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

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. SKBHCV2020/0145
(Formerly Claim No. SKBHCV2015/0011)

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

And in the Matter of an intended Application for Declaratory, Injunctive and Other Relief pursuant to Section 96 of the Constitution of St. Christopher and Nevis

And in the matter of an application for leave to apply for judicial review of the decision of the Constituency Boundaries Commission made on 16th January 2015 to submit a report to the Governor General pursuant to section 50 of the Constitution

BETWEEN:

1) HON. MARK BRANTLEY (in his personal capacity and as a representative of the Concerned Citizens Movement)
2) DR. HON. TIMOTHY HARRIS (in his personal capacity and as representative of the Peoples Labour Party)
3) HON. SAM CONDOR (in his personal capacity and as representative of the Peoples Labour Party)
4) HON. SHAWN RICHARDS (in his personal capacity and as representative of the People's Action Movement)

Claimants

AND

1) CONSTITUENCY BOUNDARIES COMMISSION
(being Mr. R.A. Peter Jenkins, Hon. Asim Martin, Hon. Marcella Liburd, Hon. Vance Amory, and Hon. Vincent Byron)

2) THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS
(and as Representative of His Excellency the Governor General)

Respondents

1) DR. KELVIN DALY
2) JANICE WILLIAMS

Interested Parties

Before: **The Hon. Mr. Justice Trevor M. Ward QC**

Appearances:-

,
Mr. Christopher Hamel-Smith SC and Mr. Douglas L. Mendes SC instructed by Ms. Talibah Byron for the Claimants.
Mr. Eamon Courtenay SC, Ms. Iliana Smith and Mr. Jerome Rajcoomar instructed by Mrs. Sherry-Ann Liburd-Charles for the First Respondent.
Mr. Justin Simon QC and Mrs. Simone Bullen-Thompson, Solicitor General, for the Second Respondent.
Dr. David Dorsett instructed by Mrs. Angela Cozier for the Interested Parties

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2020: November, 19, 20;
2021: March, 31.
Written submissions received:
December 04, 09 & 18

JUDGMENT

WARD, J.:

Introduction

[1] The Constituency Boundaries Commission (the Commission) is a body established by section 49 of the Constitution of the Federation of Saint Christopher and Nevis. Its mandate is to review the number and boundaries of the constituencies into which Saint Christopher and Nevis is divided and submit a Report to the Governor-General. This claim seeks to quash the 2015 Report of the Commission which proposed changes to the boundaries of a number of Constituencies in both St. Kitts and Nevis.

Background

[2] This is the second successive occasion on which the Commission's Report has been challenged in Court. Its Report of 5th September, 2013 was quashed by the High Court on grounds of inadequate

consultation. A summary of the background to the present proceedings will help to set the present claim in context.

[3] On 1 August 2012, the Commission was duly constituted. Mr. Asim Martin and Mrs. Marcella Liburd were appointed on the advice of the then Prime Minister. Mr. Vance Amory and Mr. Vincent Byron were appointed on the advice of the then Leader of the Opposition. Mr. Peter Jenkins was appointed Chairman.

[4] The Commission's first meeting was convened on 6th August 2012. On 6th September, 2013, it submitted its first report to the Governor General. The claimants, who were all members of the then opposition, successfully mounted a court challenge which resulted in that report being quashed on the basis that the Commission had failed to engage in adequate consultation. However, the Court rejected the claimant's contention that Mr. Jenkins was tainted with apparent bias because of certain financial dealings he had with the Government.

[5] On 27th August, 2014 the Commission met and, by majority decision, determined that it would proceed with the task of producing a second report. On or about 5th September, 2014 the claimants in the action relating to the Commission's first report appealed the trial judge's decision that there was no apparent bias on the part of the Chairman of the Commission. At the Commission's next meeting on 11th September, 2014, Mr. Byron submitted to the Commission that it should suspend its work in light of the appeal filed on 5th September. The majority took the view that there was no impediment to the Commission proceeding since the Court had imposed no stay on its work. At a subsequent meeting of the Commission on 23rd September, 2014, the Commission, by majority vote, decided to cross-appeal the trial judge's finding of inadequate consultation.

[6] Between 27th September and 10th October, 2014 the Chairman solicited and received proposals for boundary changes from the Commission's members. A copy of the 2011 Census Report was made available to members.

[7] On 14th October, 2014, the Commission, by majority vote, adopted the recommendations of members Liburd and Martin for changes to be made to certain constituency boundaries. Mr. Byron voted against, while Mr. Amory was absent.

[8] On 20th October, 2014 the Commission initiated consultations by writing to the 2nd, 3rd and 4th claimants soliciting their views on the recommendations adopted by the Commission and stipulated a deadline of 11th November, 2014 for receipt of responses. This deadline was extended to 20th November, 2020 following representations.

[9] On 14th November, 2014 Dr. Harris wrote to the Chairman stating that he needed Enumeration District Data and/or maps that showed the boundaries being proposed by the Commission and complained that the limited extension of the deadline was unrealistic. A letter to similar effect was sent to the Commission by the Chairman of the Concerned Citizens Movement (CCM) Party on 17th November, 2014.

[10] On 2nd December, 2014, the Commission met to consider proposals received from consultees. On this occasion it decided on its recommendations relating to the island of St. Kitts. On 15th December, 2014, it met again to consider proposals relating to the island of Nevis and decided on its recommendations in relation thereto. At the end of the meeting, the Chairman undertook to compile the report, based on the Commission's recommendations, and to reconvene when that task had been completed.

[11] On 13th January, 2015, The Commission was reconvened. By majority decision a motion that 'the descriptions and maps of the constituencies be accepted as consistent with the Census report and the Constitutional requirement' was carried.

[12] On 16th January, 2015, at about 2 pm, the Commission met to consider a draft report which was then tabled. There was division as to whether to approve the report or not. Mr. Byron and Mr. Amory raised issues and queried the report. In particular, Mr. Byron requested an opportunity to properly review the proposed report before any decision was made to approve it. This request met with objection from Members Liburd and Martin and he was not allowed to do so. In the end, the majority of the Commission signed the draft report; the minority refused to sign. The meeting ended at 3:45 p.m. The Chairman immediately took the signed report to the Governor General. At trial, he testified that he had no prior appointment with the Governor General but simply turned up and delivered it within minutes of it being signed.

[13] Thereafter, the Clerk of the National Assembly, acting on the instructions of the Speaker, issued a letter summoning an emergency meeting of the National Assembly for 4:15 pm. By the time

members of the National Assembly had gathered at approximately 4:35 pm, a Resolution and a draft proclamation to give effect to the Commission's report were distributed and tabled. After a rancorous debate, the National Assembly passed the Resolution at about 6:10 pm.

[14] The Attorney General, on instructions of the Prime Minister,[1] promptly took the draft proclamation to the Governor-General, who at about 6:20 p.m., signed both it and a proclamation dissolving Parliament. The proclamation was swiftly gazetted . The Attorney General received a printed copy of an Extraordinary Gazette containing the proclamation at 6:35 p.m. while at Government House. If lawful, this meant that the proclamation would have come into force on the dissolution of Parliament and the new boundaries would have taken effect at the next elections.

[15] At some time between 6:30 pm and 6:50 pm the Prime Minister announced in a live broadcast that the impugned proclamation had been gazetted and that he had advised the Governor-General to dissolve the Parliament with effect from that day. His announcement, and the texts of both the impugned proclamation and a proclamation dissolving the Parliament, were placed on the government website. The Prime Minister's press secretary sent copies of the proclamations to the media.

Legal Proceedings

[16] That very evening, the claimants applied to the High Court for an interim injunction prohibiting the Governor-General from making the impugned proclamation until the determination of their substantive legal challenge or further order of the court. After representations were made, the court ordered that the application should proceed ex parte. At 7:38 pm, Carter J granted the ex parte injunction, which was served at the home of the Attorney General at about 8:40 pm. He read it later that evening.

[17] The claimants produced affidavit evidence that members of the public were not able to obtain printed copies of the Gazette from the Government Information Service, the official provider of the Gazette, until 20 January 2015 and that as at 3:06 p.m. on19th January, 2015 the official Gazette had not been posted on the Government's website.

[18] On 19 January 2015, the claimants filed proceedings seeking leave to apply for judicial review, in which they sought relief, including an order quashing the Commission's report and an injunction

[1] Cross-examination of Mr. Jason Hamilton on 19th November, 2020

prohibiting the Governor-General from making the impugned proclamation. On the same day, the Attorney General applied to discharge the interim injunction on the basis that the proclamation had already been made by the time Carter J granted the ex parte injunction.

[19] Carter J granted the Attorney-General's application and discharged the interim injunction in a ruling dated 27 January 2015. She held that the proclamation did not rely for its validity on being in the public domain so long as it became so available within a reasonable time after it was included in the Gazette. She held that the interim injunction came too late because the proclamation had been made and published by its appearance in the Gazette by 6:35 pm on 16 January 2015, before the interim injunction was served on the Attorney General.

[20] The claimants appealed. On 5 February 2015, the Court of Appeal refused the appeal, agreeing with Carter J that the proclamation had already been made by the time she made the order and that the injunction therefore fell to be discharged. The Court of Appeal granted leave to appeal to the Privy Council. The Privy Council allowed the appeal, holding that the proclamation had been made at the earliest on 20th January, 2015.

[21] By amended Fixed Date Claim Form and Originating Motion filed on 12 August, 2020, the Claimants seek the following substantive relief:

a. A declaration that the Decision of the Constituency Boundaries Commission (the "Boundaries Commission") made on 16 January 2015 (the "Impugned Boundaries Decision") to submit a Report to the Governor General pursuant to section 50 of the Constitution (the "Impugned Boundaries Report") is ultra vires, null and void and of no effect;

b. A declaration that the Impugned Boundaries Proclamation by the Governor General signed by him on the 16 January 2015 (the "Impugned Boundaries Proclamation") is invalid, null and void and of no effect;

c. An order of certiorari to quash:

i) The Impugned Boundaries Decision;

ii) The Impugned Boundaries Report;

iii) The Impugned Boundaries Proclamation.

The claimants' grounds

[22] The Claimants submit that the impugned boundaries decision and/or the impugned Boundaries Report are ultra vires for one or more of the following reasons:

a.The fair-minded and informed observer would consider that there was a real possibility that the Boundaries Commission was biased; and/or

b.The Boundaries Commission failed to have any, or any sufficient, regard to its constitutional mandate;

c.The Boundaries Commission acted irrationally and/or contrary to its constitutional mandate, and therefore unlawfully:

i) By failing to take any account of the Enumeration District Data (the "EDD"), which EDD shows where inhabitants are located and in what numbers; and/or

ii) By failing to have regard (or any proper regard) to the locations where the boundaries which it proposed to establish would fall; and/or

iii) By failing to adopt other available options (which were before it) that would have better achieved its constitutional mandate;

d. The Boundaries Commission failed to take into account the following relevant considerations:

i)The numbers and location of inhabitants, which was readily available in the form of the EDD; and/or

ii)The nature of the instructions given to the person(s) who drew or produced the maps incorporated into the impugned Boundaries Report; and/or

iii)The existence of two other available options (which were before it) either of which would have better achieved its constitutional mandate;

e.The Boundaries Commission took into account one or more of the following irrelevant considerations:

i)The perceived need to avoid splitting communities; and/or

ii) How the changes would impact adversely on the electoral chances of those who were opposed to the then Government; and/or

f.The Boundaries Commission failed in its duty to carry out proper consultations.

[23] The claimants further contend that the impugned Boundaries Proclamation is invalid, null and void and of no effect for one or more of the following reasons:

a.The impugned Boundaries Proclamation was published in the Gazette, and therefore made, on 20 January 2015 in violation of the Court Order and injunction, granted and served on 16 January 2015, which prohibited the Attorney General (as the representative of the Governor General) from making such a proclamation; and/or

b. In publishing, and therefore making, the impugned Boundaries Proclamation on 20 January 2015, the Governor General (acting by the Attorney General) failed to take into account a relevant consideration, namely the existence and/or validity of the Court Order and injunction, granted and served on 16 January 2015, which prohibited the Attorney General (as the representative of the Governor General) from making such a proclamation in terms of any draft proclamation submitted under section 50(6) of the Constitution; and/or

c.The Governor General (acting through the Attorney General) published, and therefore made, the impugned Boundaries Proclamation on 20 January 2015 in defiance of the Court Order and injunction, granted and served on 16 January 2015, which prohibited the Attorney General (as the representative of the Governor General) from making such a proclamation in an attempt to render it ineffective, and accordingly for an improper purpose;

d.The Prime Minister and/or the Chairman of the Boundaries Commission and/or members of the National Assembly and/or the Speaker colluded to convene the

Assembly at very short notice or no notice at all (contrary to the Standing Orders and established practice) after the Boundaries Commission signed off on the impugned Boundaries Report, to debate and pass the resolution approving a draft proclamation containing the boundary changes, and to cause the Governor General to seek to make the impugned Boundaries Proclamation in such a short period of time as to deprive the Claimants of their Constitutional rights to apply to the High Court to judicially review the impugned boundaries decisions and Report; and/or

e.The impugned boundaries proclamation was made and published for the improper purpose of seeking to deprive the Claimants of the right to apply to the Court to challenge the impugned boundaries decision and the Report.

[24] The legal framework governing the series of actions and events described above will be examined next.

The Legal Framework

[25] The Constituency Boundaries Commission is a body established by section 49 of the Constitution of the Federation of Saint Christopher and Nevis. Its membership comprises two persons appointed on the advice of the Prime Minister; two appointed on the advice of the Leader of the Opposition and a Chairman appointed on the advice of the Prime Minister, after the Governor General consults with the Leader of the Opposition, and such other persons as he (the Governor General) thinks fit.

[26] By section 50, the Commission is charged with the following mandate:

(1) The Constituency Boundaries Commission (hereinafter in this section referred to as the Commission) shall, in accordance with the provisions of this section, review the number and boundaries of the constituencies into which Saint Christopher and Nevis is divided and submit to the Governor-General reports; […]

(2) ...

(3) As soon as may be after the Commission has submitted a report under subsection (1)(a), the Prime Minister shall lay before the National Assembly for its approval the draft of a proclamation by the Governor-General for giving effect, whether with or without

modifications, to the recommendations contained in the report, and that draft proclamation may make provision for any matters that appear to the Prime Minister to be incidental to or consequential upon the other provisions of the draft;

(4) […]

(5) […]

(6) If any draft proclamation laid before the National Assembly under subsection (3) or (5) is approved by a resolution of the Assembly, the Prime Minister shall submit it to the Governor-General who shall make a proclamation in terms of the draft; and that proclamation shall come into force upon the next dissolution of Parliament after it is made.

(7) The question of the validity of any proclamation by the Governor-General purporting to be made under subsection (6) and reciting that a draft thereof has been approved by resolution of the National Assembly shall not be enquired into in any court of law except upon the ground that the proclamation does not give effect to rule 1 in schedule 2.'

