension and other allowances as submitted by the Attorney-General. In my opinion the words "terms of service" must include those terms or conditions under which a Judge serves which are understood and applied by the parties in practice, or habitually, or by common consent. In other words the Constitution requires that no term applicable to the service of a Judge, be it established by way of statute, by practice or custom, shall be altered to the Judge's disadvantage after appointment. The words must therefore be construed as referring to any term applying to a Judge's service however established. That this must be the meaning to be given to the words is obvious given the width and breath of the concept of the separation of powers and the independence of the individual Judge as required by the rule of law. This is, to my mind, confirmed by the use of the words: "The salary and allowances…..and his other terms of service…." in the section.

160. Under the terms of service of a Judge, appointed before 2nd November 2000, that Judge was not required to make annual disclosure of assets or a statement of registrable interests or comply with the code of ethics established by the Act. In

my view such requirements constitute an alteration of the terms of service of the Judge. In this regard it is important to note that the only Judges affected here are those Judges appointed before the amendment, that is, those Judges appointed before 2nd November 2000.

161. Is this an alteration to the Judge's disadvantage? While it cannot be said that subjecting Judges to a code of ethics per se is to the disadvantage of the Judge, in my opinion, the same cannot be said for the requirement that a Judge each year file a declaration of income, assets and liabilities of the Judge as well as such particulars as are known by the Judge of a spouse and dependent children and a statement of registrable interests. In my opinion such a requirement is an alteration of the terms under which that Judge previously served to that Judge's disadvantage. That this is so, in my view, is emphasized by the penalties attendant upon the failure to comply with this requirement to the satisfaction of the Commission.

162. Further, if the Act provides for control, disciplinary or otherwise, other than in the manner specified by the Constitution at the time of appointment, in my view, that too would constitute an alteration of the terms of service, of a Judge appointed before the 2nd November 2000 to that Judge's disadvantage.

(ii) Control in the performance of the Judge's functions of office

163. It cannot be disputed that by its very nature a code of ethics seeks to control the manner in which persons perform the functions of their office. Whereas in

principle it cannot be objectionable for Judges to be subject to a code of ethics the requirement that the independence of the Judiciary be maintained raises two concerns. The first is, whether the imposition of such a code of ethics by Parliament, however innocent or laudable the intention, in fact presents a means of controlling the manner in which Judges perform their functions. If it is, and in my opinion it is, this must be contrary to the principle of the separation of powers and the independence of the Judiciary. The second concern is in fact a subset of the first and requires a consideration of the contents of the code prescribed by Parliament to show not only its inappropriateness in the circumstances but also to bring to the fore the manner by which the statutory code seeks to control Judges in the performance of their duties.

164. **Section 29 of the Act** provides:

> " (1) For the purpose of this Act, a conflict of interest is deemed to arise if a person in public life or a person exercising a public function were to make or participate in the making of a decision in the execution of his office and at the same time knows or ought reasonably to have known, that in the making of the decision, there is an opportunity either directly or indirectly to further his private interests or that of any member of his family or of any other person.
>
> (2) Where there is a possible or perceived conflict of interest, a person to whom this part applies, shall disclose his interest in accordance with prescribed procedures and disqualify himself from any decision making process."

165. In relation to the duties of a Judge, the circumstances in which a conflict of interest is deemed to arise under the Act are wide and far-reaching. The code of conduct requires the disqualification of a Judge, whether sitting alone or with other Judges, in any case in which there is an opportunity, directly or indirectly, to further the private interest of either that Judge, a member of that Judge's family or any other person.

166. The phrase "private interest" is not specially defined by the Act. Given its natural and ordinary meaning it would therefore encompass any interest or concern that is not a purely public interest. It would seem to me that given the nature of the matters coming before the Supreme Court it is difficult to conceive of a matter that would qualify as a matter of public interest and not further the private interest of some person. Very few matters, if any at all, would qualify to be heard by any Judge. By its very nature a judicial determination whether in the civil or criminal or public law field involves the furtherance of someone's private interest.

167. Even ignoring the words "or any other person", no Judge of the Supreme Court would be able to hear any case in which it is possible or it can be perceived that it is possible, even indirectly, to further the private interest of a Judge or a member of that Judge's family. Indeed, it would be difficult to conceive of a matter of national interest in the civil jurisdiction of the court which, given the provision, it would be open to a Judge to decide or which, particularly given the size of our society and the powers of the Commission under section 22, a Judge would risk hearing. In fact no

Judge in Trinidad and Tobago, whether sitting alone or in the Court of Appeal, would be able to adjudicate on this case without breaching the code of ethics.

168. It seems to me that by subjecting Judges to a code of ethics the Act impermissibly seeks to control the manner in which Judges deal with cases and function in their office. This, in my opinion, attacks the very basis of the independence of the Judiciary and the doctrine of the separation of powers.

(iii) Discipline

169. By the Constitution disciplinary action against a Judge is limited by:

(i) the nature of the offence: inability to perform the functions of office or misbehaviour ;

(ii) the punishment: removal from office and suspension only where the process towards removal has been commenced;

(iii) the persons who may initiate disciplinary action: the JLSC or the Prime Minister;

(iv) the persons who may investigate allegations of misconduct: a tribunal comprising Judges or to a very limited extent insofar as such investigation is required to initiate the disciplinary action: the JLSC or the Prime Minister, and

(v) the persons who may punish: the President acting on the advice of the Judicial Committee.

