



[2013] JMSC Civ. 87

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2012 HCV 03302**

**IN THE MATTER OF** the  
Independent Commission  
of Investigations Act

**AND**

**IN THE MATTER OF** section 47  
of the Telecommunications Act

**AND**

**IN THE MATTER** of the  
Interception of Communications  
Act

**BETWEEN**

**DIGICEL (JAMAICA) LIMITED**

**CLAIMANT**

**AND**

**THE INDEPENDENT COMMISSION  
OF INVESTIGATIONS**

**DEFENDANT**

**IN CHAMBERS**

**Mr. Maurice Manning instructed by Nunes Scholefield Deleon & Co, Attorneys-at-law for the Claimant.**

**Mrs. Shawn Wilkinson, Attorney-at-law for the Defendant.**

**STATUTORY INTERPRETATION - SECTION 21 INDECOM ACT-SECTION 47  
TELECOMS ACT - SECTION 16 INTERCEPTION OF COMMUNICATIONS ACT -  
WHETHER EJUSDEM GENERIS RULE APPLICABLE – GENERALIA SPECIALIUS  
NON DEROGANT**

**Heard: 28th February & 20th June 2013**

**Mangatal J:**

[1] This matter is in the nature of a joint application as the parties felt it necessary to seek the Court's guidance on the interpretation of Section 21 of the Independent Commission of Investigations Act ("the INDECOM Act"), Section 47 of the Telecommunications Act ("the Telecoms Act") and Section 16 of the Interception of Communications Act.

[2] The Claimant, Digicel (Jamaica) Limited ("Digicel") is a licensed carrier under the Telecommunications Act offering telecommunication services which enable it to provide, among other things, voice and data services to customers in the island of Jamaica. The Defendant, The Independent Commission of Investigations ("INDECOM") is a Commission of Parliament set up under the INDECOM ACT, to investigate, among other things, alleged misconduct on the part of members of the security forces and other agents of the state. INDECOM was set up to replace the Police Public Complaints Authority (PPCA), which had itself been created to investigate the alleged misdeeds of members of the police force.

[3] Digicel, by a Fixed Date Claim Form and Affidavit, filed 13<sup>th</sup> June 2012 seeks the following relief:

1. A Declaration that Digicel is restricted from providing subscriber information regarding the use of its services by third parties to INDECOM under Section 47(1) of the Telecoms Act;

2. A Declaration that INDECOM is not entitled to customer information pursuant to Section 47(2)(b)(i) of the Telecoms Act;
3. A Declaration that the INDECOM Act is not a law requiring disclosure of customer information for the purposes of investigating or prosecuting of a criminal offence;
4. A Declaration that Digicel is not compellable under Section 21(1) of the INDECOM Act to provide customer/subscriber information (and/or) traffic data to INDECOM;
5. A Declaration that Digicel is not compellable under Section 21 (4) of the INDECOM Act to produce customer/subscriber information and/or traffic data to INDECOM;
6. A Declaration that INDECOM is not a designated official for the purposes of Section 16 of the Interception of Communications Act;
7. No order as to costs, and
8. Such further and/or other relief as this Honourable Court deems just.

### **Background**

[4] On December 8<sup>th</sup>, 2009, the Bureau of Special Investigation (“BSI”) began investigating the alleged fatal shooting of one Robert ‘Kentucky Kid’ Hill by members of the Security Force. The BSI is an arm of the Jamaica Constabulary force responsible for investigating allegations of abuse and misconduct by members of the force. A file was prepared and submitted to the DPP for her ruling after the BSI completed its investigation. The DPP subsequently issued her ruling recommending that the file be referred to the Coroner for the Corporate Area. The DPP also recommended that further in-depth investigations be carried out to examine allegations/suggestions that the officers implicated in the shooting were part of a conspiracy scheme involving the cousin of the deceased and a particular woman. Based on this recommendation, INDECOM commenced its investigation into this conspiracy plot. As part of the process, it sought to procure call data information from both Digicel and Cable & Wireless