[27] In essence, section 50 dictates the procedural steps that must be taken when reviewing the number and boundaries of constituencies. It is only upon the completion of each of these steps that the proclamation is made. The new boundaries will then come into force on the next dissolution of Parliament after the proclamation is made.

[28] In its determination of constituency boundaries, the Commission must have regard to the rules set out in the second Schedule to the Constitution which govern the delimitation of constituencies. They provide:

"SCHEDULE 2

RULES FOR DELIMITATION OF CONSTITUENCIES

1. There shall be not less than eight constituencies in the island of Saint Christopher and not less than three constituencies in the island of Nevis and if the number of constituencies is increased beyond eleven, not less than one-third of their number shall be in the island of Nevis.
2. All constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable but the Commission may depart from this rule to such extent as it considers expedient to take account of the following factors, that is to say-
(a) the requirements of rule 1 and the differences in the density of the populations in the respective islands of Saint Christopher and Nevis;
(b) the need to ensure adequate representation of sparsely populated rural areas;

(c) the means of communication;
(d) geographical features; and
(e) existing administrative boundaries."

[29] Against the backdrop of the legal framework, I turn to a discussion of the various reliefs sought by the claimants and the grounds on which they seek to have the Report quashed. In summary, the claimants' challenge may be grouped under four broad themes: (I) apparent bias; (ii) failure to have regard to its Constitutional mandate (relevant vs irrelevant considerations); (iii) breach of injunction; and (iv) collusion for the improper purpose of denying the claimants access to the court.

Issue (i) - Apparent Bias

[30] The first basis on which the claimants rely is apparent bias. The claimants assert that a number of factors give rise to apparent bias on the part of the Chairman of the Commission. This issue had previously engaged the court in a previous challenge to the Commission's 2013 Report. In those proceedings it was said that the Chairman was a member and activist of the St. Kitts Nevis Labour Party and was a member of its Executive; that he had financial interests in Jenkins Funeral Home and Jenkins Construction, which had contracts with the Government; that he was employed by the Social Security Board as project manager for two government projects; that he was chairman of ZBC, a government owned radio and television station; and that he had a financial interest in a commercial entity which was set to develop a 144 condominium project on land that was acquired, or was to be acquired from the Government and that financing for this project was being sought from the State owned bank[2].

[31] The learned judge, Ramdhani, J rejected all of these contentions[3]. He held:

> *"[57] I am unable to agree that the contractual work which Mr. Jenkins is involved in with the government can be viewed in the same manner of those cases where the decision makers had a financial interest in the outcome of the decision. In fact those are cases of actual bias. Here there is no evidence to find or even suspect that the contracts which Mr. Jenkins has had and have with the government are anything*

[2] SKBHCV2013/0241 Shawn Richards et al v Constituencies Boundaries Commission et al, at para 35
[3] Ibid, paras 51-59

other than bona fide commercial transactions conducted at arms length without any form of impropriety. In these circumstances I see no analogy with those cases of direct financial connections. I have noted the un-contradicted evidence that Mr. Jenkins has on many occasions applied for and tendered for commercial contracts from the government and has failed. With all of this I am not able to find that these are 'financial connections' that the fair minded and informed observer can rely on to conclude that Mr. Jenkins consciously or unconsciously will act in a biased manner. I am not prepared to find as a principle that where a decision maker, properly appointed, has a commercial contract with a government, that should without more, be seen as that 'something more' in cases such as the present, giving rise to the possibility of bias."

[32] Notwithstanding this, the claimants contend that since then the Commission has produced a 2015 report, there are additional matters not considered by Ramdhani, J which fall for consideration in this case. The Commission accepts that this court is not precluded from considering the question of apparent bias in relation to the 2015 Report and concedes that this can include the financial connections argument since the hypothetical observer is obliged to consider all the facts and circumstances. They are right to so concede.

[33] The additional matters said to have since arisen are:

(i) the Chairman's historic voting patterns in always voting with the government appointees (and against the then opposition appointees). The claimants cite 10 occasions between 11 September, 2014 and 16 January, 2015 where the Chairman voted with the Government appointees on: whether the Commission should suspend its work in light of the appeal filed on 5 September 2014; whether the Commission should cross-appeal the judgement of Ramdhani J.; whether to adopt the recommendations of Ms. Liburd and Mr. Martin; whether to continue the process of consultation begun in 2013; whether to reject the PAM proposal, although the Chairman agreed it achieved greater equality of inhabitants; whether to proceed with the meeting of 15 December] without Premier Amory; whether to accept the description and maps of the constituencies; whether to adjourn the meeting until Friday 16 January 2015, or to extend until Tuesday 20 January 2015 so that Premier Amory could attend as otherwise he

would be off island on official Government business; whether amendments be made to the report at page 11 to reflect the fact that Premier Amory had requested to be present when Nevis was being discussed; and whether to allow Senator Byron the opportunity to leave with the report so that he could take the time to properly review the contents of the report which had just been produced to him;

(ii) the events of 16 January 2015, which show that there must have been some "backchannel communications and/or collusion" between the Chairman and the then Government which facilitated the hasty convening of an emergency sitting of the National Assembly and the putting into place of the necessary arrangements to have the proclamation printed in the Gazette which is consistent with the then Government having advance knowledge that the Commission's report was going to be approved by the Commission that afternoon; and

(iii) the discovery of the fact that on 13th August, 2013 an invoice was issued to the Office of the Attorney General which described the services rendered in the following terms:

"(a) review the Constituency and Boundaries [sic] Commission Report to determine if it conforms to the dictates of the Constitution of Saint Christopher and Nevis and general administrative law principles;

having completed the aforementioned to determine what corrective measures if any are need [sic] to have said report comply with the law;

the likelihood of the Impugned Boundaries Report withstanding the scrutiny of a court challenge and any potential pitfalls that the Government would be exposed to in attempting to have the impugned Boundaries Report tabled before the Assembly; and

the course of action to pursue going forward to present the said report before the National Assembly having transitioned the Impugned Boundaries Report from a preliminary status to completion."

[34] The allegation is that this invoice shows that the then Attorney General had sought and received advice on the draft (2013) report prepared by the Chairman prior to it being circulated to the other

members of the Commission. The suggestion seems to be that it must have been the Chairman who provided the Attorney General with the draft report.

[35] The claimants submit that these matters, taken together with the Chairman's financial dealings with the then Government, would lead the fair minded observer to conclude that there was a real possibility that the Chairman did not "approach his task with the independence of mind that was expected of him. But was simply there to do the Government's bidding.

1st Respondent's submissions

[36] The Commission submits that the Chairman has furnished explanations in respect of some of these matters. Accordingly, his explanations must form part of the relevant circumstances to be considered by the fair-minded and informed observer. They rely on The Chairman's evidence explaining some of his voting patterns; in particular, his assertion that the Opposition Members of the Commission had expressly declared that they were averse to changing the boundaries and had taken every step to prevent the Commission from fulfilling its constitutional mandate. It was submitted that his voting pattern was based on his desire to fulfil the Commission's constitutional mandate and to avoid what he perceived as an attempt by Opposition Members to place impediments in the way of the Commission.

[37] Counsel drew attention to the Chairman's evidence that he did vote to refuse to allow Member Byron to leave with the 2015 Report on 16th January 2015, because Member Byron had previously leaked confidential information to the public; had for 3 years placed impediments in the way of the Commission's work after declaring that he did not wish for changes to be made to the boundaries; and had been given the draft report at the Commission's previous meeting on 13th January, 2015. The Commission concedes that this latter assertion is incorrect since the report was not one of the items distributed at that meeting. The Chairman also testified that both in the case of the 2013 Report and in the instant case the Commission had agreed that no one would take the Report out of the meeting.

[38] As it relates to the allegation of collusion between the Chairman and the then Government, the Chairman denied that he was aware that Parliament would be dissolved on 16th January 2015 and further denied that he was aware of the events occurring after he personally delivered the 2015 Report to His Excellency the Governor General. Counsel for the Commission stressed that any call to dissolve Parliament was within the exclusive purview of the Prime Minister.

[39] As it relates to the invoice dated 13th August, 2013, the Chairman denied that he had either provided or instructed that the draft 2013 Report be provided to the then Attorney General. One possible explanation posited by the Chairman was that two officers from the Ministry of the Attorney General had been assigned to the Commission and that they had access to the draft 2013. He also testified that the recording secretary to the Commission would have assisted in the preparation of the report.

[40] It was submitted that on consideration of these explanations the fair-minded and informed observer would not conclude that he was biased.

Discussion and findings on apparent bias

[41] An allegation of apparent bias requires a court to interrogate whether there is some factor present that could prevent the decision maker from bringing an objective judgment to bear or which could distort his judgment. The test of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased: **Porter v Magill**[4]

[42] What are the characteristics of this notional fair-minded and informed observer? These are succinctly stated in **Gaston Browne v Constituencies Boundaries Commission**[5]:

> "The characteristics of the fair-minded and informed observer are now well understood: he must adopt a balanced approach and will be taken

[4] [2002] 2 WLR 37.

[5] ANUHCVAP2013/0, 028, citing with approval R v. Abdroikov [2007] 1 WLR 2679 2688 at para 15; Gilles v Secretary of State for Work and Pensions (Scotland) [2006] 1WLR 781, para17.

to be a reasonable member of the public, neither unduly complacent or naive nor unduly cynical or suspicious. Full knowledge of the material facts and fair-mindedness [are] also part of his attributes…The fair-minded observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

[43] The test for apparent bias must be approached in two stages. The first is fact finding: the court must ascertain all the circumstances bearing on the suggestion that the decision maker was biased. The second stage requires the court to ask itself whether those circumstances would lead a fair-minded and informed observer to conclude there was a real possibility that the decision maker was biased: **Vance Amory v Thomas Sharpe QC et al.**[6] The relevant circumstances are those apparent to the court upon investigation of the material before it and not just the facts known to the objectors or the hypothetical observer at the time of the decision: **National Assembly for Wales v Condron.**[7] They also include any explanations given by the decision maker. As Lord Phillips MR explained in **Re Medicaments and Related Classes of Goods (No. 2):**[8]

"86 The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."

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[6] HCVAP 2009/013
[7] [2006] EWCA Civ 1573 at para.50.
[8] [2001] 1 WLR 700

[44] In adjudicating on the question of apparent bias the court must assume the persona of the fair-minded and informed observer. In the words of Baptiste J.A. in **Vance Amoy:**

> "The fair-minded and informed observer is a legal construct upon whom remarkable qualities have been grafted, geared no doubt to insulate the administration of justice from the contaminants of unfairness and partiality. The court no doubt is the touchstone and carries the mantle of the fair-minded and informed observer."[9]

[45] With this mantle donned, it is for me to ascertain and assess all the circumstances bearing on the suggestion that the Chairman was biased, and to ask myself whether those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility of bias.

[46] The relevant circumstances grounding the allegation of apparent bias have been set out above. The question is whether the additional factors relied on by the claimants add "something more" which would cause the fair-minded and informed observer to conclude that there was a real possibility that the Chairman was biased. The Claimants invite me to answer this question affirmatively. I turn therefore to examine the matters relied on by the Claimants as establishing that "something more".

(a) The Chairman's voting pattern

[47] The Claimants assert that on almost every occasion that an issue was put to the vote, the Chairman voted with the government appointees. In applying the legal principles to this case, the fair-minded and informed observer would know of the composition of the Commission in accordance with Section 49 of the Constitution. With the exception of the Chairman, who cannot be a member of the National Assembly, its membership comprises political appointees. The Chairman was appointed without objection by anyone, including the 1st Claimant, Mr. Brantley, who was required to be, and had been, consulted during the appointment process. The fair-minded and informed observer in St. Kitts & Nevis with knowledge of the political culture will appreciate that such an arrangement is likely to give rise to tensions and that decisions taken might often be along party lines. They would thus appreciate that the method prescribed for appointing the Chairman was designed and intended to have an independent person holding the

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[9] At para. 12.

ring and thus he is presumed to be impartial. But the fair-minded and informed observer will also know that the proviso to section 49 of the Constitution provides that decisions of the Commission require the vote of the majority of all its members. In the event of political deadlock, it is inevitable that the Chairman will vote with one side or the other.

[48] Before bias can be ascribed to the Chairman therefore, the fair-minded and informed observer would be keen to know the reasons why he may have voted the way he did and would appreciate that a mere arithmetical approach to the number of occasions on which he voted with one side or the other would not necessarily tell the entire story.

[49] In this regard, by way of explanation for voting not to suspend meetings of the Commission pending the outcome of the appeal lodged by the claimants against Ramdhani, J's finding on the question of apparent bias, the Chairman stated that he was in receipt of legal advice that the lodging of an appeal did not operate as a stay and thus there was no impediment to the Commission continuing with the work which the Constitution mandated it to do. I fail to see how the fair-minded and informed observer would conclude that the Chairman was biased notwithstanding his explanation that his vote to proceed with the Commission's work was premised on legal advice.

[50] As it relates to his vote to cross-appeal Ramdahni, J's judgment, the Chairman explained that his decision was motivated by his thinking that a ruling from the Court of Appeal would provide useful guidance to the present and future Commissions[10]. This was communicated to all members of the Commission via letter dated 20 September, 2014 in which he proposed this course of action. The fair-minded and informed observer would understand the Chairman to be saying that he was seeking to have legal clarity and certainty on a vexed area of the law. The hypothetical observer in St. Kitts and Nevis would also consider that since the proposal to cross-appeal came from the Chairman himself, it would be highly unlikely that he would vote against a motion to that effect. In my view the fair-minded and informed observer would not consider that there was a real possibility of bias, notwithstanding the explanation advanced by the Chairman for voting to cross-appeal the judgment and especially where he proposed that course.

10 1st Affidavit of Peter Jenkins, para. 22.1, Trial Budle, Volume 8.

[51] As it relates to his vote in support of the proposals submitted by Mr. Martin and Mrs. Liburd, the Chairman explained that he supported them because they focused on maintaining the 8 constituencies for St, Kitts and the 3 in Nevis and in changing the number of inhabitants in each constituency to obtain as nearly equal inhabitants as possible while maintaining reasonable flexibility to allow for the provisions of Schedule 2, Rule 2 (a) -(e)[11]. This explanation suggests that the Chairman supported these proposals because he thought, rightly or wrongly, they were consistent with the Commission's constitutional mandate. While it is not for me to determine whether the explanation should be accepted, I cannot see that the fair-minded observer would consider that there was a real possibility of bias, notwithstanding the explanation advanced.

[52] As it relates to his vote in support of continuing the process of consultation, the Chairman explained that he thought it best to obtain the views and suggestions of the consultees on the proposals at an early stage of the process, and before the Commission considered the matters further. This approach, he said, was informed by the guidance derived from Ramdhani J's judgment. He therefore proposed that the Commission forward the draft proposals to the parties previously consulted. This was agreed by majority vote of the Commission. Notably, Mr.Byron abstained.[12] Would the fair-minded and informed observer conclude that there was a real possibility of bias because the Chairman voted in favour of a consultative process across the political spectrum? I think not.