As we have seen these provisions ensure that the independence of the Judiciary and its constitutional role are not compromised.

170. **The Concise Oxford Dictionary 11th Edition** defines the verb 'discipline" as: " to punish or rebuke formally for an offence". Accordingly the words disciplinary action must be taken to mean proceedings taken with a view to punishing or rebuking formally for an offence. It would be a fallacy therefore to assume that discipline only arises in circumstances that lead to a dismissal or suspension as has been suggested.

171. It cannot be disputed that although the word misconduct is not used, the Act provides that, with respect to disclosure of assets and obedience to the code of ethics, a failure to comply with the terms of the Act constitutes misconduct punishable by criminal prosecution; the placing of the offender's assets in a blind trust or by such action as the Commission shall deem appropriate.

172. In my view, in the context of the instant case, any method of punishment for an offence or misconduct arising out of a duty imposed upon a person by a term of service or a duty imposed on that person by virtue of their office constitutes a method of disciplining that person and any action aimed at inflicting punishment for such an offence or misconduct constitutes disciplinary proceedings. By providing for the investigation and punishment of a Judge for breaches of the Act, the Act therefore seeks to discipline Judges in their capacity as Judges in a manner that is contrary to

the provisions of the Constitution designed to ensure the independence of the Judiciary.

173. Additionally, with respect to disciplinary proceedings, the Constitution is very specific with respect to the nature of the complaints that may be made with regard to a Judge, the persons who may punish a Judge and the persons who may enquire into the complaints. The Constitution ensures that in this latter regard the investigation is by a tribunal comprising persons who hold or have held the office of a Judge in the Commonwealth, a tribunal of peers. The Constitution also provides the manner by which complaints may be sifted and weighed by the appropriate functionary, the Prime Minister with regard to the Chief Justice and the JLSC with regard to the other Judges, before the commencement of any formal investigation.

174. Again the rationale for these safeguards is clear and it is to ensure that as far as possible the separation of powers remains intact and the independence of the Judiciary and a Judge's ability to function is not lightly compromised.

175. The Act empowers the Commission to investigate and hold an enquiry as to breaches of the Act by Judges. It allows both the Commission and members of the public to initiate such investigations: **sections 15, 32 and 33 of the Act.** In addition the Act, **by section 17**, gives the Commission the power take any action against a Judge as it deems appropriate if it is of the opinion that a breach of any of the provisions of the Act has been committed. As well, **by section 22**, where it appears to

the Commission that a breach of the Act has been committed or a conflict of interest may have arisen, the Commission shall order that the Judge to place some or all of that Judge's assets in a blind trust.

176. The Act therefore provides for complaints, additional to those permitted under the Constitution, to be made against a Judge for a breach of duties imposed in the capacity of Judge; for these complaints to be made by the Commission and members of the public; for the Commission to hold an enquiry with respect to the alleged breaches and for the Commission to punish Judges for the said breaches. In addition by creating offences punishable by summary conviction for breaches of the Act, the Act provides an additional means of punishing Judges for duties imposed on Judges as Judges.

177. In my view therefore the provisions of the Act which allow for action to be taken and punishment to be inflicted against a Judge for duties imposed in the capacity as Judge are inconsistent with section 106 and 136 and 137 of the Constitution. Further, since neither sections 138 or 139 of the Constitution gives the Commission the power to punish for breach of a duty under the Act as sections 17(1)(a) and 22 seek to do the power to punish for a disciplinary breach is also contrary to those sections.

Magistrates

178. As we have seen the Act seeks to vest an element of disciplinary control over Magistrates to the Commission. In my view this is inconsistent with sections 111 and 127

of the Constitution which vests this power solely in the JLSC or, with the consent of the Prime Minister, a Judge of the Supreme Court.

179. In this regard it is important to note that a comparison of the statutory provisions establishing the JLSC and the Commission reveal that with respect to its composition the JLSC is specifically geared towards dealing with persons exercising judicial functions. As we have seen the JLSC comprises at least four persons with legal training one of whom is the Chief Justice and another a person who is or has held the post of a Judge in the Commonwealth**.**

180. That the composition of the JLSC is specially designed to deal with persons exercising judicial functions is illustrated by the fact that by section 121(2) of the Constitution, the Public Service Commission "shall not remove, or inflict any punishment on, a public officer on the grounds of any act done or omitted to be done by that officer in the exercise of a judicial function conferred upon him unless the Judicial and Legal Service Commission concurs therein." Section 123(2) provides a similar injunction to the Police Service Commission.

181. The composition of the Commission, on the other hand, is established not by the Constitution but by the Act. The Commission comprises five persons: a Chairman, a Deputy Chairman and three 'persons of integrity and high standing' one of whom must be an Attorney at Law for at least 10 years and the other a Chartered or Certified Accountant.

182. With respect to tenure, section 136 (5) to (11) of the Constitution applies to both members of the Commission and the JLSC alike. However, unlike the members of the JLSC who by section 126 (3) of the Constitution hold office for not less than three and not more than five years, the period of office of the members of the Commission is not specified by the Constitution but rather, from a reading of section 8(1) of the Act. By that provision the period of office for a member of the Commission is in the discretion of the President.