Jamaica Limited (“LIME”) relating to the telephone numbers of the persons mentioned earlier as being a part of the conspiracy. Notices dated 28<sup>th</sup> September 2011 were served on Digicel and LIME pursuant to Section 21 of the INDECOM Act. LIME complied with the request and provided the information. The Claimant however took the view that it could not comply with the request. In a letter dated 3<sup>rd</sup> October 2011, Digicel informed INDECOM that it could not comply with the request as its interpretation of the relevant sections of the Telecoms Act and the Interception of Communications Act is that these legislative provisions prohibit it from disclosing such information and that the INDECOM Act did not amend these earlier Acts. From thereon, both sides were engaged in constructive dialogue relative to the interpretation to be accorded to these provisions. Unable to reach a compromise the parties agreed that it would be best for them both to approach the Court with their respective views and have the matter determined by the Court.

[5] At the start of submissions, Digicel expressed its position that it was not unwilling to provide the information to INDECOM. However, given the differences of opinion regarding the interpretation of the relevant statutes, it felt it necessary to have the Court clarify the issues and provide its ruling before Digicel acts. It was also indicated that circumstances have overtaken the events which initially gave rise to this application. However Counsel on both sides stated that the issue remains a live one, since it is likely to arise again, and thus the Court’s ruling is still required.

### Relevant Statutory Provisions

[6] The text of the main relevant statutory provisions has been set out below.

#### ***Section 21 INDECOM ACT***

***21. (1) Subject to subsection (5), the Commission may at any time require any member of the Security Forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act, to furnish a statement of such information and produce any document or thing in connection***

*with the investigation that may be in the possession or under the control of that member, official or other person.*

*(2) The Statement referred to in subsection (1) shall be signed before a Justice of the Peace.*

*(3) Subject to subsection (4), the Commission may summon before it and examine on oath-*

*(a) any complainant; or*

*(b) any member of the Security Forces, any specified official or any other person who, in the opinion of the Commission, is able to furnish information relating to the investigation.*

*(4) For the purposes of an investigation under this Act, the Commission shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.*

*(5) A person shall not, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.*

*(6) Section 4 of the Perjury Act shall apply to proceedings under this section in relation to an investigation as it applies to Judicial proceedings under that section.*

**Section 2 "Specified Official" means-**

*(a) a correctional officer;*

*(b) such other public officer, as the Minister may by order specify, being a person upon whom is conferred any of the powers, authorities and privileges as are conferred by law on a member of the Jamaica Constabulary Force.*

**Section 47 Telecommunications Act:**

**47.-(1) Every carrier and service provider shall, subject to subsection (2), regard and deal with as secret and confidential, all information regarding the type, location, use, destination, quantity and technical configuration of services used by their customers.**

**(2) A carrier or service provider-**

**(a) shall disclose the information referred to in subsection**

**(1) to-**

**(i) the Commissioner of Police;**

**(ii) the officer of the Jamaica Constabulary Force in charge of-**

**(A) internal security; or**

**(B) the National Firearm and Drug**

**Intelligence Centre or any organization replacing the same; or**

**(iii) the Chief of Staff, or head of the Military Intelligence Unit of the Jamaica Defence Force, upon being requested to do so by the person referred to in sub-paragraph (i), (ii) or (iii), as the case may require, for the purposes of investigating or prosecuting a criminal offence;**

**(b) may disclose such information-**

**(i) to the Office or pursuant to the provisions of any law for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence;**

**(ii) with the written consent of the customer;**

**(iii) where the disclosure is necessary in defence of the carrier or service provider in any proceedings brought against the carrier or service provider.**

**(3) A service provider or carrier shall not be liable to any action or suit for any injury, loss or damage resulting from a disclosure of information pursuant to subsection (2).**

**Section 16 Interception of Communications Act**

**16 (2) Where it appears to the designated person that a person providing a telecommunications service is or may be in possession of, or capable of obtaining, any communications data, the designated person may, by notice in writing, require the provider-**

**(a) to disclose to an authorized officer all of the data in his possession or subsequently obtained by him; or**

**(b) if the provider is not already in possession of the data, to obtain the data and so disclose it.**

**Digicel's Submissions**

[7] Mr. Manning, Counsel representing Digicel, opened his submissions by firstly asking the Court to consider whether Digicel was compellable pursuant to Sections 21 (1) and (4) of the INDECOM Act to provide the information requested. In construing Section 21 (1), Counsel submitted that the Court should apply the *Ejusdem Generis* rule. He argued that in applying that rule, Digicel would not fall within the category of persons from whom the Commission can request information or ask to produce documents.