[53] As it relates to the Chairman's vote to reject the People's Action Movement proposal, although the Chairman admitted that those proposals sought to deal with equality and appeared to have smaller variations from those proposed by the Commission, the Chairman posited two reasons for voting against them. First, because he said they were not supported by any data or basis for the figures advanced but were merely listed without more[13]. Secondly, because PAM's proposals required the splitting of a number of communities/villages in Constituencies. He considered this to be a relevant factor under Rule 2 and justified a departure from the rule that all constituencies shall contain as nearly equal numbers of inhabitants as appears to the Constituency Boundaries Commission to be reasonably practicable[14]. The fair-minded and informed observer would be

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11 Ibid at para. 29.

12 Ibid,para. 30.10-11

13 Ibid, para 40.7.1

14 Ibid, 40.7.2.

aware that even when a proposal from the Labour Party required the splitting of the Village of St. Paul, this too was rejected for the same reason[15].The question is not whether the Chairman's interpretation of Rule 2 is correct, provided that this explanation reflects his honestly held belief that the avoidance of splitting communities was a permissible consideration under Rule 2. If accepted by the fair-minded and informed observer, I am unable to find that in the face of this explanation they would nonetheless conclude that there was a real possibility of bias because of his vote on this issue, especially where he maintained this position even when the Labour Party proposed splitting St. Paul.

[54] As it relates to proceeding with the Commission's meeting of 15 December, 2014 in the absence of Mr. Amory, who had written to the Chairman advising of his unavailability due to prior commitments and seeking a postponement of the meeting, the Chairman relies upon the documented minutes of that meeting. In short, those minutes reflect that upon receipt of Mr. Amory's request to postpone the meeting, the Chairman circulated the request to all members of the Commission. No response had been received as at the evening of 14 December. According, the Chairman instructed the Recording Secretary to remind members of the scheduled meeting. The Chairman communicated this to Mr. Amory in a letter dated 18 December, 2014 in which he reminded him that at the meeting 2nd December, 2014 the agenda item included the review of the responses from the consultees in relation to both St. Kitts and Nevis. He reminded Mr. Amory that he had left the meeting after the St. Kitts responses had been reviewed. The Chairman explained that notwithstanding this, by majority vote, the Commission decided to adjourn the meeting to 8th December, in order to allow Mr. Amory the opportunity to be present when Nevis was discussed. Unforeseen circumstances led to that meeting having to be rescheduled to 15 December. The Chairman explained further that Mr. Byron did not object to the meeting. The fair-minded and informed observer would know that although Mr. Byron said that he found the decision to proceed "particularly unfortunate, disturbing and unfair," he does not say that he objected to proceeding in Mr. Amory's absence and it is not clear from his affidavit that he expressed these views to anyone at the meeting. The fair-minded and informed observer might conclude that Mr. Amory bears some responsibility for not being present when the responses in relation to Nevis were to be reviewed. In these circumstances, I am not persuaded that the fair-

15 Ibid, para. 40.8.3.

minded and informed observer would conclude that there was a real possibility that the Chairman was biased because he decided to proceed with the meeting of 15 December, 2014 in Mr. Amory's absence.

[55] As it relates to his vote to accept the description and maps of the constituencies, the Chairman explained that maps were prepared to reflect the final recommendations of the Commission for submission to the Governor General. These maps were to depict the final recommendations of the Commission and had been discussed and voted upon by the Commission. This process was adopted for the 2013 Boundaries Report without objection from any member of the Commission[16]. No doubt the fair-minded and informed observer would consider that although on a previous occasion there was no objection to a procedure used, in the face of objection it is expected that the objection would be considered on its merits and not dismissed on the basis that no objection was taken previously. In light of the explanation regarding the purpose of the maps and that they had been discussed by the Commission, it cannot be said that the fair-minded and informed observer would nonetheless consider that there was a real possibility that the Chairman was biased for voting to accept these maps and descriptions of constituencies.

[56] Regarding the Chairman's decision to proceed with the meeting on 16 January, 2015 instead of postponing it to 20th January to accommodate Mr. Amory who was scheduled to be overseas on official business, the Chairman offers the meagre explanation that, "the meeting [of 13 January] noted that the Commission would meet on January 16, 2015 at 1 p.m.[17]" The fair-minded and informed observer might well think that no satisfactory answer has been provided explaining why the meeting could not be or was not postponed to 20th January. The Chairman's position seems to be that the meeting was scheduled for that day and so it proceeded. The fair-minded and informed observer in considering this explanation might think that Mr. Amory's official commitment provided a sound basis for postponing the meeting. On the other hand, they would also consider that once there was a quorum, the meeting could properly proceed. It cannot be said that they would consider that there was a real possibility of bias on the part of the Chairman because he chose to align himself with members who wished to proceed, especially when it is considered that Mr. Amory had not attended a Commission meeting since 2nd December, 2014.

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16 Ibid,

17 Ibid, para. 48 and 53.3.

(b) Choice of Commission's lawyers

[57] Apart from citing the Chairman's voting patterns, the claimants contend that the selection of the Law Offices of Sylvester Anthony as the Commission's Attorneys is another factor that indicates apparent bias. In explaining the choice of the Law Offices of Sylvester Anthony, the Chairman's evidence was that they were chosen because of its known competence in the area of public and constitutional law and had in fact represented the Commission in the 2013 Boundaries Claim without objection from any member of the Commission or any political party. The Claimants have not suggested that the firm is not competent, experienced in public law matters and have not denied that they previously represented the Commission in the case involving the 2013 report without objection by anyone. It seems to me that the fair-minded observer would expect the Commission to select a law firm with precisely that type of expertise and experience. Accordingly, I do not think that the fair minded and informed observer, furnished with the Chairman's explanation, would nonetheless consider that there was a real possibility of bias.

(c)Attorney General's Statement on High Court Judgment

[58] The claimants further contend that the Attorney General's statement in the National Assembly that the Commission was in the process of reviewing the judgment of Ramdhani, J gives rise to the inference that there had been inappropriate contact between the Chairman and the Attorney General and that there had been meetings held by the Commission in the absence of the opposition appointees and to which the Government was privy. This in turn gives rise to apparent bias on the part of the Chairman.

[59] The Attorney General's statement was in the following terms[18]:

> "The report that was laid before this Honourable House that took the form of of a subsequent resolution and that was deemed to be null and void and of no effect. However Mr. Speaker there was no…ah…aspersion cast…cast… in relation to the Commission itself nor was there any… there was no reference to the Commission and

[18] See 1st affidavit of Shawn Richard, Vol. 1

the work of the Commission. And so Mr. Speaker the life of the Commission still exists…ah…the Commission still has its work to carry out its mandate...ah…before this house…ah…closes for the session. And so Mr. Speaker the Commission is currently reviewing the judgment…ah…in relation to the course of action going forward. The work of the Commission will continue Mr. Speaker."

[60] In response, the Chairman's evidence is that at the Commission's meeting of 27th August, 2014, he refuted the implication that there had been meetings held by the Commission in the absence of the opposition appointees and to which the Government was privy.[19] He confirmed that the August 27th meeting was the first since Ramdhani, J had given judgment. The minutes of this meeting confirm this. See "**RAPJ 3".** Though invited by Mr. Byron to respond publicly to the Attorney General's claim that the Commission had been reviewing the judgment, the Chairman explained that he did not consider it his responsibility to do so. Whereas the fair-minded and informed observer might think that a public statement from the Chairman would have put the matter to rest, I do not see how that would lead them to conclude that the failure to do so gives rise to a real possibility of bias on the part of the Chairman.

(d) Collusion with the government

[61] Regarding the allegation that the events of 16 January 2015 show that there must have been some "backchannel communications and/or collusion" between the Chairman and the then Government which facilitated the hasty convening of an emergency sitting of the National Assembly and the putting into place of the necessary arrangements to have the proclamation printed in the Gazette, the hypothetical observer would consider the Chairman's denial that he was aware that Parliament would be dissolved on 16th January 2015 and his further denial that he was aware of the events occurring after he personally delivered the 2015 Report to His Excellency the Governor General. In assessing his denial the fair-minded and informed observer would no doubt consider that there were two Government appointed parliamentarians sitting on the Commission who would have also known that the Report was scheduled to be finalised that day and would appreciate that this gives rise to other equally reasonable inferences that would tend to weaken the inference that the Chairman must have been party to the collusion with the

19 1st Affidavit of Peter Jenkins para18.4

Government as alleged. I do not consider that the fair minded and informed observer viewing matters in this way would nonetheless consider that there was a real possibility of bias on the part of the Chairman.

(e) Invoice for legal services

[62] Yet further, the claimants contend that the invoice for legal advice provided to the Attorney General dated 13 August, 2013 suggest backroom communications between the Chairman and the Attorney General. It was suggested to the Chairman in cross-examination that this invoice shows that the then Attorney General had sought and received advice on the draft (2013) report prepared by the Chairman prior to it being circulated to the other members of the Commission. The suggestion seems to be that it must have been the Chairman who provided the Attorney General with the draft report. Although the former Attorney General was cross-examined it was not suggested to him that the Chairman was the person who furnished him with the draft report.

[63] The Chairman denied that he had either provided or instructed that the draft 2013 Report be provided to the then Attorney General. One possible explanation posited by the Chairman was that two officers from the Ministry of the Attorney General had been assigned to the Commission and that they had access to the draft 2013. In his oral testimony, the former Attorney General confirmed that two officers from his chambers were assigned to the Commission. The Chairman testified that because he was not technically savvy, he had clerical assistance to actually produce the report. I am of the view that on consideration of these explanations, the fair-minded and informed observer will appreciate that other reasonable inferences may be drawn as to the source of any leak which may point away from the Chairman. In those circumstances, the hypothetical observer would not conclude that there was a real possibility of bias on the part of the Chairman.

[64] The Court is mindful that it has to consider the cumulative effect of the matters relied on as establishing bias as it is the appearance that these facts give rise to which matters: See **Vance Amory** at para 20. For the reasons outlined above, I am satisfied that neither individually nor cumulatively do the factors relied upon by the claimants lead the fair-minded and informed observer to conclude that there is a real possibility that the Chairman was biased. In the premises they add nothing more to the Complaint about the Chairman's financial connections with the then Government and which Ramdhani J, rejected.

Issue (ii) - Whether the Commission took into account irrelevant considerations and failed to take into account relevant considerations

[65] The claimants invite the court to find that the Commission acted irrationally and/or contrary to its constitutional mandate to ensure that each constituency contained as nearly equal number of inhabitants as far as reasonably practicable. They rely on the United States Supreme Court decision in **Kirkpatrick v Preisler**[20] for the proposition that "as nearly as practicable" standard requires "a good-faith effort to achieve precise mathematical equality" and only "limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown" is permissible.

[66] The claimant's complain that the Commission failed to meet this standard for a number of reasons. First, the Commission failed to take into account the Enumeration District Data derived from the 2011 census, which shows where inhabitants are located and in what numbers. This data, they say, represents the best source of information that would allow the Commission to achieve its constitutional mandate that all constituencies contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable.

[67] Mr. Byron cogently sets out in his third affidavit the nature and value of Enumeration District Data and the reasons why the claimants say this data was of critical relevance to the work of the Commission:

> "Enumeration District Data is the base data collected by the enumerators census workers who go from house to house) when a census is conducted. As part of the Census exercise, each enumerator covers and collects the relevant data for a clearly defined geographical area, known as an Enumeration District, which is delineated on a map.
>
> This Enumeration District Data collected by the enumerators (showing the number of persons in each defined Enumeration District) can be then aggregated for larger geographical areas. For example, the ED data for a number of individual Enumeration Districts (each such individual Enumeration District being a clearly defined geographical area delineated on a map) can be aggregated to provide the population data for the town

[20] 394 US 596

of Basseterre. Again, by way of further example, the ED data for a number of individual Enumeration Districts can be aggregated to provide the population data for the various parishes. And finally, at the highest level, the ED data for all of the individual Enumeration Districts is aggregated to provide the population data for St. Kitts and Nevis as a whole[21]."

[68] Mr. Byron supports this by reference to the St. Christopher/Nevis section of the 1980-81 Population Census of the Commonwealth Caribbean which illustrates the different levels of aggregation of the Enumeration District Data to provide the population data for the whole of St. Christopher and Nevis, then for the town of Basseterre and then for the individual Enumeration Districts within Basseterre. The Enumeration District Data collated in the 2011 Census would be the updated version of the 1980-81 data and would furnish the information the Commission required to make recommendations that would achieve as nearly equal numbers of inhabitants in each constituency.

[69] Mr. Byron's evidence is that the Commission steadfastly refused to use this data despite his repeated urgings and requests from the political parties that were consulted during the process. Instead, it relied on the summary data for the 2011Census to inform its recommendations to alter some constituency boundaries.

[70] To illustrate the deficiency resulting from the Commission's dependence on the census summary data, to the complete exclusion of the Enumeration District Data, Mr. Byron examines the 2015 Report in which certain named "communities" and "groupings of communities" were shifted to form part of another. The complaint is that the named communities and groupings of communities do not identify defined geographical areas whose boundaries can be ascertained with any degree of precision or certainty. It is said that in many instances one community "shades into another adjoining community" and there are no maps showing the boundaries of those communities, producing confusion as to whether particular areas on the ground are to be considered as being within or outside one of these communities.

[71] According to Mr. Byron, this conundrum might have been resolved by using the enumeration district data which would have ensured that each such listed community (or grouping of

21 Third affidavit of Vincent Byron dated 8th November, 2019. Paras 13 &14,.

communities) was really a collection of individual enumeration districts, each of which would be a clearly defined geographical area delineated on a map and identifying the specific individual enumeration districts that comprise the particular listed community or grouping of communities.

[72] It is the claimants submission that by failing to take account of the enumeration district data, the Commission deprived itself of critical data which would have allowed it to identify the specific geographical areas comprising these communities and the boundaries between each such listed communities and grouping of communities and to produce maps showing the location of Constituency boundaries that would accurately or reliably result in the populations of these listed communities and groupings of communities being located within a particular Constituency as opposed to another adjoining Constituency.

[73] The claimants further submit that the Commission failed to take into account the nature of the instructions given to the person(s) who drew or produced the maps incorporated into the impugned Boundaries Report; and/or the existence of two other available options (which were before it) either of which would have better achieved its constitutional mandate.

[74] The claimants illustrate the direct relevance of the enumeration district data to the work of the Commission and its mandate to attain near equality of inhabitants in each constituency using the constituencies of St. Christopher No.2 and 3 as examples. In its Report, the Commission did not recommend any change to the boundaries of St, Christopher No. 2. Thus with 4549 inhabitants it would be 4% above the mean. However, the Commission recommended that St. Christopher No. 3 should be decreased from 4, 491 inhabitants (3.3% above the mean) to 3, 675 inhabitants which would be 16% below the mean. Using the enumeration district data would have given the Commission the option to move Enumeration Districts No. 71091, comprising 161 inhabitants and Enumeration District No. 71092, comprising 107 inhabitants from St. Christopher No. 2, to St. Christopher No. 3. With a total of 268 inhabitants moved from St. Christopher No. 2 into St. Christopher No. 3, St. Christopher No.2 would have 4,281 inhabitants or 2％ below the mean instead of the Commission's recommendation of 4 % above the mean. St. Christopher No. 3 would have 3, 943 inhabitants which would place it at 9% below the mean instead of the Commission's recommendation of 16% below the mean. The claimants do not suggest that this is the best or only option; their point is that it illustrates how use of the enumeration district data

from the 2011 Census would have allowed the Commission and consultees to develop other potentially superior options in relation to boundary changes that would more closely achieve its constitutional mandate. The claimants submitted that PAM's proposal was one such superior option because, on analysis of its recommended deviations, it would have produced a maximum deviation of 9.6% and an average deviation of 4.51%.