183. It would seem to me therefore that not only is the JLSC by its composition better able to deal with discipline of Magistrates but the fact that the term of office of members and the manner of their appointment are fixed by the Constitution provides the JLSC with greater insulation from executive or legislative action. This, to my view, is necessary in order to maintain a level of independence necessary to ensure that Magistrates as members of the lower Judiciary are accorded the autonomy appropriate to their status as members of the Judiciary.

184. In my view, therefore, not only is the provision giving the Commission some disciplinary control over the Magistrates inconsistent with the Constitution but given the statutory provisions establishing the Commission, an exercise of disciplinary control over Magistrates by the Commission would not provide the insulation acknowledged by the Constitution to be necessary to ensure that the independence provided to Magistrates as members of the Judicial arm of the State is not eroded.

185. While it cannot be doubted that it is within the power of Parliament, as supreme law maker, to enact legislation which is inconsistent with the Constitution it also cannot be doubted that such power is limited by the procedure set out in the Constitution.

Section 54 of the Constitution

186. The Constitution while confirming its position as the supreme law also confirms the supremacy of Parliament to enact laws for the peace, order and good government of Trinidad and Tobago "so however the provisions of this Constitution……. may not be altered except in accordance with the provisions of section 54.": **section 53.**

187. Parliament's power, therefore, to pass any law for the peace, order and good government is curtailed by the requirement that such laws comply with the Constitution and that they not be altered except in the manner prescribed by section 54. Further by **section 2 of the Constitution: "**any other law inconsistent with this Constitution is void to the extent of the inconsistency".

188. In so far as it is relevant **section 54** provides:

"

(1) Subject to the provisions of the section, Parliament may alter any of the provisions of this Constitution…..

(2) In so far as it alters –

(a) sections……..101 to 108, 110……133 to 137;

A Bill for an Act under this section shall not be passed by Parliament unless at the final vote thereon in each House it is supported by the votes of not less than two-thirds of all the members of each House.

(3) In so far as it alters-

(a) this section;

(b) sections…….138 and 139….

A Bill for an Act under this section shall not be passed by Parliament unless it is supported at the final vote thereon---

(i) in the House of Representatives, by the votes of not less than three-fourths of all the members of the House; and

(ii) in the Senate, by the votes of not less than two-thirds of all the members of the Senate.

(4) No Act other than an Act making provision for any particular case or classes of case, inconsistent with provisions of this Constitution, not being referred to in subsections (2) and (3) shall be construed as altering any of the provisions of this Constitution…..unless it is stated in the Act that it is an Act for that purpose.

(5) In this section references to the alteration of any of the provisions of this Constitution ….include references to repealing it, with or without re-enactment thereof or making of different provisions in place thereof or the making of provision for any particular case or class of case inconsistent therewith, to modifying it and to suspending its operation for any period."

189. The section therefore deals with two situations. The first restricts the method by which certain sections of the Constitution, that is those provisions referred to in sections 54 (2) and (3), the entrenched provisions, may be altered. That is, it restricts the manner in which those sections may be repealed, repealed and re-enacted, different provisions made in place of, provisions made for any particular case or class of case inconsistent with, modified, suspended or changed in any way. In any of these instances a Bill seeking to do so must be passed with the requisite majorities in both Houses of Parliament.

190. The second deals with the non-entrenched provisions of the Constitution and ensures that no Act inconsistent with any of these sections is construed as altering them unless it is stated that it is an Act for that purpose.

191. The rationale for this is two fold. First, the Constitution acknowledges that there are certain provisions, entrenched provisions, which provide the foundation of the Constitution and upon which our society rests and ensures that these sections not be altered except by the will of the people as expressed by more than a bare majority of its representatives. Second, and equally as important, it serves to direct the mind of those legislators to the fact that the intention of the Bill is to alter existing provisions of the Constitution, be those provisions entrenched or non-entrenched. In other words it serves to warn the members of both Houses of the magnitude of the proposed legislation, that its intention is to alter the supreme law of the land.

192. Section 54 therefore, consistent with the supremacy of the Constitution, ensures that no section of the Constitution is altered by implication or inadvertently.

193. It must be noted here however that special provisions are made by section 13 with respect of Acts inconsistent with sections 4 and 5 of the Constitution, the 'Human Rights provisions'. With respect to those Acts whereas the validity of such an Act does not require an alteration to the Constitution, not only must the Act declare its inconsistency but it must specifically declare that it is inconsistent with those sections, it must be passed with the votes of not less than a three-fifths majority in both Houses and it must be an Act which is reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

194. The conjoint effect of section 2 and section 54 of the Constitution is therefore:

(i) with respect to the entrenched provisions, save with respect to an Act containing provisions inconsistent with sections 4 and 5 of the Constitution for which special provision is made by section 13, any Act inconsistent with any of those provisions is void to the extent of the inconsistency;

(ii) Parliament may however repeal, repeal and replace, make different provisions in place thereof, make provisions for any particular case or class of cases inconsistent with, modify or suspend any of the entrenched provisions by the passage of a Bill for that purpose, that is for the purpose of any of the above, with the required votes in both Houses of Parliament;