[8] Counsel also went on to consider whether the power of the Commission to direct the production of documents, similar to a Supreme Court Judge, meant that INDECOM could do so without more. He argued that Section 21(4) was administrative and that the section does not enable INDECOM to call for the production of specified documents. Further, he argued that there is substantive law which provides for the disclosure of the

requested information and INDECOM does not fall within or come under that substantive law. Consequently, he submitted that since a Judge cannot seek information which is otherwise prohibited or not fully within a substantive law, Section 21 (4) does not give a substantive right to that information. Digicel is therefore not compellable under Section 21 of the INDECOM Act, especially having regard to Section 21 (5).

[9] Mr. Manning during the course of his submission also addressed the issue concerning the exercise of Digicel's discretion to disclose information pursuant to Section 47(2) (b) (i) of the Telecoms Act. The force of his submission was that for Digicel to exercise its discretion, the law in question on which a party is relying must specifically require the disclosure of subscriber information for the purpose of investigating or prosecuting a criminal offence, and that reliance cannot be placed on a general law. Mr. Manning argued that the INDECOM Act does not make reference to the disclosure of this type of information and Section 21(1) cannot be construed as allowing for such a disclosure given its very general nature. He argued that in any event, the Claimant has a discretion, and that discretion is informed by weighing the obligation of keeping information secret and confidential per Section 47 (1) versus the disclosure of this information where the law under which the request is made is not entirely clear. On this basis, the Claimant would not be under an obligation to exercise its discretion in favour of the Defendant.

[10] Counsel further submitted that even if Section 21(1) were to extend to every other person not listed it could not supersede the specific prohibition against the disclosure of subscriber information under Section 47 (1) of the Telecoms Act. He argued that in order to supersede the Telecoms Act, the INDECOM Act would require language repealing or altering the effect of section 47 (1) of the Telecoms Act.

[11] Regarding the issue of whether INDECOM is otherwise entitled to the information by means of any other statute, namely the Interception of Communications Act, Mr. Manning argued against this. He noted that while the information being requested by



Digicel could fall within the meaning of “traffic data” under that statute, only a “designated person” could ask for such communication to be disclosed and INDECOM does not have such a designation. He further argued that the general provisions under the INDECOM Act could not be seen as overriding the specific provisions concerning secrecy in the Telecommunications Act or the specific regime surrounding the disclosure of communication data under the Interception of Communications Act.

### **INDECOM’S Submissions**

[12] Mrs. Wilkinson, who represented INDECOM in this matter, began her submissions by looking into the background or purpose for which the INDECOM Act was passed. She submitted that this was critical in interpreting the expression “any other person” as contained in Section 21(1) of that Act. She argued that when one looks at the purpose which the Act was meant to give effect to, the Court should construe the words “any other person” widely. If construed in that manner, this would therefore mean that Digicel could be asked by the Commission to produce the information requested.

[13] Mrs. Wilkinson also considered whether in the public interest, the information requested by Digicel could be disclosed. It was her submission that INDECOM as a Commission of Parliament had powers akin to that of a Commission of Inquiry. She cited several authorities, some dealing with Commissions of Inquiry on this issue, and others dealing with differing situations, which in her submission demonstrated that in the public’s interest, the Court will order confidential information to be disclosed. This would be so once the request was being made pursuant to the purpose of the relevant body and not otherwise. She submitted that consequent on this, Digicel was compellable under Section 21 of the INDECOM Act to produce the relevant information/documents that were requested by INDECOM.