The Commission's evidence

[75] The evidence adduced by the Chairman on affidavit and in his oral evidence reveals that a number of factors informed the Commission's attitude towards the use and disclosure of the Enumeration District Data. First, the Commission took the view that such data was not necessary and had not been considered by the Commission in formulating its draft proposals or final recommendations to the Governor-General in 2013[22].

[76] Secondly, at a meeting of the Commission held on 2nd July, 2013, the Head Statistician, Mrs. Beverly Harris, indicated that the data in relation to the enumeration data communities is not published because such communities are so small that it is possible to identify individuals and individual households from the data and pinpoint party affiliations.

[77] Thirdly, the Commission was advised that the use of such data would contravene the provisions of the Statistics Act, Cap 23:31 which were construed as prohibiting the use or publication of the enumeration data even to the Commission.[23]

[78] Fourthly, in relation to the failure to use maps, the Chairman explained that no maps were used to determine the number of inhabitants for each constituency. The census data was used because this was considered adequate. Maps were only prepared after the final recommendations to show the new boundaries for submission to the Governor-General[24]. These were prepared by Mrs. Harris who, as head of the Statistical Department and head of the Census, was regarded as more than capable of producing the maps which were based on the census data and the number of

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22 1st Affidavit of Peter Jenkins, para. 34.Vol. 8, p. 21 and 2nd Affidavit of Peter Jenkins, paras.18.2 & 21.11 -21.23, Vol. 8, p. 47.

23 Ibid, at paras 40.3 - 40.6.

24 2nd affidavit of Peter Jenkins at para 18.3.

inhabitants agreed for each Constituency by the Commission. She had provided the same services for the 2013 Boundaries Report without objection by any member of the Commission[25].

Discussion and findings

[79] The issue at hand as it relates to the enumeration district data is whether the Commission failed to take into account a relevant consideration, having regard to their mandate under Rule 2, Schedule 2 of the Constitution. It is settled that where a decision-maker has failed to take account of relevant considerations or has taken into account irrelevant considerations then the decision will be quashed.

[80] In the 7th Edition of De Smith's Judicial Review, the learned authors state the principle thus:

> "When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard must be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully betake into account. If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised."

[81] The learned authors of **Garner's Administrative Law** describe the approach to be taken by the Court when faced with reviewing a decision on this ground. They state:

> "The courts look to the governing statute to see what factors or matters are required to be taken into account in reaching a decision as to the exercise of power; and conversely, what factors or matters should not be taken into account."[26]"

[82] Such factors or matters may be expressly stated or arise by necessary implication. As Lord Greene explained in **Associated Picture Houses Ltd v Wednesbury Corporation**[27] at page 228:

> "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the

25 Ibid, para. 57.2

26 Garner, Jones and Thompson, Garner's Administrative Law (8th edn), 1996, London: Butterworths, p.223.

27 [1948] 1 KB 223

discretion it must have regard to those matters."

[83] Thus, the question here is whether section 50 of the Constitution and/or Schedule 2 to the Constitution expressly or implicitly require the Commission to have regard to enumeration district data.

[84] It is clear that neither section 50 of the Constitution nor Schedule 2 does so expressly. Thus the next question to be posed is whether a requirement to have regard to enumeration district data is imposed by necessary implication?

[85] A correct statement of the principle to be applied seems to be that "it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself would have taken into account if they had to make the decision….In certain circumstances, notwithstanding the silence of the statute, there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them would not be in accordance with the intention of the Act." (Emphasis added). See **In re Findlay.**[28]

[86] It seems to me, this passage articulates the test to be applied in the case at bar: whether the enumeration district data is so obviously material to the Commission's mandate that anything short of direct consideration of them would not be in accordance with the intention of the Constitution and the mandate given to the Commission thereby. That mandate is set out in Rule 2, Schedule 2 of the Constitution. It requires the Commission, so far as reasonably practicable, to attain near equality of inhabitants in each constituency.

[87] In view of the evidence regarding the nature and utility of the enumeration district data, it is difficult to understand how they could be viewed as anything but obviously material to the Commission's mandate to achieve near equality of inhabitants in each constituency. As a tool, it has considerable advantage and is of greater utility than the summary census data actually relied on by the Commission. In seeking to realign constituencies, the enumeration district data would

28 [1985] 1 AC 318.

have been the optimal unit of reference that would have enabled the Commission to identify specific geographical areas comprising the communities it sought to shift and which would be transparently delineated on a map. These enumeration districts could then be shifted across boundaries. In this way, as cogently demonstrated in the examples given by Mr. Byron and Mr. Richards in their respective affidavits, the Commission would have been able to make superior recommendations that resulted in the number of inhabitants in each constituency being closer to the mean as required by the Constitution.

[88] In its written submissions dated 4th December, 2020, the Commission properly concedes that this is so:

> "The CBC has carefully reviewed [123] - [135] of the Claimant's submissions dated 13th November, 2020 and does accept that EDD, if available, would enable the CBC to shift enumeration districts across boundaries rather thereby enabling the CBC to make recommendations which are closer to the mean number of inhabitants in any given constituency. The EDD is therefore of better use to the CBC than the compiled census data which was used by the Commission."[29] In this regard, it is arguable that if the EDD is available and can enable the CBC to make decisions so that boundaries are as nearly as to the mean number of inhabitants as possible, the CBC would not be fulfilling its constitutional mandate by using data which only permits higher deviations from the mean."

[89] Since the Commission's concession that the enumeration district data is of greater utility contains the caveat "if available", it is necessary to explore the reasons given by the Commission for not considering the enumeration district data at all.

[90] One of the reasons advanced by the Commission for not having regard to the enumeration district data is that it was not available to the Commission because it was advised that the use of such data would contravene the provisions of the Statistics Act, Cap 23:31. Counsel for the Commission drew the Court's attention to sections 7, 16, 17(1)(b) including the definition of

29 1st Respondent's written submissions dated 4th December, 202 at para. 44.

"publish" in section 16(3) of the Statistics Act for the purposes of demonstrating that there is some merit to the reluctance of public servants to disclose unpublished Enumeration District Data to the Commission. In view of this, I am invited to find that if the Enumeration District Data was not readily available to the Commission for the preparation of the 2015 Report, then the decision to use the census data would be perfectly lawful.

[91] In response, the claimants cite Mr. Byron's evidence where he denies ever having been made aware of any advice that use of the enumeration district data would contravene the Statistics Act and asserting that there is no record of this in the Commission's minutes[30]. Counsel for the claimants further submitted that the suggestion that the Statistics Act somehow prevented the use or publication of the enumeration district data is false and misleading. Sections 7, 16, 17(1)(b) and 16(3) of the Statistics Act have no bearing on whether the enumeration district data should have been made available to the Commission. It is said that there is nothing in the Statistics Act*,* Cap 23:31 which prevents or prohibits the use or publication of the Enumeration District Data. In fact, the enumeration data collected in 2011 was presented by the Department of Statistics in Tables 33 and 34 of the Population and Housing Census 2011 summary Table and Charts. These tables 33 and 34 were published in the Gazette Vol. CVIV No. 38 dated 30 July 2019.

[92] Counsel for the claimants further submitted that the Commission had no interest in publishing the enumeration district data or in having it published by anyone else; it's only interest was in itself accessing and using the data to carry out its constitutional mandate of achieving constituencies that contain as nearly equal numbers of inhabitants as appears to be reasonably practicable. It was submitted that whether or not the enumeration district data was published does not affect the fact that it is collected and used by the staff of the Ministry of Sustainable Development for planning and other purposes; forms part of the official records of the Government of St. Kitts and Nevis; and should be available to be used by the Commission in carrying out its constitutional mandate.

[93] In view of the competing contentions, the Statistics Act falls to be construed by the Court.

[94] Section 7 provides:

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[30] See 3rd Affidavit of Vincent Byron – Vol. 9, Tab 66, page 1225 at para. 58.

"7. (1) The Department shall cause the statistics and other particulars collected pursuant to this Act to be compiled and tabulated, and shall cause such statistics and particulars, or abstracts thereof, or extracts therefrom, with or without observations thereon, to be published as the Minister shall either generally or specially direct.

(2) No report, summary of statistics or other publication under this Act shall, without the previous consent in writing of the person or of the owner for the time being of the undertaking in relation to which a return or answer was made or given for the purposes of this Act, contain any of the particulars comprised in any individual return so arranged as to enable any person to identify any particulars so published as being particulars relating to any individual person or business."

[95] Section 7 of the Statistics Act is concerned with the compilation, tabulation and publication of statistics and imposes certain obligations on the Statistics Division of the Planning Unit to cause the collected statistics to be compiled and tabulated and these statistics may be published as the Minister may direct. Section 7(2) forbids the publication of particulars from any individual return in a manner that allows a particular individual to be identified.

[96] Turning to section 16, it provides:

"Restriction on publication of returns.

16. (1) No individual return, and no part of an individual return, made, and no answer to any question, put, for the purposes of this Act or of any regulation, shall be published:

Provided that the above prohibition shall not apply—

(a) in a case where the consent in writing of the person to whom, or of the owner for the time being of the property, business or undertaking to which such return or answer relates has been previously obtained; or

(b) in a case of and for the purposes of a prosecution under this Act or

under any regulation."

(2) No information derived from any Government, parochial, municipal or other public records or documents relating to any individual, firm, corporation, or association shall be published in such form as to enable any person to identify such information as relating to any individual, firm, corporation or association, except—

(a) in the case of information relating to an individual or a firm, with the consent in writing of such individual or of all the partners of such firm, as

the case may be; and

(b) in the case of information relating to a corporation or an unincorporated association, after the passing by the directors or other governing body (by whatever name known) of such corporation or unincorporated association, or if there be no such governing body, by the members of such corporation or unincorporated association, of a resolution approving of the publication of such information:

Provided that the above prohibition shall not apply in a case of and for the purposes of a prosecution under this Act or under any regulation.

(3) For the purpose of this section, the term "publish" includes to communicate in any manner, orally or in writing or to reveal to a court of law or to any other tribunal or to any person, other than a person employed in the Department

[97] Section 16(1) thus restricts the publication of individual returns without the consent in writing of the person or entity to whom the return relates or for the purpose of a prosecution under the Act or any regulation. Section 16(2) restricts the publication of information which is published in such form as to enable any person to identify such information as relating to any individual. Section 16(3) provides the definition of "publish" to include any communication to anyone other than someone employed in the Department.

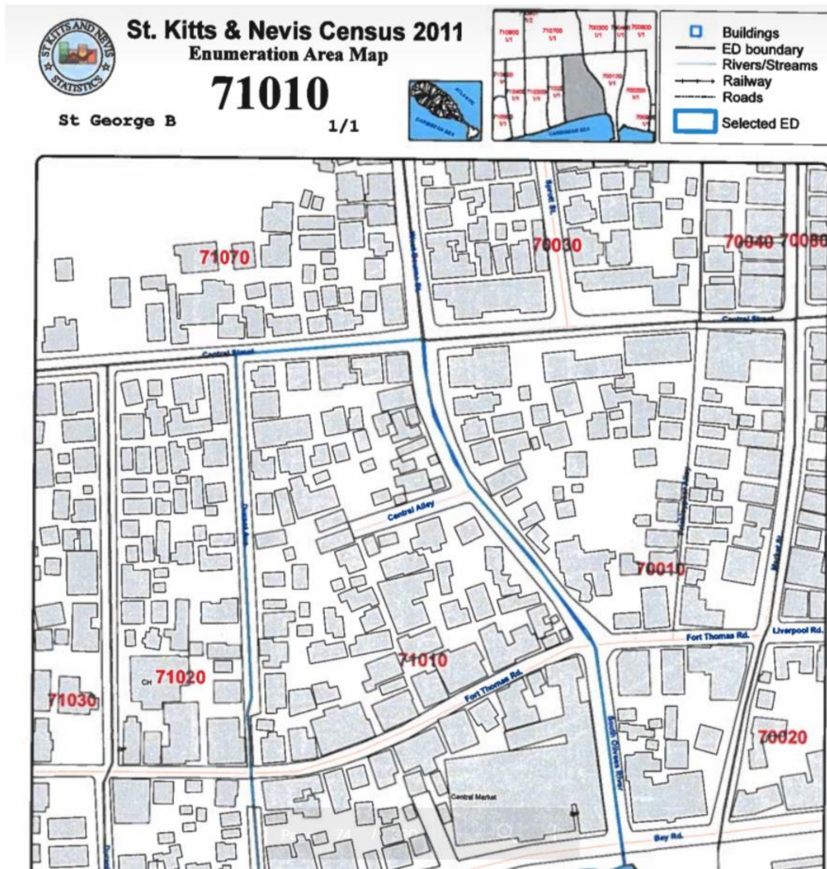
[98] Section 17(1)(b) prescribes the offense and penalty for disclosing or publishing such information without lawful authority.

[99] In order to determine whether the disclosure of the Enumeration District Data to the Commission would run afoul of these provisions, it is useful to have an appreciation of what the data actually looks like. An example of the 2011 enumeration district data for St. George B by population and sex is contained at exhibit "**VB/41**":

List of Enumeration Districts with Population by Sex

ED	Sex		Total
	Male	Female	
71010	87	83	**170**
71020	75	71	**146**
71030	48	51	**99**
71040	36	65	**101**
71050	37	40	**77**
71060	73	76	**149**
71070	27	27	**54**
71080	62	79	**141**
71091	62	99	**161**
71092	49	58	**107**
71100	86	105	**191**
71110	63	52	**115**
71120	75	64	**139**
71130	85	63	**148**
71140	68	74	**142**
71150	75	73	**148**
71161	231	266	**497**
71162	120	148	**268**
71170	52	57	**109**

[100] An example of the 2011 enumeration maps is depicted below:



[101] As can be seen, the form in which this data is presented does not equate with the publication of individual returns or any information that comports with the mischief of the sections concerned which is to prevent publication of the information in such a form so as to be able identify that information as relating to any particular individual.