(iii) accordingly therefore sections 4 and 5 apart, in order to pass an Act the provisions of which are inconsistent with any entrenched provision Parliament would first have to amend the Constitution to facilitate such an Act. Such a Bill to amend the Constitution would have to be passed by the required majorities in both Houses;

(iv) with respect to the non- entrenched provisions, an Act containing provisions inconsistent with those provisions of the Constitution shall be construed as altering the Constitution if it declares that it is an Act for that purpose;

(v) an Act containing provisions inconsistent with any of the non-entrenched provisions of the Constitution which does not state that it is an Act for that purpose, that is for the purpose of altering a non-entrenched provision of the Constitution will be void to the extent of its inconsistency with the Constitution;

(vi) in order to pass an Act the provisions of which are inconsistent with any of the non-entrenched provisions of the Constitution, while not required to be passed by a special majority, the Bill for such an Act will have to state that it is an Act for that purpose.

195. Therefore save insofar as the Constitution has first been altered to accommodate a provision inconsistent with an entrenched provision, any Act containing provisions

inconsistent with an entrenched provision of the Constitution, sections 4 and 5 excepted, is void to the extent of that inconsistency. In the case of a non-entrenched provision, however, once the Act states that it is an Act for the purpose of altering the Constitution even if the actual provision of the Constitution is not amended in any way the Act shall be construed as altering the Constitution. In the case of a non-entrenched provision therefore the voting majority is irrelevant what matters is the statement that the Act alters the Constitution.

196. In the instant case Constitution Amendment No 4 amended the Constitution insofar as the Commission and the legislative power of Parliament in that regard were concerned. As we have seen that amendment did not extend to endowing the Commission or allowing Parliament to endow the Commission with the power to punish for breaches of any Integrity Legislation. Neither did Constitution Amendment No. 4 purport to nor did it amend sections 106, 136 and 137. These sections, all entrenched, were therefore not altered to facilitate the inclusion of Judges of the Supreme Court under the regime of the Integrity Legislation. In particular insofar as the Act with respect to these Judges purports to:

(i) alter the terms of service of Judges appointed prior to the 2nd November 2000;

(ii) control the manner in which a Judge discharges his or her duty;

(iii) empowers the Commission to investigate or discipline a Judge;

(iv) empowers the Commission or any other body to punish a Judge for duties imposed by virtue of the Judge's office

the Act is inconsistent with sections 106, 136 and 137 of the Constitution and void to the extent of that inconsistency.

197. In my view therefore it is not sufficient to look at the certificate of the Clerks of respective Houses and calculate whether the Act was passed with the majorities necessary to alter those sections. Section 54 requires that to pass an Act inconsistent with sections 106, 136 and 137 of the Constitution those provisions must have been specifically altered and that a Bill for an Act for that purpose, that is, to alter any one of the sections specified in subsections (2) or (3) must be passed with the requisite majorities.

198. In other words the Bill must have been for the purpose of repealing, repealing and replacing, making different provisions in place thereof, making provision for a particular case or class of case inconsistent therewith, modifying, suspending or changing in any way an entrenched provision.

199. In the instant case the Bill for the purpose of altering the Constitution, Constitution Amendment No.4 changed section 138 by repealing and replacing subsection 138(2)(a) and deleting the word "Senators" from subsection 138(2)(c).

200. The Act, despite the fact that on a mathematical calculation it may have complied with the votes required to alter the Constitution, did not purport to nor did it alter sections 106, 136 and 137 of the Constitution. In any event those being entrenched sections the Constitution could not have been altered in that manner nor could the Act be interpreted

as altering the Constitution in that manner. In the circumstances the Act insofar as it is inconsistent with sections 106, 136 and 137 of the Constitution it is void to the extent of those inconsistencies.

201. With respect to Magistrates, as we have seen, the Act is inconsistent with section 111 of the Constitution. Section 111 is not an entrenched section of the Constitution. In order therefore for the Act to be construed so as to alter the Constitution to give effect to those inconsistent provisions the Act must state that that it is an Act for that purpose. The question is whether this Act has done so.

202. Since the purpose of the preamble of any Act is "to assist in explaining the purport and purpose of the written law": section 11(1) of the Interpretation Act. It is necessary to first examine the preamble to Act No 88 of 2000. As we have seen in its preamble this Act recites section 13 of the Constitution and complies with the requirements necessary to pass a law inconsistent with that section. In the case of **Attorney- General of Trinidad and Tobago v Mcleod [1984] 1WLR 552,** referred to by the Commission, the long title of the Act challenged was "An Act to amend the Constitution of the Republic of Trinidad and Tobago Act 1976". In that case this was deemed sufficient to alter a non-entrenched provision of the Constitution and there was no requirement for the Bill to be passed by a special majority.

203. This Act, in accordance with section 13, merely states that it is an Act inconsistent to two entrenched sections, section 4 and 5, of the Constitution. Unlike Constitution

Amendment No. 4 no mention is made of section 54 of the Constitution in the preamble to Act No. 88 of 2000. Further nowhere in the body of that Act does it state that it is an Act for the purpose of altering the Constitution. Indeed no reference is made to the Constitution in the body of the Act. In the circumstances I am of the view that with respect to Magistrates the Act cannot be read as altering the Constitution and is inconsistent with sections 111 and 127 of the Constitution insofar as it seeks to vest disciplinary control of Magistrates in the hands of the Commission and void to the extent of such inconsistency.