[14] In regards to the question concerning whether the INDECOM Act was a statute whose provisions require disclosure for the purpose of investigating or prosecuting a criminal offence, Mrs. Wilkinson submitted that it was. She accepted that INDECOM was not set up solely for the investigation of criminal offences. However, she argued

that in satisfying its mandate, some of the occurrences/incidents named in the Act, which INDECOM investigates are criminal acts. She therefore submitted that on this premise, the INDECOM Act is indeed such a law as contemplated by the provision in Section 47 (2) (b) (i).

[15] On the point raised by Digicel as to whether the Interception of Communications Act has any bearing on the ability of INDECOM to request disclosure of subscriber information from Digicel, Counsel submitted that such an issue should not be considered by the Court having regard to the circumstances of the instant case. She stressed that the Notice that was issued by INDECOM was not issued under the authority of the Interception of Communications Act, but under the INDECOM ACT. Further, she argued that nowhere in the Interception of Communications Act does it say that the information that was being requested by INDECOM may not be obtained otherwise than by a Notice issued under that Act. Having regard to this, it was her contention that the provisions of the Interception of Communications Act, in no way, affect or derogate from the powers of INDECOM under the INDECOM Act to compel the production of information and or documents.

### **Resolution of the Issues**

[16] I must extend my gratitude to both Mr. Manning and Mrs. Wilkinson for their industry in the conduct of this matter. Some very important questions on statutory interpretation have been raised and the submissions have been thorough and illuminating.

### **Whether Digicel can be compelled to produce documents pursuant to section 21 of the INDECOM Act**

[17] Section 21(1) of the INDECOM Act empowers the Commission to “***require any member of the Security Forces, a specified official or any other person who, in its opinion, is able to give assistance in relation to an investigation under this Act***” to furnish a statement or any document or thing in connection with an investigation. The term “Documents” is defined in Section 2 of the Act as “any written information relating

(directly or indirectly) to a complaint,” or “any record generated in any manner whatsoever, including any record generated by an automated recording device or programme.” One of the contentions in this claim surrounds the meaning to be given to the words “any other person.” Mr. Manning has suggested that I apply the *Ejusdem Generis* rule in construing those words, whilst Mrs. Wilkinson has argued the converse.

[18] The *Ejusdem Generis* principle is a well-known principle of statutory interpretation. In essence, it states that where general word(s) in a Statute follow two or more particular words capable of forming a genus or category, the construction of the general word (s) must be confined to things of that class or category. As explained by Lord Diplock in the House of Lords’ decision, ***Quazi v Quazi [1980] A.C. 744***, at pages 807 to 808, cited by Mr. Manning:-

***...the rule applies to cut down the generality of the expression “other”...The presumption then is that the draftsman was directed only to that genus and that he did not, by the addition of the word “other” to the list, intend to stray from its boundaries, but merely to bring with the ambit of the enacting words those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interest of brevity.***

[19] The *Ejusdem Generis* rule however is merely a rule of language and not a rule of law. It is not viewed in isolation from other rules of statutory interpretation nor can it override these rules. This is evident from the dicta of Lord Scarman at pages 823 -824 in ***Quazi***, where he stated:

***...It is, at best, a very secondary guide to the meaning of a statute. The all-important matter is to consider the purpose of the statute: see Rands v. Oldroyd [1959] 1 Q.B. 204. If the legislative purpose of a statute is such that such a statutory series should be read ejusdem generis, so be it: the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfill the purpose of the statute. The rule, like***

***many other rules of statutory interpretation, is a useful servant but a bad master.***

(My emphasis)

In the ***Quazi*** decision, as was correctly pointed out by Mrs. Wilkinson, their Lordships considered the purpose of the statute in great detail, before forming the view that the ejusdem generis rule could not be applied. It is for this reason that Mrs. Wilkinson urged the Court to look at the intent behind the passing of the INDECOM Act. The ejusdem generis rule should be used to carry out, not to defeat the intent or purpose of the statute. Where one considers the purpose of the legislation on a whole and it appears that the legislative intent was for the general words to go beyond the class designated by the specific words, the rule cannot apply.