[102] Accordingly, I do not read any of the provisions of the Statistics Act as prohibiting the disclosure of these statistics to the Commission thereby making it unavailable to the Commission for the purpose of discharging its constitutional mandate. Indeed, the minutes of the Commission's meeting of 4th June, 2013 record that "*Ms Harris agreed to present to the Commission the ED's that are over fifty (50). This data is to be presented by parishes.*" This statement must be put into context. Preceding Mrs. Harris' undertaking, she had presented her report on the distribution of the total count on census day across the constituencies. She had indicated that in St. Kitts there were 8 electoral districts, some of which cut across parish boundaries; but said in Nevis it was by parishes, making it much clearer than St. Kitts. According to the minutes, Mr. Byron indicated that the 'ED 's' [enumeration district data] would be more helpful as some of the information would be

conflicting. Ms. Harris indicated that some ED's were merged due to size for publication. Mr. Byron indicated that based on what Mr. Buchanan raised, even though you can merge ED's in a community, there can be multiple overlaps. After some further discussion, Ms. Harris undertook to present to the Commission the ED's that are over fifty (50). Her undertaking can only give rise to the inescapable inference that they were available to the Commission.

[103] Another reason posited by the Chairman in his evidence was that the Commission was advised by the Head Statistician, Ms. Harris, that based on the small size of some of the communities the use of the enumeration district data may have allowed the Commission to identify families or voters. They were concerned that it would be possible to identify individuals and individual households from the data and to pinpoint party affiliations. Counsel for the Commission submitted that if the use of enumeration district data might have had this effect in some communities it then raises another issue of gerrymandering of voters. It was submitted that if in fact the use of enumeration district data has the potential to expose party affiliations then its use poses a serious risk to the impartiality of the Commission. This may result in the public perception of gerrymandering which may undermine and cause damage to the work of the Commission. Whether or not this risk was to be taken was a matter for the Commission, and its decision not to take that risk cannot invalidate the entire process when the data actually relied on at the parish and community level was in fact based on enumeration district data.

[104] The claimants counter that the only way the Commission could become aware of the political affiliation of the population in the individual districts was by consulting the past voting practices of the area. But since political affiliation is not a matter which the Commission may take into account, there should have been no cause to fear that the Commission would seek to obtain and to come into possession of such information. Further, even if by the use of the enumeration district data the Commission could discern the political affiliation of inhabitants, they were obliged in law to ignore that information. Furthermore, given the size of St Kitts and Nevis and known voting patterns, the Commissioners would in any event have had some detailed knowledge of political affiliations. This has never been suggested to be a factor which has or could hamper the Commission in the performance of its duties. In any event submitted the claimants, the Enumeration Districts in St. Kitts & Nevis (or at least the vast majority of them) are not in fact so small as to identify households and reveal political affiliation. If (exceptionally) there were a few

Enumeration Districts where the total population of inhabitants was so very low that there was thought to be such a genuine risk, that risk could be mitigated by providing the Enumeration District Data for just those few Enumeration Districts with very small numbers of inhabitants (below a specified threshold, of say 50 inhabitants) on a consolidated basis.

[105] I am in full agreement with the claimants' submissions. The evidence that use of the enumeration district data would pose a risk identifying households and revealing political affiliation is tenuous. The data is expressed in numbers of inhabitants in a defined geographical area called an enumeration district which is shown on a map. It would require a determined effort and an analysis of past voting patterns to identify individual households and discern party affiliations. In my view, the raw data form in which the enumeration district data is presented does not pose a risk of that type of exposure without more.

[106] A further reason advanced by the Commission for not using the data was that it took the view that such data was not necessary and had not been considered by the Commission in formulating its draft proposals or final recommendations to the Governor-General in 2013. That explanation can be given short shrift. Simply to say that it was not necessary and was not used provides no answer to the question posed. Secondly, the fact that it was not used in formulating the 2013 Report is irrelevant.

[107] In light of my findings on this issue, I hold that the Commission plainly failed to take into account highly relevant Enumeration District Data which was obviously central to, and would have better enabled it to achieve, its constitutional mandate to ensure that constituencies contained as nearly equal number of inhabitants as reasonably practicable. In so doing, the Commission acted irrationally and/or contrary to its constitutional mandate, and therefore unlawfully:

Issue (iii) - Whether the Commission took into account irrelevant considerations

Claimants' submissions

[108] The claimants contend that while the Commission is permitted to depart from the requirement of nearly equal inhabitants to such extent as it considers expedient, it may only do so to take account

of the specific factors identified at Schedule 2, Rule 2 of the Constitution, namely, the differences in the density of the populations in the respective islands of Saint Christopher and Nevis, the need to ensure adequate representation of sparsely populated rural areas, the means of communication, geographical features, and existing administrative boundaries.

[109] The claimants submitted that nowhere in the Commission's report does it advert to any of these factors as justification for departure from the primary requirement of equality of inhabitants or even to justify rejecting PAM's proposal and the Commission's 2013 report in which the recommendations were closer to the mean when compared to its 2015 Report. Instead, the Chairman has made clear that the justification for not achieving near equality was to avoid the splitting of communities, a factor which is clearly not provided for in Rule 2 of Schedule 2 of the Constitution.

[110] As such, the claimants submitted that, not only is the Commission's report legally flawed on the traditional public law ground of taking into account an irrelevant consideration, but the Commission acted in direct violation of the Rule 2 of Schedule 2 of the Constitution in taking into account a constitutionally impermissible factor. On this ground alone, the Commission's report is unlawful and must be set aside submitted the claimants.

Commission's submissions

[111] On behalf of the Commission, it seems to be admitted that the Commission's recommendations in its 2015 Report did not achieve constituencies with as nearly equal number of inhabitants as reasonably practicable. The Commission cites the 2014 Judgment of the Hon. Mr. Justice Ramdhani which they say appeared to hold that "geographical features" referred to in subrule (d) to Rule 2 of Schedule 2, would entitle the Commission to take into account splitting of communities. The passage giving rise to that view is found at paragraph [110] where the Learned Judge stated:

> "…Boundary review and changes, whether in St. Kitts and Nevis, or Antigua or in the United Kingdom inevitably triggers an inter play between (a) the constitutional mandate to ensure an almost equal number of inhabitants residing in each constituency and (b) a number of standard factors, such as present geographical features (this would include considerations of whether or not to break existing local ties), means of communication,

existing administrative boundaries."

[112] The Commission does admit, however, that it is unclear from the Judgment the extent to which the point was argued and whether it formed part of the *ratio* of the decision.

[113] Further, counsel for the Commission drew the Court's attention to the decision of **R v Boundaries Commission ex p Foot**[31] in the Divisional Court where it was held that the word "geographical" in the United Kingdom legislation was to be equated with the word "topographical". The Commission submitted that in the United Kingdom, the breaking of local ties is a separate and distinct consideration to geographical features. Accordingly, the Commission submitted guardedly that it may be incorrect to assume that the Commission is entitled to depart from the requirement that constituencies contain as nearly equal number of inhabitants on the ground that avoiding splitting of communities is subsumed within the 'geographical features' exception as the term "geographical features" appears to refer to physical features such as the existence of a river or mountain and not to splitting communities. The Commission further observed that while Schedule 2 permits the Commission to specifically consider "administrative boundaries," it makes no mention of "community boundaries".

Discussion and findings

[114] The issue here is whether the Commission could depart from its mandate to achieve constituencies containing as nearly equal number of inhabitants as far as reasonably practicable by taking into account the need to avoid splitting communities. Put another way: is this a permissible factor to which the Commission may lawfully have regard in the discharge of its duties and its mandate?

[115] The principles discussed above at paragraphs 79 - 82 apply. Thus, the question is whether the Constitution expressly or implicitly permits consideration of this factor by the Commission. It is clear that this factor played a prominent role in the recommendations that the Commission ultimately made, which, as has been established, created large deviations from the mean (which the Commission at paragraph 5 of its Report puts at 4, 348 for St. Kitts a 4, 479 for Nevis). The highest deviation above the mean was 15% in St. Christopher 1, while the highest deviation below the mean was 17% in St. Christopher 5.

31 [1983] 1 All ER 1100

[116] Both the evidence of the Chairman and the Commission's Report are replete with references to the need to avoid splitting communities. By way of example, in his first affidavit, the Chairman states:

> "...I noted these proposals sought to deal with equity and appeared to have smaller variations from those proposed by the Commission, however, I went further to stated (sic) that the said proposals of PAM were not supported by any data or basis for the figures. The figures were simply listed without more.
>
> Further, the proposals from PAM required the splitting of a number of communities/villages in constituencies which the Commission was required to consider under Rule 2, Schedule 2 of the Constitution and which the Commission tried to avoid unless absolutely required. This was not acceptable to the Commission…
>
> The proposals of PAM were rejected by the Commission because there was no basis for the figures recommended, and no justification was given for the splitting of communities in the constituencies."

[117] Similarly, in the Commission's impugned report, the following observation is recorded at paragraph 6:

> "The Commission noted the unease of members of the Commission with respect to the splitting of communities to achieve near equality of inhabitants."

[118] That this unease influenced its ultimate recommendations is clear from paragraphs 10 (B) (ii) & (iii) of the report under the rubric **"The Number of Inhabitants in the Eight (8) Constituencies in St. Kitts:**

> "The People's Action Movement made a proposal that would have required enumeration data. In addition, the proposal did not show how the number of inhabitants in each constituency would be arrived at. No supporting information was provided. Thirdly, the proposal would have resulted in the splitting of a number of communities. As a result, the proposal could not be adopted.
>
> (iii) The response from the St. Kitts-Nevis Labour Party included a number of options. One of which was to maintain the number of

> inhabitants in Constituencies 1 and 2. The Commission adopted these recommendations as it would have avoided splitting the splitting of Frigate Bay in Constituency 1 and the removal of Greenlands from Constituency 2. The Commission therefore removed Greenlands from Constituency 3, as well as a portion of a Parish of St. Peters.
>
> The Commission did not agree with the recommendation to split the village of St. Paul's and as such, maintained its proposal for Constituencies #5 and #6."

[119] In the result, Constituency No. 1 was 15% above the mean, Constituency No. 5 was 17% below the mean and Constituency # 6, 9% above the mean.

[120] The Constitution expressly authorises the Commission to consider five specific factors which might lawfully be considered in order to depart from its mandate as aforesaid. These are to be found in Rule 2, Schedule 2: (a) the differences in the density of the populations in the respective islands of Saint Christopher and Nevis, (b) the need to ensure adequate representation of sparsely populated rural areas, (c) the means of communication, (d) geographical features, and (e) existing administrative boundaries.

[121] It will be observed that the avoidance of splitting communities is not expressly listed as a relevant nor is it by necessary implication to be regarded as such. Nor do I believe is it subsumed within the reference to "geographical features." Geographical features refer to the natural features of an area or place. Examples include rivers, mountains, streams plateaus etc. As counsel for the Claimants and counsel for the Commission both recognise in their written submissions, whether the term local ties or community ties may be subsumed under geographical features formed no part of the ratio of Ramdhani J's judgment. That was not a live issue before him.

[122] Secondly, reliance on the English authority can be misleading as the statutory regime there is materially different as borne out in **ex parte Foot**. That case concerned the method employed by the English Boundaries Commission in determining boundaries of recommended constituencies. The relevant statutory provisions were the House of Commons (Redistribution of Seats Act) 1949, s 2(1)(a), Sch 2,rr 4, 5, 6 and the House of Commons (Redistribution of Seats) Act 1958, s 2(2).

[123] In formulating their recommendations, the commission were required by section 2(1)(a), to give

effect to the rules for the redistribution of seats set out in Schedule 2 to the 1949 Act. Rule 4(1) of those rules provided that 'So far as practicable' constituencies were not to cross county or London borough boundaries. Rule 5 contained a requirement, first that 'The electorate of any constituency shall be as near the electoral quota as is practicable'. Secondly, it provided that the commission was permitted to depart from the strict application of rule 4(1) if it appeared to the commission that a departure was desirable to avoid excessive disparity between the actual electorate of any constituency and the electoral quota. Rule 6 gave the commission a discretion to depart from the strict application of both rules 4 and 5 if special geographical considerations, including in particular the size, shape and accessibility of a constituency appear to them to render departure desirable. Section 2(2) of the House of Commons (Redistribution of Seats Act) 1958 provided:

> "It shall not be the duty of the Boundary Commission, in discharging their functions under the said section two, to aim at giving full effect in all circumstances to the rules set out in the Second Schedule to the principal Act, but they shall take account, so far as they reasonably can, of the inconveniences attendant on alterations of constituencies other than alterations made for the purposes of rule 4 of those rules, and of any local ties which would be broken by such alterations; and references in that section to giving effect to those rules shall be construed accordingly."

[124] In recommending new boundaries, the Commission adopted a policy of not crossing metropolitan district boundaries although that was not specifically identified in the rules or in any section. Counsel for the appellant asserted that the primary purpose of the rules was to achieve electoral equality between constituencies. The complaint was that the failure to depart from rule 4 and to recommend constituencies which crossed boundaries had produced serious disparities between the electoral quota and the size of the electorate or many of the proposed constituencies. The question arose whether the paramount objective of the redistribution rules was the attainment of electoral equality and, in particular, whether the Commission was entitled to adopt a policy of not crossing local boundaries even though said policy caused electoral disparity.

[125] The House of Lords held:

> "While the achievement of electoral equality is certainly a very important objective, the framework of the 1949 rules itself makes it plain that as a matter of general policy r 5 was to be regarded as subordinate to r 4 and not vice versa. Section 2(2) of the 1958 Act, while

> explicitly giving the commission a general discretion to depart from the rules in formulating proposals, in effect placed a mandatory obligation on them to take account, so far as they reasonably could, of the inconveniences that would attend alterations of constituencies that might be made for the purpose of achieving electoral equality and of any local ties which would be broken by such alterations."

[126] Most importantly, the Court held that the practical effect of the construction which it had placed upon section 2(2) of the 1958 Act was that "a strict application of the rules ceases to be mandatory so that the rules, while remaining very important indeed, are reduced to the status of guidelines." (p. 1109, b-c). In effect, the commission could disregard the objective of equality of constituency quota to take account of the effect on local ties.

[127] I am in respectful concurrence with the claimants' submission that there is a crucial distinction between the legal regime governing the exercise of the functions of the English Boundaries Commission and that which governs the St. Kitts and Nevis Constituency Boundaries Commission, given that Rule 2 of Schedule 2 uses language which is markedly different from the UK legislation.. As I have already held, on a proper construction of the local provisions, the primary constitutional mandate imposed upon the St. Kitts and Nevis Commission is to achieve near equality of inhabitants so far as reasonably practicable.

[128] Clearly, the Commission took the view that it would not split communities, even at the altar of sacrificing its constitutional mandate to ensure that each constituency contained as nearly equal number of inhabitants as reasonably practicable. To my mind the preoccupation with the need to avoid splitting communities was clearly an irrelevant consideration by the terms of Schedule 2, Rule 2.

[129] While it may be thought that preserving community ties is a worthwhile objective in the delineation of constituency boundaries, I remind myself that it is not enough that a consideration is one which many people, including the court itself would have taken into account if they had to make the decision, but what the Constitution permits. Not only did the Commission consider this irrelevant factor but it elevated it and gave it such prominence in its decision making to the point where it

compromised its mandate to achieve constituencies with near equal number of inhabitants. In so doing the Commission acted unlawfully.