204. In this regard the case of **Kariapper v Wijesinha [1967] 3 All ER 485** referred to by the Commission is distinguishable on the facts. In Kariapper the Constitution of Ceylon, unlike our Constitution, did not require the Act to state that it was an Act to alter the Constitution. That Constitution merely required that the Act be endorsed with a certificate of the speaker certifying that the Act received the required number of votes in the House of Representatives. Since the Act was so endorsed it was valid despite the fact that it did not purport to amend the Constitution. Nonetheless the statement of the Judicial Committee in the judgment of Sir Douglas Menzies at page 494 letter I is of some assistance:

> "Accordingly, therefore, on general principles and with the guidance of earlier authority, their lordships have come to the conclusion that the Act, inconsistent as it is with the Constitution of Ceylon, is to be regarded as amending that constitution unless there is to be found in the constitutional

restrictions imposed on the power of amendment some provision which denies it constitutional effect."

205. In my opinion there is to be found in section 54 of our Constitution constitutional restrictions that deny the Act effect with respect to both Judges and Magistrates. It seems to me that Parliament proceeded on the erroneous basis that in order to subject Judges and Magistrates to the Act all that was needed was an alteration to section 138 of the Constitution and failed to consider the effect of sections 106, 136, 137, 111 and 127 of the Constitution on the Act as amended.

206. Further, and equally as important, by the inclusion of the words "Subject to this Constitution…"section 139 of the Constitution explicitly limits the power of Parliament to enact legislation to give effect to section 138 to legislation which conforms with the other sections of the Constitution.

Conclusions

207. One of the difficulties presented by these proceedings is the fact that we are dealing here with the effects of two separate pieces of legislation, Constitution Amendment No.4 and Act No. 88 of 2000, on the Act.

208. The first is the Act that amended the Constitution, the Constitution Amendment No 4. This is the Act that purports to give the Commission and Parliament the power to subject Judges and Magistrates to the jurisdiction of the Commission and any legislation

enacted by Parliament in that regard. As we have seen this amendment seeks to bring Judges and Magistrates under the jurisdiction of the Commission whether it be for the limited purpose of enforcing a code of ethics established by Parliament or for the wider purposes referred to earlier.

209. In my opinion, with respect to the provisions of the Constitution, whatever the interpretation placed on section 138(2)(a),

(i) as regards Judges of the Supreme Court, any Act passed by Parliament under the authority of section 139 inconsistent with sections 106, 136, 137 and 138 of the Constitution will be void to the extent of that inconsistency,

(ii) with respect to Magistrates, any Act inconsistent with sections 127, 128 and 138 of the Constitution will be void to the extent of that inconsistency unless that Act states that it is an Act for the purpose of altering the Constitution.

210. With respect to the provisions of the Constitution there is still outstanding however the interpretation to be placed on section 138(2)(a). It is the duty of the Court to place a meaning on the section. This duty exists even though, as in this instance, any meaning to be placed on the section offends against a provision of the Constitution.

211. The presumption of constitutionality referred to earlier is not a rule of law but merely an aid to be used to assist in the resolution of "ambiguities or obscurities in the actual words used in a statute": **Attorney-General of the Gambia v Momodou Jobe [1984] 1 A.C.689 at page 702 C**. That being the case it seems to me that since by neither

interpretation can the Court give effect to this presumption then the presumption can not assist in the construction to be used in the construction to be placed on the section.

212. In these circumstances it seems to me that I ought to give the section the wide interpretation that was intended by Parliament. That is the section should be interpreted as charging the Commission with the duty of " receiving from time to time, declarations in writing of the assets, liabilities and income of members of the House of Representatives, Ministers of Government, Parliamentary Secretaries, Senators, Judges, Magistrates, Permanent Secretaries, Chief Technical Officers, Members of the Tobago House of Assembly, Members of the Municipalities, Members of Local Government Authorities, members of the Boards of all Statutory Bodies, State Enterprises and the holders of such other offices as may be prescribed." This is despite the fact that, as I have found, such an interpretation, with respect to Judges and Magistrates, offends against other sections of the Constitution namely sections 106, 111, 127, 136 and 137. Since section 2 of the Constitution only renders such an interpretation void where inconsistent with any other law save insofar as it refers to Judges and Magistrates to place such a construction on the section in my view would not be rendered void by virtue of section 2 of the Constitution.

213. The second piece of legislation Act No 88 of 2000. This amendment, as we have seen, seeks to include in the Act "Judges and Magistrates appointed by the JLSC" into the definition of persons in public life and accordingly persons to whom the Act applies by amending the relevant schedule to include Judges and Magistrates.

214. As we have seen the Act seeks to do three things: impose on persons subject to the Act a duty to disclose assets; provide for compliance with a code of ethics and punish for breaches of the duty to disclose and the code of ethics. Insofar as the duty to disclose assets are concerned that duty is inconsistent with the Constitution with respect to those Judges appointed prior to 2nd November 2000. Insofar as the Act provides for compliance with a code of ethics we have seen that, with respect to Judges, those provisions are inconsistent with those sections of the Constitution which protects a Judge from control in the manner in which the Judge discharges the functions of office. Insofar as the Act seeks to punish or mandate the institution of disciplinary proceedings for the breach of obligations imposed by the Act we have seen that it is inconsistent with those sections which, in the case of Judges, limit disciplinary proceedings and, in the case of Magistrates, vest the power to discipline in the JLSC or a Judge of the Supreme Court. Further, in any event, insofar as the Act purports to give the Commission the power to punish for breaches of the Act it is contrary to section 138 of the Constitution.