[20] What then was the legislative intent behind the passing of the INDECOM Act? It is well-known that the Preamble to an Act of Parliament may recite the facts that led to the enactment of the Act, and it gives an idea of the main object and the mischief which the legislators intended to address. It is one of the permitted aides to construing the scope and object of the Act- see Section 56(1) of the Interpretation Act. The Preamble to the Indecom Act states:

***An Act to repeal the Police Public Complaints Act; to make provision for the establishment of a Commission of Parliament to be known as an independent Commission of Investigations to undertake investigations concerning acts of members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons, and for connected matters.***

[21] I was referred by Mrs. Wilkinson to certain paragraphs of the recent decision of the Full Court comprising Justices Lawrence-Beswick, Sykes and Williams in the case of ***Gerville Williams and Others v Commissioner of the Independent Commission of Investigations and Others HCV 06344 of 2011 (delivered 25<sup>th</sup> May, 2012).***

[22] At paragraphs 79, 109 and 110 of Gerville Williams, my sister Beswick-Lawrence J. analyzed the matter thus:

**79. The Indecom Act provides that the Commission can require any person to give a statement to assist an investigation. It provides: (sub-section 21(1))**

...

**Section 21(5) limits the nature of the evidence which is so compellable ....**

**109. I conclude therefore that where the Indecom Act requires anyone to provide a statement, such a requirement would be demonstrably justified in a free and democratic society seeking to obtain accurate reports from persons who have useful information for the purposes of the Act.**

**110. Therefore even if there were a derogation of the right to silence and against self-incrimination, obtaining information in the situations specified in the Indecom Act can be justified in any free and democratic society.**

[23] Insight is to be gathered from paragraphs 130-132 of my brother Sykes J's judgment, in which he considered the sequence of circumstances which fueled the passage of the INDECOM ACT. He stated:

**130. Jamaica has had a long standing problem with investigation of the circumstances in which persons have either been killed or mistreated by members of the security forces, particularly the Jamaica Constabulary Force (JCF). The view had developed, rightly or wrongly, that members of the security forces, the police in particular, are involved in too many shooting incidents which have led to the death or serious injury of citizens. Others have been injured or killed while in the custody of the state. Over the years, successive government administrations have sought to address the problem. A major attempt to address the problem and to reduce**

*public cynicism was the establishment of a statutory body known as the Police Public Complaints Authority (PPCA). It functioned for a number of years. It was felt that this body despite its best efforts did not accomplish the task satisfactorily. The statutory provisions were said to be inadequate. In the eyes of some, the PPCA was ineffective. Another significant effort saw the establishment of the Bureau of Special Investigations (BSI). This body, whatever the objective evidence may be, did not appear to command public confidence largely because it was established within and operated by the JCF, the very institution which was under a cloud of suspicion when it came to allegations of serious abuse and misconduct. Persons felt that it would not be able to conduct fair and impartial investigations into members of the force. In one sense the BSI was even weaker than the PPCA because it did not have any statutory powers to conduct effective investigations.*

*131. Successive administrations, for years, have been heavily criticised by human rights groups, domestic and international, for not doing enough to investigate thoroughly, professionally and independently incidents of complaints against the security forces. The criticisms were relentless. The government decided to scrap the PPCA and replace it with Indecom. In effect the perception was that the PPCA and BSI failed to do an adequate job. There is little to suggest that the population at large had confidence in their work.*

*132. A brief reference to some statistics provided by Indecom appointed under the ICIA gives an insight into the scale of the problem. It makes sober reading. Indecom stated, in one of its affidavits filed in this claim, that between 1999 to 2010-a mere eleven years-2257 persons were killed by the police. This figure came from the police-the BSI. By any measure this is indeed a high rate of killings by the police and the perception that the police were unaccountable led the public to conclude that the cases were not*