[130] The claimants further contend that the Commission took into account another irrelevant consideration, namely, how the proposed boundary changes would impact adversely on the electoral chances of those who were opposed to the then Government. This is based on an analysis by Mr. Shawn Richards which purports to establish that the effect of the revised recommendations, had they been in place in 2010, would have been to deliver all eight seats in St Kitts to the Labour Party rather than the six they had in fact won. Mr. Richards deposed:

> "I have done a detailed analysis of the of the (sic) impact which the proposed changes in the First Report, the Proposals put out by the Commission for consultation and the 2014 Recommendations would have had or would have on the electoral prospects of the major contending parties, using the results of the 2010 elections as the point of reference. This analysis is exhibited hereto and marked **"SR16"**. This analysis shows quite clearly that the real effect of the 2014 Recommendations would be to give the Labour Party a clear and significant advantage through the Boundary changes recommended...Under the proposals put out for consultation, the SKNLP would have won all 8 seats. The margins of victory would range from 133 votes in Constituency No 5 St. Anne Sandy Point to 1826 in Constituency No 6 in St. Pauls.[32]"

[131] In response, the Chairman deposed that the Commission never took into account considerations such as electoral prospects or past voting pattern in coming up with draft proposals or its final recommendations.

[132] The Commission submitted that the obvious and most dangerous error in the exercise embarked upon by Mr. Richards is that it assumes that voters in 2010 will be the same voters in 2015 and that they will vote in the same pattern as they did 5 years ago. They submitted that this evidence is highly speculative and ought not to be relied upon. There can be no gainsaying this.

[133] While this complaint is pleaded in terms of an irrelevant consideration, implicit in the subtext is an allegation of gerrymandering by the Commission with an obvious overlap with the allegation of

[32] 1st affidavit of Shawn Richards, Vo. 1, TAB 3, pages 36-37 at paras 58-61.

bias. Where an allegation of gerrymandering arises, whether expressly or implicitly, there must be cogent evidence that the Commission altered the boundaries and that the alterations had the effect of diluting or weakening the support of one side or the other in the altered constituencies and that the Commission so altered the boundaries precisely for achieving that effect: See **Gaston Browne** at para 34. As the Court of Appeal further observed:

> "[35] It cannot be disputed that whenever constituency boundaries are altered, that the fortunes of an electoral candidate will be correspondingly affected - either positively or negatively. That consequence is inevitable. However, that without more, does not lead to the inevitable conclusion that the alteration was with the intention of or for the purpose of affecting a candidate's political fortunes by deliberately giving one an unfair advantage over the other."

[134] In this case, there is no evidence that such a consideration was at play in the Commission's deliberations and the matters on which the Court is asked to rely to draw such an inference are highly speculative. This ground accordingly fails.

Issue (iv) - Whether the Commission failed in its duty to carry out proper consultations.

[135] The Claimants contend that the Commission failed in its duty to carry out proper consultations by failing to provide the consultees with the enumeration district data and maps which would have assisted them in giving intelligent consideration to the Commission's proposals and providing an intelligent response; ii) failing to give reasons for its proposals; iii) failing to give adequate time for a response; and iv) failing to conscientiously take PAM's proposals into account.

[136] The evidence grounding these complaints may be shortly stated. The Commission initiated the consultation process by letter dated 8th October, 2018, enclosing its proposed recommendations for the drawing of the boundaries. The Commission initially gave the consultees until 11th November, 2014 (three weeks) to submit their proposals; subsequently extended by nine days to 20th November 2014.

[137] By letter dated 31st October 2014, the People's Action Movement sought, inter alia, explanations; requested Enumeration District Data to assist in making proposals which it felt would achieve the

constitutional mandate of near equality; and the maps which would show where the proposed boundaries were located which it considered would assist PAM in analyzing the Commission's proposed recommendations.

[138] The Commission's failure to reply prompted PAM to follow up with a letter dated 11th November 2014 repeating its request for the Enumeration District Data and the maps which it explained were particularly needed to show how the Commission's proposals translate into the actual locations of the boundaries on the ground; pointing out the significant deviations from the mean of greater than 10% in all but three constituencies and noting that "the Commission's proposals did not provide an explanation as to which factors, if any, had been taken into account to warrant such significant departure from the mean in so many constituencies."

[139] By letters dated 12th November 2014[33] to all consultees the Commission replied, inter alia, in the following terms:

> "...[T]he suggested proposals which we have circulated and upon which we seek your comments or counter proposals were informed by the desire of the Commission to ensure that the constituencies of the Federation contain as near to equal numbers of inhabitants as is reasonably possible.
>
> Also, we made these suggested proposals, which you now have, because the Commission believes that we should do our very best to avoid splitting communities if this can be avoided…
>
> As previously advised, the Commission did not use the Enumeration District Data in its deliberations, and, as you have already been informed you are not entitled to this information. …
>
> The Commission notes your requests for maps. The Commission has not commissioned or used any maps in its deliberations. The Commission therefore has no maps to provide you as requested. The Commission has however provided you with all the information

[33] Exhibit "SR9", Vo. 1, p.80

available to the Commission and which was used by the Commission in formulating these proposals. "

The claimants' submissions

[140] The claimants complain that when the Commission initiated the consultation process by letter dated 8th October, 2018, the Commission provided no reasons why the boundaries were drawn in the particular ways they were set out in the letter. In particular, no reasons were given why the number of inhabitants per constituency deviated so far for the mean; whether this was as a result of the application of one or other of the factors listed in Rule 2 of Schedule 2, and if so which ones.

[141] The claimants further contend that the time given by the Commission to consultees to submit their proposals was woefully inadequate. The Commission initially gave the consultees until 11th November, 2014 (three weeks) to submit their proposals; subsequently extended by nine days to 20th November 2014. It is said that given that the reasons for the Commission's proposals were only communicated on 12th November 2014, the period of 9 days was a woefully inadequate period of time for the consultees to give intelligent consideration to the proposals and make an intelligent response since it was only on the 12th November 2014 that the consultees understood that the need to avoid splitting communities was an overriding consideration. Moreover, given that in the 2013 report, the need to avoid splitting communities was rejected by the majority of the Commission, the consultees would have had to contend with this new factor for the first time on 12th November 2014. More time could have been given the parties in these circumstances.

[142] The Claimants also contend that the Commission failed to give conscientious consideration to PAM's proposals contained in its letter dated 20th November which the Commission accepted achieved nearer equal numbers of inhabitants than the Commission's proposed recommendations. Instead the Commission rejected them on the grounds that they split communities; would have required enumeration data; and did not show how the number of inhabitants in each constituency would be arrived at.

[143] The claimants say it is difficult to make sense of the second reason because PAM could not make use of the enumeration district data because the Commission did not provide it despite requests. Further, if the absence of this data did not impede the Commission from finalising its proposals why

was it needed to properly assess PAM's proposals. Thirdly, if the Commission was intent on complying with its obligations to conscientiously take PAM's proposal into account, particularly since it achieved nearer equality, the Commission ought to have required PAM to provide the data which it claimed was missing. Instead, it dismissed PAM's proposal out of hand.

The Commission's submissions

[144] In relation to the Commission's failure to provide the Enumeration District Data or maps to the consultees, the Commission submits that the Commission cannot be expected to provide information and/or documents which it has not used in formulating its proposals. Further, as demonstrated from the consultees' proposals themselves, the information provided by the Commission was sufficient for the consultees to properly formulate alternative proposals. The Commission seeks to debunk any notion that it did not receive and consider the alternatives to the Commission's proposals by reference to the evidence of the Chairman contained in his first affidavit ad the first affidavit of Mr. Byron Vincent Byron which demonstrates that changes were made to the proposals at the Commission's meeting on 2nd December 2014 albeit not as a consequence of the proposals from the consultees. This, they say, demonstrates that the Commission was not wedded to its proposals when the consultations were undertaken and therefore the consultations were properly undertaken at the formative stage. The Commission submitted that the extended period which was actually used by the consultees was sufficient for them to formulate meaningful proposals. In the circumstances, they invite the court to find that the Commission's consultations were properly conducted.

Discussion and findings

[145] The substance of what constitutes adequate consultations has been the subject of pronouncements by the Court of Appeal in **Gaston Browne** and in **R v North and East Devon Health Authority, ex parte Conghlan**[34] The applicable principles are succinctly stated in judgment of Lord Woolfe in the latter case:

> **"108** It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be

[34] [2001] QB 213

proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council*, *Ex p Gunning* (1985) 84 LGR 168…

112 ... It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

[146] To this must be added the observations of the Court of Appeal in **Gaston Browne** regarding what is meant by a "formative stage". The Court adopted the dicta of Wilkie J in **Sardar v Watford BC** when he stated:

> "… The description "a formative stage" may be apt to describe a number of different situations. A Council may only have reached the stage of identifying a number of options when it decides to consult. On the other hand it may have gone beyond that and have identified a preferred option upon which it may wish to consult. In other circumstances it may have formed a provisional view as to the course to be adopted or may "be minded" to take a particular course subject to the outcome of consultations. In each of these cases what the Council is doing is consulting in advance of the decision being consulted about being made. It is, no doubt, right that, if the Council has a preferred option, or has formed a provisional view, those being consulted should be informed of this so as better to focus their responses. The fact that a Council may have come to a provisional view or have a preferred option does not prevent a consultation exercise being conducted in good faith at a stage when the policy is still formative in the sense that no final decision has yet been made …"

[147] The Court of Appeal articulated an important principle as it relates to the disclosure obligations of the Commission in the consultative process:

> "[31] …Also, while it is fully accepted that a public body is under an obligation to

> disclose information or come to the table with all cards facing upwards, this is a principle which must be applied within context. It cannot be taken to mean that all information, including information which is irrelevant, must be disclosed. In the circumstances of this case the duty was to consult on the changes being proposed to existing constituency boundaries. It would be expected that the Commission would furnish information so as to: (a) show or depict the proposed boundary changes; and (b) to explain or justify why the proposed changes would meet the objective—that is, to achieve nearly equal numbers of inhabitants taking into account voter's parity."

[148] The Claimants essential complaints are that the Commission a) failed in its duty to carry out proper consultations by failing to provide the consultees with the enumeration district data and maps; b) failed to give reasons or adequate reasons for its proposals; c) failed to give adequate time for a response; and d) failed to conscientiously take PAM's proposals into account. Each will be examined in turn.

a) Failure to provide the enumeration district data and maps.

[149] The evidence establishes that the Commission did not use the Enumeration District Data or maps in formulating its proposals (erroneously as I have found). The evidence further discloses that the Commission had disclosed to the consultees all of the material which had informed and shaped its proposals. The Chairman made this clear in his letter dated 12th November, 2014. In those circumstances there was no obligation on the Commission to disclose material upon which it had not relied in formulating its proposals.

b) Failure to give reasons or adequate reasons for its proposals

[150] In its letter of 20th October, 2014 initiating consultations, the Commission did not set out within the body of that letter the reasons for the proposed changes. However, in its letter dated 12th November, 2020 ("SR10") the Commission explained the basis for its proposals in the following terms:

> "In our view, the proposals now circulated by the Commission fall well within the constitutional rules the Commission is required to follow.

The above notwithstanding, the suggested proposals which we have circulated and upon which we seek your comments or counter proposals were informed by the desire of the Commission to ensure that the constituencies of the Federation contain as near to equal inhabitants as is reasonably possible. Also, we made these suggested proposals, which you now have, because the Commission believes that we should do our very best to avoid splitting communities if this can be avoided."

[151] The justification advanced by the Commission for its proposals is the need to avoid splitting communities. The claimants have rightly and successfully taken issue with this but it cannot be said that the Commission failed to provide a reason to the consultees. The consultees appreciated that this was a key consideration for the Commission. In the words of Mr. Richards, "...it was only on the 12th November 2014 that the consultees understood that the need to avoid splitting communities was an overriding consideration." This means that before making its final decision, the Commission had communicated to the consultees the rationale for its recommendations. Further, the documents accompanying the Commission's invitation letter included a document captioned "Proposed recommendations of the Commission". In that document the Commission explained that it used the 2011 Census Report to establish the average sizes (the mean) of constituencies in St. Kitts and in Nevis. Having determined the mean, the Commission considered that "there was an undeniable need for change in the constituency boundaries in the Federation." The Commission then set out its recommended changes so that the consultees knew what changes it proposed. It may be said with some justification that the Commission's explanations do not go into the depth that the claimants sought but this does not necessarily mean that they were inadequate.

c) Failure to give adequate time for a response

[152] The claimants say since it was only on 12th November, that they understood that the desire to avoid splitting communities was the Commission's overriding objective, the extension of the deadline for responses to 20th November was woefully inadequate. I can't agree. The Chairman's evidence is that the initial consultation period of three weeks was informed by the Judgment of Ramdhani J in the first Boundaries Case where he determined that 26 days was a reasonable period of time for the purpose of receiving feedback. With the extension to 20th November, the

claimants were given a total of 30 days to respond. On the face of it, there is nothing unreasonable about that period. The disclosure that the Commission was motivated by a desire to avoid splitting communities to my mind does not require any extended period beyond that which was afforded for intelligent consideration and response. Indeed, the Claimants response has been that it is simply not a permissible factor under the rules governing the delimitation of constituency boundaries. The Claimants have demonstrated through their exchange of correspondence with the Commission that they were well versed in these matters and of the Constitutional requirements. For example, in his letter dated 11th November, 2018, Mr. Richards states that even without the Enumeration District Data and the maps which they had been requesting, "...we have already done considerable work in anticipation of receiving the information requested." Mr. Richards then proceeds to dissect the Commission's proposals, as he says, "even at this stage and without full information." Further, by letter dated 20th November 2020, while expressing concern about not receiving the enumeration district data and maps, Mr. Richards was able to submit a comprehensive analysis of the Commission's proposals and make counter-proposals. The letter concludes:

> "With the benefit of the requested information, we shall in due course be able to provide the Commission with much more complete and comprehensive input with respect to its current proposals and the other alternative options available to it. Nonetheless, we trust that the results we have presented (based on the preliminary and provisional analysis that we have been unable to undertake to date are sufficient to demonstrate that the Commission's current proposals are unsatisfactory and unacceptable and to illustrate how important it would be for the Commission to have the benefit of such further analysis and input."

[153] It seems to me that this letter conveys that the only impediment to PAM completing its proposals was the outstanding Enumeration District Data and maps. As I have already held, the Commission was not obliged to disclose that which it did not use and which did not inform its own proposals. Notwithstanding, the fact that this data was not supplied, PAM was able to provide an intelligent and comprehensive response to the Commission's proposals within the deadline.

[154] Other consultees were similarly concerned with obtaining the enumeration district data and maps. The Concerned Citizens Movement wrote to this effect on 10th November, Dr. Harris wrote on

behalf of the People's Labour Party on 11th and 14th November. Nonetheless, People's Action Movement, the Concerned Citizens Movement, the St. Kitts-Nevis Labour Party and the National Integrity Party were all able to finalise meaningful proposals and submit them to the Commission. The Commission received the Concerned Citizens Movement's proposals on 4th December, 2014 and duly considered it notwithstanding its late receipt.

[155] The submission that the time afforded by the Commission for consultation was woefully inadequate is therefore unsustainable.

d) Failure to conscientiously take PAM's proposals into account.