215. In accordance with section 2 of the Constitution therefore the Act is void to the extent of those inconsistencies. With respect to the inclusion of Judges and Magistrates therefore,

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or whether on a fair review of the whole matter it can be assumed

that the legislature would have enacted what survives without enacting the part that is ultra vires at all":

per **Viscount Simon** in **Attorney-General for Alberta v Attorney General for Canada [1947] A.C. 503 at page 518**.

216. The specific remit of this Court is to consider whether, in the light of the provisions of the Constitution, Judges and Magistrates are subject to the Act. Given my findings with respect to the inconsistencies between the Act and the Constitution, in order to answer the question posed I must consider, insofar as the amendment to the Act seeks to apply the Act to Judges and Magistrates, how much of the Act is inconsistent with the provisions of the Constitution in this regard and therefore void pursuant to section 2.

217. My options therefore are to read the Act as though there was no reference to Judges and Magistrates, in other words by ignoring item 8 in the schedule, or to read the Act as requiring:

(i) only Judges appointed after the 2nd November 2000 be subject to the Act and only insofar as it requires those Judges to declare their assets, liabilities and income and make a statement of registrable interests and no more; and

(ii) Magistrates be subject to the Act but only so far as they are required to declare their assets, liabilities and income, make statements of registrable interests and be subject to the code of ethics prescribed by Parliament.

218. In this regard, in my view, there are two relevant considerations. The first is, the manner by which Judges and Magistrates were incorporated into the Act. As we have seen this was by way of an amendment which, while not disturbing the existing provisions of the Act, sought to include Judges and Magistrates into the definition of persons in public life via the schedule to the Act. It seems to me that by amending the Act in this manner, with respect to Judges, Parliament sought to subject all of the Judges to all of the duties and liabilities under the Act. Similarly with respect to Magistrates, Parliament sought to subject the Magistrates to all of the duties and liabilities under the Act. It seems to me that, by the inclusion of Judges and Magistrates into the Act by incorporation into the schedule, the intention of Parliament could not have been to treat Judges differently dependent on their date of appointment. Nor could it have been to subject Magistrates to some and not all the provisions of the Act.

219. The second consideration, and by far the most important in my opinion, arises from the use of the words "Subject to this Constitution" in section 139 of the Constitution. It cannot be disputed that Parliament's power to enact the legislation, "imposing such duties" on Judges and Magistrates " as are necessary to enable the Commission to carry out effectively the purposes of section 138" is by section 139 to be subject to the other provisions of the Constitution. Pursuant to section 139 Parliament sought to impose those duties on Judges and Magistrates by way of Act No 88 of 2000. As we have seen such incorporation is inconsistent with sections 106, 136 and 137 of the Constitution. Accordingly it would seem to me that that part of the amendment to section 138(2)(a) which seeks to incorporate Judges and Magistrates into the Act is rendered

ultra vires the power of Parliament to so legislate by the use of the words 'subject to this Constitution' in section 139.

220. In these circumstances it seems to me that rather than reading the Act as incorporating some Judges and not others and applying some provisions to Magistrates but not all the Act must be read so as to delete item 8 of the schedule. Accordingly therefore it seems to me that the Act should be read as not including Judges and Magistrates as persons in public life.

221. I am of the view therefore that having regard to the provisions of the Constitution of the Republic of Trinidad and Tobago and the Integrity in Public Life Act Judges and Magistrates are not subject to the provisions of the Integrity in Public Life Act as amended.

QUESTION NUMBER 2

What is the meaning of the expression "Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest"?

222. As we have seen the Judiciary is that arm of the State charged with the responsibility of exercising the State's judicial functions. One of these functions is to ascribe legal meanings to legislation enacted by the legislative arm of the State. In other words one of the duties of the Courts is to give meaning to the words used by Parliament

to express its intention. Unlike the first question posed where this Court was required to examine the validity of Parliament's intention in the light of the Constitution, here the Court is required to ascribe a meaning to the words adopted by Parliament to describe its intention.

223. It cannot be over emphasized that by this question this Court is not called upon to identify those organizations the members of which are covered by these words. Neither am I called upon to editorialise on Parliament's intention. The role of the Court here is to assist the Commission as to the intention of Parliament ascertained from the words used by it in order that the Commission may determine the persons under the purview of the Act and thereby exercise its mandate under section 138 of the Constitution.

224. This question requires the Court to place a legal meaning on the expression "Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest" found in the schedule to the Act, the schedule that identifies the persons in public life subject to the provisions of the Act.

225. In seeking to ascribe a legal meaning to the words used in the Act assistance can be obtained from two sources. Since the use of the words originated from sections 138 and 139 of the Constitution, the use of the words or phrases or the meaning ascribed to those words or phrases in those sections or any other provisions of the Constitution will assist in the interpretation of those words as used in the Act. The second is, insofar as there are ambiguities in the meaning to be placed on the words, the purpose and intent of

those amendments incorporating the provision into the Act, that is, Constitution Amendment No.4 and Act No. 88 of 2000 would also be relevant.

226. With regard to the latter, as we have seen, the purpose of these amendments was to widen the scope of persons who were to be subject to integrity legislation from, Judges and Magistrates apart, specific members of the legislature: members of the House of Representatives, and senior members of the executive: Permanent Secretaries and Chief Technical Officers, to include the members of the Senate and persons exercising executive functions on behalf of the State.

227. At the end of the day the Commission seeks guidance on the persons whom Parliament intended to make subject to the Act by the use of the words: "Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest."

228. Consequently the following questions arise:

(i) What are the bodies referred to by the use of the words: "Statutory Bodies", "State Enterprises"?

(ii) What is meaning and effect of the words: "members of the Boards of" immediately preceding those categories of bodies?

(iii) What is the meaning to be ascribed to and the effect of the words "including those bodies in which the State has a controlling interest" found immediately after the two categories of organisations?

(i) "Statutory Bodies", "State Enterprises".

"**Statutory Bodies"**

229. The term 'Statutory Bodies' though used in both the Act and the Constitution has not been defined in either. Reference has been made to the **Exchequer and Audit Act Chap. 69:01** which, by **section 2**, defines the term "statutory body" to mean " any municipality, county council, board, commission or similar body corporate established and incorporated by an Act." Since section 138(2)(a) of the Constitution however makes specific reference to Municipal Corporations and Local Government Authorities. It is clear therefore that the words as used in the Act could not have been intended to refer to those bodies.

230. In their natural and ordinary meaning the term must be taken to mean: 'those bodies or organizations established by statute.' In my view there is no other possible meaning that can be ascribed to these words.

"State Enterprises"

231. Again no statutory definition has been given to this term in the Constitution or the Act. In its natural and ordinary meaning the word "enterprise" has been defined by the **Concise Oxford Dictionary** as: "a business or company".

232. Some assistance however can be obtained from the use of the words elsewhere in the Constitution. In **sections 116(3) and 119(8) of the Constitution** reference is made to enterprises owned or controlled by the State. **Section 116** establishes the office and

functions of the Auditor-General. **Section 116(3)** empowers the Auditor-General to carry out audits of "all enterprises that are owned or controlled by the State". Similarly **section 119** deals with the Public Accounts Committee of Parliament and provides for a Public Accounts (Enterprise) Committee who shall consider and report to the House of Representatives on the audited accounts, balance sheets and other financial statements of "all enterprises that are controlled by or on behalf of the State": **section 119(8).**

233. **Section 119(9)** provides as follows:

> "For the purposes of subsection (8) and section 116(3) an enterprise shall be taken to be controlled by the State if the Government or any body controlled by the Government –
>
> (a) exercises or is entitled to exercise control directly or indirectly over the affairs of the enterprise;
>
> (b) is entitled to appoint a majority of the directors of the Board of Directors of the enterprise; or
>
> (c) holds at least fifty per cent of the ordinary share capital of the enterprise,
>
> as the case may be."

234. It would seem to me that it is appropriate to ascribe to the term "State Enterprises" a meaning consistent with the use of similar words in the Constitution. In my view the words "State Enterprises" must be taken to mean: 'a business or company owned or controlled by or on behalf of the State'. For the purpose of determining control

by the State regard must be had to the indicies of control identified in section 119(9) of the Constitution.

(ii) "Members of the Board of all Statutory Bodies and State Enterprises".

235. In this regard it must noted that the Interpretation Act Chap 3:01 makes specific reference to another category of organization created by Statute, the Statutory Board: **sections 34 to 36 of the Interpretation Act**. While the term is not expressly defined, **section 34** deals with appointments to Statutory Boards and defines the word "board" as including "corporation, tribunal, commission, committee or other similar body." This definition is however stated to be the definition to be used for the purposes of sections 34, 35 and 36 of the Interpretation Act.

236. The question here whether these bodies, Statutory Boards, are included in the ambit of Statutory Bodies or State Enterprises. In my view the answer depends entirely on whether such an organisation can fit itself into either of the categories specified by section 138. So that if the Statutory Board is a body or organisation established by statute or is a business or company controlled by or on behalf of the State then it falls into one of the categories referred to in the Constitution and the Act. It seems to me therefore that a Statutory Board being a body or organisation established by Statute it falls within the category of Statutory bodies referred to in section 138 of the Constitution and the schedule to the Act.

237. To properly answer this part of the question posed by this application however regard must be had to the history of the legislation insofar as amendments were made to it and section 138 of the Constitution.

238. As we have seen initially no reference was made to Statutory Bodies or State Enterprises in section 138 of the Constitution. By Constitution Amendment No.2, the Constitution was amended to include: "members of those Statutory Boards and State Enterprises……as may be prescribed." Consequently the 2000 Act provided for: "Members of the Boards of Statutory Bodies and State Enterprises as prescribed in accordance with section 138(2) of the Constitution" to be subject to the Act. The Constitution therefore empowered Parliament to include under the jurisdiction of the Commission two classes of persons, members of Statutory Boards and members of State Enterprises. The Act however referred to another type of organization instead of Statutory Boards, Statutory Bodies, thereby impermissibly widening the scope of the Act. As well, instead of prescribing the members of or those organisations which it determined ought to be subject to the Act, the Act merely repeated the phrase 'as prescribed in accordance with section 138(2) of the Constitution'.