[156] The Claimants contend that the Commission failed to conscientiously take PAM's proposals into account. In order to assess this assertion, I have had particular regard to the minutes of the Commission meeting held on 2nd December, 2014, the 1st affidavit of the Chairman and the 1st Affidavit of Mr. Byron.

[157] The minutes of 2nd December, 2014 reveal that item 6 on the Agenda was "Review of Responses from Consultees." The records reflect that the Commission proceeded to discuss the proposals received from the People's Action Movement, the Concerned Citizens Movement, the St. Kitts-Nevis Labour Party and the National Integrity Party. As it relates specifically to PAM's proposals, it is apparent from the minutes and the affidavit of the Chairman that this proposal received proper consideration. According to the Chairman's 1st affidavit at paras. 40.7.1 - 40.7.3:

> "...I noted these proposals sought to deal with equity and appeared to have smaller variations from those proposed by the Commission, however, I went further to stated (sic) that the said proposals of PAM were not supported by any data or basis for the figures. The figures were simply listed without more.
>
> Further, the proposals from PAM required the splitting of a number of communities/villages in constituencies which the Commission was required to consider under Rule 2, Schedule 2 of the Constitution and which the Commission tried to avoid unless absolutely required. This was not acceptable to the Commission…

> The proposals of PAM were rejected by the Commission because there was no basis for the figures recommended, and no justification was given for the splitting of communities in the constituencies."

[158] Mr. Byron's account of these deliberations is set out at paragraph 45 of his first affidavit:

> "On 2nd December, 2014, there was another meeting of the Constituency Boundaries Commission at which the proposals submitted were considered. I pointed out that what the PAM proposal achieved was much closer to the equality of inhabitants required by the Constitution than the Commission's own recommendations. In response, Mr. Jenkins agreed that the PAM proposal achieved greater equality but he took the position that the Commission was seeking to avoid splitting communities. On this basis, and on this basis alone, the majority of the Commission decided to reject the PAM proposal and to prefer their own proposal with some minor modifications."

[159] In my view, this evidence does not support an assertion that the Commission did not give conscientious consideration to PAM's proposals. The Commission was obviously aware of the contents of the proposal and conceded that PAM's proposals produced smaller variations from the mean than its own. However, it considered that the proposals did not explain how the numbers were arrived at and entailed splitting communities. The fact that the Commission did not agree with them or adopt them does not mean that they were not given conscientious consideration. The Commission may have erroneously believed that it could properly take into account the need to avoid splitting communities but that does not translate into a finding that the proposals were not given conscientious consideration.

[160] For the reasons outlined at paragraphs 149-159, I am therefore unable to agree with the Claimants that the Commission's consultative process was inadequate.

CHALLENGE TO THE PROCLAMATION

[161] Quite apart from their challenge to the 2015 Boundaries Report itself, the claimants challenge the Proclamation signed by the Governor General on 16th January 2015, to effect changes to the

Constituency Boundaries in St. Kitts and Nevis in accordance with the recommendations contained in the said Report. As against the 2nd Respondent the claimants seek a declaration that the Proclamation is invalid, null and void and of no effect, and an order of certiorari to quash said Boundaries Proclamation. The Claimants' challenge to the Boundaries Proclamation is premised on two broad bases. First, that the Proclamation was made on 20 January 2015 in violation of the Court Order and injunction, granted and served on the Attorney General on 16 January 2015, which prohibited the Governor General (Acting through the Attorney General) from making such a proclamation. Secondly, that the Proclamation was published and therefore made in violation of the injunction granted on January 16th, 2020 for the improper purposes of depriving the claimants of the right to apply to the Court to challenge the decision of the Commission and the Report through the mechanism of the ouster clause in section 50(7) of the Constitution which would preclude a judicial review challenge.

Issue (v) - Whether the proclamation was made in breach of the injunction

[162] The first basis may be taken shortly as the Privy Council has already determined that question of fact in the interlocutory Appeal of **Brantley & other v Constituency Boundaries Commission & Attorney General.**[35]

[163] The relevant narrative on this issue may be picked up at the point where the Resolution giving effect to the Commission's recommendations as contained in its Report and a draft proclamation were tabled in the National Assembly on 16th January, 2015. They were subsequently approved at about 6:10 pm. The former Attorney General, on instructions of either the Prime Minister or the Minister of Justice,[36] promptly took the draft proclamation to the Governor-General, who at about 6:20 pm signed both it and a proclamation dissolving Parliament. At the trial, the former Attorney General testified that he was instructed by either the Minister of Justice and Legal Affairs, Mr. Nesbitt, or the Prime Minister to have the proclamation gazetted immediately. Accordingly, he gave instructions for the proclamation to be gazetted. At about 6:35 pm, he received in hand a printed copy of an Extraordinary Gazette containing the proclamation while at Government Headquarters.

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[35] [2015]. UKPC 21

[36] Cross-examination of Mr. Jason Hamilton on 19th November, 2020

If lawful, this meant that the proclamation would have come into force on the dissolution of Parliament and the new boundaries would have taken effect at the next elections in accordance with section 50 (6) of the Constitution.

[164] Meanwhile, that very evening, the claimants applied to the High Court for an interim injunction prohibiting the Governor-General from making the impugned proclamation until the determination of their substantive legal challenge or further order of the court. After representations were made, the court ordered that the application should proceed ex parte. At 7:38 pm, Carter J granted the ex parte injunction.

[165] Under cross-examination, the former Attorney General testified that he was aware that following the printing of the Gazette containing the proclamation, the next step was the distribution of the Gazette but said that was not his responsibility.

[166] He testified that he was served with the injunction at about 8:40 p.m. but did not read it until shortly before 9:40 p.m. Having done so, he didn't take any steps to prevent the distribution of the Gazette through the normal distribution channels as this was not within his ambit. He referred the matter to Counsel who was engaged. He however said that he gave consideration to the injunction and called certain members of the Cabinet to advise them of it, but there was no in depth discussion of the subject until Saturday 17th January when he spoke to the Prime Minister and the Cabinet Secretary. While he had considered whether the Gazette should be distributed at the distribution points, he could not recall what advice he gave them regarding the distribution of the Gazette. He could not recall giving advice that the Gazette should not be distributed. He became aware during the proceedings that the Gazette had been distributed on January 20th, 2015 but could not recall his reaction on this discovery.

[167] The Claimants adduced affidavit evidence of Mr. Macclure Taylor filed on January 21, 2015 and Mr. Sam Condor filed on 21st January, 2021. Their evidence, shortly stated, is that upon hearing of the purported making of the proclamation, they visited the Government Information Service (GIS). Mr. Condor averred that he was a regular subscriber to the Gazette and had received every issue once published. He had been to the Government Information Service Department located at the Ministry of Information, Government Headquarters, Church Street many times to obtain copies of the Gazette. This is the Department responsible for distributing the Gazette and he said he knew of

no other place in St. Kitts and Nevis where copies of the Gazette could be obtained.

[168] He visited the GIS on 19th January, 2015 at about 1:00 p.m. The Director of the GIS was out of Office. Mr. Condor spoke to an employee and requested a copy of all of the 2015 Gazettes but there were none. He subsequently spoke to one Heather Herbert who was responsible for sending out the Gazettes at about 2:30 p.m. She advised him that the GIS had no 2015 Gazettes as yet. He returned to the GIS on 20th January, 2015 at about 2:00 p.m. and again asked for the 2015 Gazettes. On this occasion two clerks were able to furnish him with copies, including the impugned proclamation SRO No. 2 of 2015.

[169] Mr. Taylor's first visit to the GIS seeking copies of all 2015 Gazettes was on 19th January, 2015 at about 8:50 a.m. He too averred that from his own experience there are no other departments in St. Kitts and Nevis from which the Gazette can be obtained. He spoke with Ms. Herbert and learnt that there were no Gazettes for 2015 as yet; the most recent Gazette was the December 11th, 2014 issue. He bought a copy. He returned to the GIS at about 8:51 a.m. on 20th January, 2015. He again spoke with Ms. Herbert who told him that she had not yet received any 2015 Gazettes.

[170] In determining the date on which the proclamation was made, the Privy Council considered the meaning of "proclamation" as defined in section 119 of the Constitution which provides:

> "proclamation" means a proclamation published in the Gazette or, if such publication is not reasonably practicable, published in Saint Christopher and Nevis by such means as are reasonably practicable and effective;"

[171] The Privy Council then explained what the making of a Proclamation entails in the context of that definition:

> "[21] The making of a proclamation is not simply the signing of a document, which can thereafter be kept on an internal government file. Nor is it the production of a hard copy of the text of a Gazette which similarly is deposited in a file and not made available to the public by the publication of the Gazette. A proclamation is what it says it is. It is something which is proclaimed or published; and the constitutionally recognised means of publication are stated in section 119. Lon Fuller in "The Morality of Law" (2nd ed, p 39) identified as one of eight desiderata of law the need to publicise, or at least make available to the affected party, the rules he is expected to observe. One of the benefits of such

promulgation is that laws can be subjected to public criticism (Fuller op cit p 51). Section 119 provides the means of promulgation by which law is made by proclamation."

[172] The Privy Council accordingly held that upon a proper construction, "the impugned proclamation was made no earlier than 20 January 2015, when it became available to the public by publication in the Gazette on the authority of the Governor-General."

[173] Their Lordships further held that since the Governor-General dissolved the Parliament "as from the 16 day of January, 2015", the dissolution unquestionably occurred with effect from 16 January and therefore predated the "making" of the impugned proclamation. Thus, the dissolution of the National Assembly occurred before the impugned proclamation was made. As a result, the impugned proclamation, if valid, would have effect only on the dissolution of the Parliament that was elected on 16 February 2015.

[174] Clearly then, the Proclamation was made in breach of the injunction since, on the evidence, the order granting the injunction had been made and served on the Attorney General on the evening of 16th January while the proclamation was made at the earliest on 20th January.

[175] While the Privy Council determined which was first in time as between the proclamation dissolving Parliament and the making of the impugned boundaries proclamation, their Lordships expressed only tentative views on whether the publication of the impugned proclamation in the Gazette after the grant of the interim injunction was unlawful and therefore of no effect. The task of answering that question definitively falls to this Court.

[176] The evidence relating to the circumstances under which the proclamation came to be made have already been summarised at paras 163 - 169 above. The question now is whether the publication of the impugned proclamation in the Gazette after the grant of the interim injunction was unlawful and therefore of no effect.

[177] On this, the Privy Council stated:

> "34. If a minister acts in breach of an injunction, for example in the belief that it is invalid or that it has come too late to prohibit his actions, the legality of the act, which the order prohibited, may be open to challenge by judicial review on the basis that the minister in so

> acting has failed to take into account a relevant consideration, namely the validity of the court order pending its discharge. If a minister were to go further and knowingly exercise his powers in defiance of the injunction and in an attempt to render it ineffective, it would be clearly arguable that he had used his powers for an improper purpose: *Padfield* (above). On the factual hypothesis on which the Board is considering these other constitutional questions, the making of the impugned proclamation by its publication on 20 January 2015 may be amenable to a quashing order under normal principles of judicial review."

[178] These principles must be applied to the facts as I have found them. A Minister of the Government had responsibility for the distribution of the Gazette containing the impugned boundaries proclamation. On the evidence of the former Attorney General, that Minister was the Minister of Justice and Legal Affairs. While the former Attorney General's recollection of the advice which he gave to the Prime Minister and Cabinet Secretary on Saturday 17th January, 2015 regarding the distribution of the Gazette after being served with the injunction has faded, I note that in in his affidavit in support of the application to set aside the interim injunction filed a mere two days later on 19th January, 2021, his considered view was that:

> "At the time this Honourable Court made the *ex parte* Order the Proclamation had already been made and indeed gazetted. Accordingly, the act *ex parte* Order seeks to prohibit having already occurred prior to the Order being made and prior to notice of the Order being given to the Applicant/Third Defendant the granting of the injunction would have been of no effect (in the words of Madame Justice of Appeal Edwards in as she then was in SKBHCV2009/009 HON. SHAWN K. Richards et al v Constituencies Boundaries Commission et al *"useless and unenforceable.")*and should now be set aside."

[179] If, therefore, the Attorney General advised, and the relevant minister acted on the belief, that the injunction was invalid or that it had come too late to prohibit distribution of the Gazette, then that minister in so acting failed to take into account a relevant consideration, namely the validity of the injunction pending its discharge. Alternatively, if the minister knowingly exercised his powers in defiance of the injunction and in an attempt to render it ineffective, then he would have used his powers for an improper purpose. On either basis, I would hold that the publication

of the impugned proclamation in the Gazette after the grant of the interim injunction was unlawful and therefore of no effect.

Issue (vii) - Whether the Proclamation was published for an improper purpose

[180] The claimants contend that the Prime Minister and/or the Chairman of the Boundaries Commission and/or members of the National Assembly and/or the Speaker colluded to convene the Assembly at very short notice or no notice at all (contrary to the Standing Orders and established practice) after the Boundaries Commission signed off on the impugned Boundaries Report, to debate and pass the resolution approving a draft proclamation containing the boundary changes, and to cause the Governor General to seek to make the impugned Boundaries Proclamation in such a short period of time as to deprive the Claimants of their Constitutional rights to apply to the High Court to judicially review the impugned boundaries decisions and Report; and/or the impugned boundaries proclamation was made and published for the improper purpose of seeking to deprive the Claimants of the right to apply to the Court to challenge the impugned boundaries decision and the Report.

[181] To appreciate the claimants' submissions it is necessary to set them against the background of the provisions of sections 50 (6) and 50 (7) of the Constitution. The sections provide:

> "(6) If any draft proclamation laid before the National Assembly under subsection (3) or (5) is approved by a resolution of the Assembly, the Prime Minister shall submit it to the Governor-General who shall make a proclamation in terms of the draft; and that proclamation shall come into force upon the next dissolution of Parliament after it is made."

> "The question of the validity of any proclamation by the Governor General purporting to be made under subsection (6) and reciting that a draft thereof has been approved by resolution of the National Assembly shall not be enquired into n any court of law except upon the ground that the proclamation does not give effect to rule 1 in Schedule 2."

[182] The claimants' case is that it is with these provisions in mind that the chain of events were orchestrated to immunise the proclamation from legal challenge. In order to assess the merits of

this argument, it is necessary to look more closely at the events of January, 16, 2015. I gratefully adopt with some modification the helpful summary of the relevant chronology contained in te claimants written submissions.

Relevant timelines

[183] At about 2 p.m. on 16 January 2015, the Commission met to finalise its report. Mr. Byron's request to leave with the document to study it with the benefit of his notes from previous meetings was denied by majority vote. The Report was accepted by majority vote. The Chairman and the government appointees signed off on the report; the opposition appointed members declined to do so. The meeting concluded at about 3.45 p.m. At about 4.05 p.m., Mr. Byron was handed a letter dated 16 January 2015 from the Clerk of the National Assembly giving notice of an 'emergency meeting' of the National Assembly at 4.15 p.m. that afternoon. The letter did not state what the 'emergency' was. It attached an Order Paper which made no reference to the Boundaries Commission.

[184] Mr. Shawn Richards, the Fourth Claimant, found out about the 'emergency' meeting from a friend at about 4 p.m. that day. He was given a copy of the same letter as he entered the National Assembly. Mr. Eugene Hamilton, an Opposition Representative, likewise found out by word of mouth and was handed the letter as he entered the National Assembly. Likewise the Second Claimant, Dr. Timothy Harris, Representative and then Leader of the People's Labour Party.

[185] At the commencement of the proceedings, the Speaker of the National Assembly rose and announced that the emergency sitting was per Standing Order 3 (Meetings) subsection 3 which says that provided that in the case of any emergency of which the Speaker shall be the sole judge, a meeting of the National Assembly may be summoned on such shorter notice as he/she may determine and such notice may be given to members by such means as the urgency of the case permits. He then declared that the House was in session under an emergency sitting[37].

[37] See transcript of video recording of sitting of the National Assembly at Exhibit "TH5" Vol. 3, Tab 20, page 552 *et seq*.

[186] The Prime Minister and Representative for Constituency #6 informed the House that a draft proclamation had been prepared giving effect to the Boundaries Commission's report of 16 January 2015. The Prime Minister proceeded to read the text of a proposed resolution. Proceedings soon became rowdy as when Opposition members raised points of order questioning the propriety of the Speaker's actions. He, apparently, was brooking no dissent. After heated exchanges back and forth for some time, the Speaker put the question whether the resolution be approved. The motion was carried at 6.10 p.m.. At 6.20 p.m. the Governor-General signed a copy of a draft proclamation purporting to give effect to the Boundaries Commission's report and at the same time made a Proclamation dissolving Parliament on the 16th January 2015. The facts concerning how and when the Impugned Boundaries Proclamation was published in the Gazette have been set out above and do not warrant repetition here.

[187] In a televised broadcast from the steps of Government Headquarters which concluded at about 6.50 p.m., the Prime Minister announced that the Governor-General had approved the Boundaries Commission's Report and that he had advised the Governor-General to dissolve Parliament.

[188] Breaking down the timelines further helps to put matters into perspective in order to appreciate what was accomplished between 3:45 p.m. when the Commission completed its meeting and 4:35 p.m. when the sitting of the National Assembly commenced. Upon the Chairman submitting the Report to the Governor General the following actions would have had to occur:

a. the Report would then have been sent to the Prime Minister who would have had to consider it in order to determine whether the draft proclamation to give effect to the Commission's recommendations should be laid with or without modifications;
b. the draft proclamation to give effect to the recommendations of the Boundaries Commission was prepared;
c. Notices of the emergency meeting of the National Assembly were prepared and served on members of the Assembly as early as 4:05 p.m.;
d. Once the draft proclamation was approved by a resolution of the National Assembly at 6:10 p.m., the Prime Minister or the Minister of Justice instructed the Attorney General to submit it to the Governor-General who signed it at 6:20 p.m;
e. The Attorney General then gave instructions for the proclamation to be printed in the official gazette. He had a copy of the gazette in his hands by 6:35 p.m.

[189] The claimants submit that the “extraordinary events” of January 16, 2015 are sufficient to give rise to the irrefutable inference that there was a deliberate plan to collapse the normal procedure ending with the making of the proclamation such that section 50(7) would take effect to preclude a judicial review challenge. They submit that that inference was confirmed by the candid statements made by the Prime Minister himself, Minister Skerritt and Mr. Sylvester Anthony, attorney for the Commission. They all revealed a plan to prevent the opposition from moving the court to challenge the Commission’s report, as had been done on previous occasions. I will return to these statements shortly.

The Attorney General’s submissions

[190] Counsel for the Attorney General cite De Smith’s Judicial Review at paragraphs 13-010-01 for the proposition that although bad faith can be imputed to Ministers of the Crown, the courts will not readily impute it to the Crown itself. A court will not in general entertain allegations of bad faith made against the repository of power unless bad faith has been expressly pleaded and properly particularized. They submit that this passage holds true for imputing improper purpose also and applies to the Governor General who is Her Majesty’s representative in the Federation, pursuant to section 21 of the Constitution of St. Kitts and Nevis.

[191] It was further submitted that the second Respondent does not understand the Claimants to be asserting that the Governor General was a part of this collusion, but rather that the purpose of the collusion was to cause him to make the Proclamation in a short period. They submit that the evidence does not implicate the Governor General in any such collusion or the matters as alleged nor does it indicate that the Governor General had control of or was actively involved in the publication of the Boundaries Proclamation. They stress that the Governor General has no role outside that mandated by section 50 of the Constitution in relation to the Boundaries Proclamation. In these circumstances, the Second Defendant submitted that the Court should not make a finding that the Governor General made and/or published the Boundaries Proclamation for an improper purpose. Instead, should the Court decide that a declaration should be made in favour of the claimants, it would suffice to outline the terms of such declaration with reference to the Executive instead of a specific reference to the Governor General. This would comport with the evidence in the case and the principles relating to imputing an improper purpose to the Crown.

[192] The claimants in their written reply to these submissions take no issue with them.

Discussion

[193] Section 1 of the Constitution of Saint Christopher and Nevis declares that it is "a sovereign democratic federal state". Section 2 provides that the Constitution is its supreme law and "if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

[194] Chapter II is concerned with the protection of fundamental rights. Among those is the right of every person to the protection of the law guaranteed by section 3(a).

[195] Section 18 provides that a person may apply to the High Court for redress to enforce the protective provisions of Chapter. So far as relevant, section 18 (1) provides:

> "If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her … then, without prejudice to any other action with respect to the same matter that is lawfully available, that person … may apply to the High Court for redress."

[196] Chapter IX of the Constitution (entitled "Judicial Provisions") also vests the High Court with jurisdiction in constitutional matters. Section 96(1) provides that, subject to inter alia section 50(7), "any person who alleges that any provision of this Constitution (other than a provision of Chapter II) has been or is being contravened may, if he or she has a relevant interest, apply to the High Court for a declaration and for relief under this section."

[197] The Privy Council has held that while the ouster provision of section 50(7) may exclude a challenge under section 96, it does not exclude the High Court's jurisdiction under section 18 to enforce the protective provisions of Chapter II, including the section 3(a) right to the protection of the law. A useful definition of the concept of the protection of the law was articulated by the Caribbean Court of Justice in **Maya Leaders Alliance v The Attorney General of Belize**[38] in the following terms:

[38] [2015] CCJ 15

> "The right to protection of the law is a multi-dimentional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life liberty or property. It encompasses the right of every citizen to access the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power." (My emphasis)

[198] With these Constitutional provisions in mind, I turn to the facts.

Findings and conclusions

[199] The facts outlined above in relation to the events of January 15.16 2015 give rise to a number of logical inferences. In the first place, the Government must have had knowledge that the report would be finalized that evening in order to have an emergency sitting of the National Assembly convened by the Speaker at such short notice. If the former Attorney General is to be believed, not even he had advance knowledge of this sitting. Moreover, given that the Commission only concluded its business at about 3:45 p.m., it is a marvel that within twenty minutes, opposition members were being served with notice of the sitting or learning about the planned sitting from various sources and that within forty five minutes, the necessary paperwork to facilitate a sitting of the National Assembly had been done. There is no obvious or apparent reason why the debate on the Commission's report should qualify as an emergency. According to the evidence of Dr. Harris in his 2nd affidavit filed such haste did not attend the Commission's 2013 Report. In his words:

> "When the Commission's first report was produced in 2013, at least three days notice was given as far as I recall. It may have been more. I cannot see what was different this time which would make the Speaker think that such short notice was needed."

[200] As the Court sees it, these facts give rise to the inference that there was a prior plan to rush the draft proclamation through the National Assembly the moment it came to hand. The claimants invite the court to find that this inference is confirmed by certain statements made by the Prime Minister, Minister Ricky Skerrit and Counsel for the Commission, Mr. Sylvester Anthony, which demonstrate that the plain intention of the Government was to rush the Report through the Assembly, dissolve Parliament and have the proclamation published all before the Opposition was able to approach the Court to challenge the lawfulness of the Commission's decision.

[201] I will deal first with the utterances of Mr. Sylvester Anthony. On or about 20 January 2015, Mr. Anthony, was asked during a radio interview about the timeline between the passage of the Resolution in Parliament, the Gazetting of the Proclamation and the dissolution of Parliament. The substance of Mr. Anthony's response was that the timeline represented "exceptional efficiency" and reflected the deployment of good strategy on the part of the Government who had outmaneuvered the opposition. It is unclear in what capacity he was being interviewed. While he spoke of "we as lawyers for the government," I do not know if he was speaking with the knowledge and authority of the Government or, indeed, of the Commission. Secondly, the question was not directed to matters relating to the work of the Commission of which Mr. Anthony was counsel. The question sought to elicit Mr. Anthony's opinion about events outside of the Commission's remit. As the Commission rightly points out in their written submissions, the Commission has no further role to play once it submits its Report to the Governor General. I therefore do not accept the claimants' invitation to ascribe the same or any weight to the utterances of Mr. Sylvester Anthony as I would to those of the Prime Minister or Minister Skerritt.

[202] Different considerations apply to the statements of the Prime Minister as leader of the Government and to those of Mr. Skerritt, a Minister of Government. On 17 January 2015, Mr. Skerritt sent an email to the St Kitts Nevis Observer. This email was forwarded to Dr. Harris on 20th January, 2015 and is exhibited to his second affidavit. It reads:

> "Colleague, Just in case you have been following recent political developments in St. Kitts & Nevis, for the record, I thought it would be useful if you were made aware of the following facts:
> - The Parliamentary Electoral Boundaries Commission was at work for nearly two years. It's report was long overdue.
> - All parties agreed that the 25 year old boundaries were badly in need of re-alignment.

- It was the third attempt at carrying out the constitutional requirement of boundaries re-alignment in 6 years.
- the two opposition appointed members on the five-man Commission did everything they could to slow up the process.
- There was never a chance of unanimous agreement with the final proposals.
- the final report was therefore carried forward, in agreement by the majority of the members of the Commission.
- Parliament then met in emergency session where the final report was submitted and proclaimed, according to the requirements of the Constitution.
- This was the exact process carried out by the PAM Party Government 25 years ago.
- The well documented history of the opposition's manipulation of the judicial system, their continuous attempts at parliamentary disruption, and the nearing deadline for General elections, more than justified an emergency sitting of Parliament this time.
- The new fairer boundaries configuration came into effect immediately on the dissolution of Parliament.
- Tim Harris' unsuitable leadership style was highlighted in his panicky and unruly behaviour in and around Parliament.
- The Opposition is now doing what they do best–shout foul and use disruptive tactics. They are reactionaries who have no plan.

Best regards,
Ricky Skerritt"

[203] In a radio interview on 23 January 2015, the Prime Minister responded to criticisms that his administration's conduct on 16 January 2015 had been improper. A transcript of tan extract of that interview is exhibited to the 2nd affidavit of Mr. Condo.r[39] The Prime Minister stated, inter alia:

> '[…] we've used our majority in Parliament to ensure that a very critically important piece of legislation was passed in the Parliament as quickly as possible to avoid, as the opposition had done before, to prevent the opposition from blocking what we believe is a fundamental right of the people of St Kitts and Nevis and that is to have elections with fair boundaries. […] [E]very time, the opposition goes to the court and frustrates the process. This time around, we've been advised legally and constitutionally, that what we needed to do is exactly what we did. It is within the four walls of our constitution and the laws of St Christopher and Nevis'"

[39] Vol. 4, Tab 36, page 729 at para 3.

[204] It seems clear from the Prime Minister's utterances that he felt that over the years the opposition members were obstructionist to the cause of boundary changes and that they had accessed the court successfully in the past to achieve their goal. This seems to have been viewed cynically as a manipulation of the court. The Government therefore sought and obtained advice on the strategy to be adopted if the effort to change the boundaries was not to be thwarted yet again. The Prime Minister's utterances constitute an admission that the concatenation of events of January 15th was no coincidence; rather it was the execution of that strategy which, he was ill-advised, was within the four walls of the Constitution.

[205] Accordingly, I accept the claimants' submission that the facts relayed above give rise to the irresistible inference that there was a deliberate plan by the executive branch of government, in the control of the then governing party, to rush the Report through the Assembly, dissolve Parliament and have the proclamation published before the Opposition was able to approach the Court to challenge the lawfulness of the Commission's decision. No evidence has been adduced to rebut, displace or in any way attenuate this inference. It has been said that "in our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case." See **R. v. Irc Ex parte T. C. Coombs & Co.**[40] This is the situation here. Accordingly, I draw that inference and find that the Government deliberately attempted to prevent the Claimants from obtaining access to the High Court for redress.

[206] This finding leads to a consideration of the constitutionality of a deliberate attempt to deprive the claimants of their right to access the courts. The Privy Council has articulated what the consequences are should the facts be as I have found them. At paragraph 32 the Board stated:

> "32. In the Board's view there is at least a strongly arguable case that a deliberate attempt by one branch of government, in the control of a governing party, to prevent individuals

[40] [1991] 2 A.C. 283

from obtaining access to the High Court for a constitutional adjudication under section 96 would be unconstitutional as it would deny the protection of the law contrary to section 3(a). In such circumstances, it is strongly arguable that section 2 would nullify the impugned proclamation and section 50(7) would not apply. In any event, on the ordinary principles of judicial review, it is arguable that the making of the Impugned Boundaries Proclamation would be open to challenge, notwithstanding the ouster clause, if the power to do so were exercised for an improper purpose: Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 and Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147."

[207] This statement of principle requires no embellishment. To seek to deny the claimants access to the High Court for a constitutional adjudication under section 96 would be unconstitutional as it would deny the protection of the law contrary to section 3(a). This is not within the four walls of the Constitution as the Prime Minister was ill-advised; it is a clear violation of the right of access to the courts guaranteed by section 3(a) of the Constitution. In these circumstances, the ouster clause in section 50 (7) would have no application.

[208] In the premises, I hold that the proclamation was published for the improper purpose of denying the claimants the right of access to the court, guaranteed under section 3(a) and is accordingly null and void and of no effect.

[209] I accordingly grant the following Declarations and Orders:

(i) A declaration that the Decision of the Constituency Boundaries Commission made on 16 January 2015 to submit a Report to the Governor General pursuant to section 50 of the Constitution is ultra vires, null and void and of no effect;

(ii) A declaration that the Impugned Boundaries Proclamation signed by the Governor General is invalid, null and void and of no effect;

(iii) An order of certiorari to quash:

i) The Impugned Boundaries Decision;

ii) The Impugned Boundaries Report;

iii) The Impugned Boundaries Proclamation.

[210] The Court expresses its immense gratitude to counsel for the claimants and the respondents for

the meticulous and diligent manner in which they approached this case and for the outstanding quality of the submissions received which assisted the Court in no small measure. It is noted, however, that counsel for the interested parties failed to submit any submissions within the time stipulated.

Trevor M. Ward, QC
High Court Judge

By the Court

Registrar