239. Understandably therefore less than one month afterwards Parliament revisited the legislation and amended the Constitution by deleting the words: "members of those Statutory Boards and State Enterprises" replacing them with the words: "members of the Boards of all Statutory Bodies, State Enterprises and the holders of such other offices as may be prescribed". The discrepancy between the Constitution and the Act was therefore

corrected and the jurisdiction of the Commission with respect to the organisations under its purview increased. While doing so Parliament limited the persons in those organizations coming under the jurisdiction of the Commission from: all the members of those organizations to the members of the boards of those organisations. The schedule of the Act was then amended to read: "Members of the Boards of all Statutory Bodies and State Enterprises" thereby prescribing for only members of the Boards of these bodies to be subject to the Act.

240. It is clear that in the Act the words "members of the Boards of" refer to both Statutory Bodies and State Enterprises. Once again there is no definition in the Act of the word 'Board'. Nor is there such a definition in the Constitution. There can be no doubt that the word "Board" cannot be interpreted to mean Statutory Board since to adopt that meaning would lead to an absurdity. In any event the definition of 'board' in section 34 of the Interpretation Act does not purport to be a definition of general application nor is it a definition found in another part of the relevant legislation.

241. **The Jowitt's Dictionary of English Law** defines "Board" as:

> "An official or representative body organised to perform a trust or to execute official or representative functions or having the management of a public office or department exercising administrative or governmental functions. Commissioners of State Ins. Fund v Dinowitz 179 Mics 278, 38 NYSs 2d 34, 38."

"A committee of persons organized under authority of law in order to exercise certain authorities, have oversight or control of certain matters, or discharge certain functions of magisterial, representative, or fiduciary character. Thus "board of aldermen", "board of health", "board of directors", "board of works"."

"Group of persons with managerial, supervisory or investigatory functions and power".

Black's Law Dictionary defines Board as body of persons having delegated to them certain powers of central government, ……..or set up for the purpose of local government, usually for the purpose of administering a service within the area of two or more local authorities; or elected as directors by the shareholders of a company."

242. As we can see the definition of Board in the legal dictionaries give the word two meanings: the first, accords with the definition of board used in the context of Statutory Board adopted in the Interpretation Act, that is, a body of persons having delegated to them certain powers of the central government; the second, a group of persons with managerial, supervisory or investigatory functions and powers as in the board of directors of a company.

243. **The Concise Oxford Dictionary** defines Board as "the decision making body of an organization".

244. To adopt the first meaning ascribed to the words by the legal dictionaries, as we have seen will result in an absurdity. To adopt the second meaning in my view accords with the natural and ordinary meaning of the word. In my view this accords with the common use of the word as understood in the phrase "board of directors": persons responsible for the decision-making and or management of a company.

245. In my opinion in the word "Board" as used in the phrase must be taken to mean: "the decision making body of an organization or that part of an organization responsible for its management ". In my view therefore the phrase "Members of the Boards of Statutory Bodies and State Enterprises" refers to the members of that part of those organisations responsible for its decision-making or management.

(iii) "including those bodies in which the State has a controlling interest"

246. The first thing to be acknowledged is that if by the use of these words in the Act Parliament intended to extend the meaning of the words 'Statutory Bodies' or 'State Enterprises' as used in the Constitution to include additional organizations such an extended meaning would be impermissible and ultra vires its powers under section 139 of the Constitution. In any event in my view "…. the word "includes" is used really for no other reason than to provide illustrations of things which fall within the definition and which would be considered to fall within it in any event in a normal construction of language.": **de la Bastide CJ** in **Board of Inland Revenue v Young (1997) 53 WIR 335** at **page 366g.**

247. In the circumstances I am of the opinion that these words serve no purpose other than to illustrate and remove from all doubt that these organizations, that is those bodies in which the State has a controlling interest, fall within the definition of Statutory Bodies or State Enterprises.

Conclusion

248. In my opinion therefore the words "Members of the Boards of all Statutory Bodies and State Enterprises including those bodies in which the State has a controlling interest" as found in the Act must be taken to mean:

'the members of the management or decision making body of:

(i) all organisations or bodies established by Statute;

(ii) all businesses or companies controlled by or on behalf of the State'.

249. Further for the purpose of determining control by or on behalf of the State a business or company shall be taken to be controlled by the State if the State exercises or is entitled to exercise control directly or indirectly over its affairs; if the State is entitled to appoint a majority of the directors of the Board of Directors or holds at least fifty percent of the capital of that body.

250. This interpretation to my mind is in accord with the purpose and intention of the legislation as expressed by the Constitution and the Act, that is, to preserve and promote the integrity of persons exercising executive or legislative functions on behalf of the State.

251. It may very well be that given the number of organisations the members of which are brought or are liable to be brought under the purview of the Act by these words Parliament may wish to consider whether the intention of Parliament was in fact to include the members of the Board of bodies who, although exercising functions on behalf of the executive, by virtue of their functions and duties as established by the relevant statutes are not in positions which are amenable to the type of corruption the Act seeks to prevent. This however is not a matter for the Court but rather for Parliament.

Dated this 15th day of October, 2007.

……..
Judith A. D. Jones
Judge