***being properly investigated. The PPCA body and the BSI were seen to be ineffective, underfunded and lacking in statutory authority to conduct investigations that met acceptable standards. This was the context of the passage of the legislation.***

[24] My Brother Williams J explained at paragraph 330 of the judgment that

***INDECOM was established to replace the Police Public Complaints Authority (“PPCA”), whose performance was the subject of considerable criticism (not much of which could honestly be said to have been unjustified).***

He continued at paragraph 335

***...That the Act was intended to give to the body that it created (i.e. Indecom), greater powers or more efficacy than existed before in relation to the collecting of statements (and evidence generally) in the course of its investigations. This was the “mischief” that the passing of the Act, and the establishing of Indecom was clearly meant to cure; or put another way, one of the purposes for which the Act was passed...Whether it is the purposive approach that is applied or the mischief rule that is adopted, or a broad and flexible approach (as in the Fisher case), it is clear that the intention of Parliament was to give Indecom what the PPCA lacked, that is the capacity to undertake efficacious investigation.***

[25] I am in agreement with these views expressed by my fellow judges as to the purpose for the passing of this particular piece of legislation. When one looks at the legislative scheme itself and the kind of powers that are given to the Commission and its officers, it is clear that Parliament intended that INDECOM should have far-reaching powers to enable it to effectively carry out its mandate. In any event, and importantly, as Mrs. Wilkinson points out in her written submissions headed “Response to Claimant’s Submission”, Section 21(1) of the INDECOM Act does not just say “other person”, it makes reference to “**any** other person”. The section also makes reference to the opinion

of the Commission. It seems to me that the qualifying effect of the word “any”, along with the classification of persons as falling within the sweeping net of Indecom’s opinion, operate to dispel the notion that “any other person” was meant to be restricted to a particular genus. In other words, these qualifications support the view that the words “any other person” are to be given a wide and expansive meaning.

[26] With this in mind, I cannot accept Mr. Manning’s argument that “any other person” should be confined to only persons concerning security personnel or officers that are employed in the public service. If that interpretation was to be applied, INDECOM would be severely handicapped in carrying out the mandate for which it was created. It would mean that INDECOM would be restricted to only getting information from the very same types of persons whom it may be investigating. It is not difficult to conceive that valuable information may be in the hands of all sorts of persons, and not just those who are security personnel, or employed in the public service, or for that matter, solely a complainant civilian in a particular case. The words “any other person” cannot be regarded as *ejusdem generis* to the words “Security Forces” or “Specified official”. “Any other person” in my view is meant to capture any one, whether natural or juristic, who can assist the Commission with an investigation. In **Gerville Williams** whilst the Full Court was not required to rule on the specific interpretation of Section 21(1), it seems their Lordships were of the view that the section was meant to be expansive and not restrictive. In my judgment Digicel falls within the description of any other person and can be required to assist INDECOM where the necessity duly arises under the INDECOM Act.

[27] In researching this matter, I found it very instructive to note the contents of section 18 of the Contractor-General Act and the similarity in wording between subsection 18(1) and 21(1) of the INDECOM Act. This section will also be important when I turn to consider the question of whether Digicel can be compelled to produce the information, data and documents being required by INDECOM. Section 18 provides as follows:

**S. 18-Evidence**



**(1) Subject to the provisions of subsection (5) and section 19(1), a Contractor-General may at any time require any officer or member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in the possession or under the control of that officer, member or other person.**

**(2) Subject as aforesaid, a Contractor-General may summon before him and examine on oath-**

**(a) any person who has made representations to him; or**

**(b) any officer, member or employee of a public body or any other person who, in the opinion of the Contractor-General, is able to furnish information relating to the investigation,**

**and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act.**

**(3) For the purposes of an investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents.**

**(4) Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person by or under the Official Secrets Act, 1911 to 1939 of the United Kingdom (or any Act of the Parliament of Jamaica replacing the same in its application to Jamaica ) or, subject to the provisions of this Act, by any other law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor-General for the purpose of an investigation and accordingly no person shall be liable to prosecution by reason only of his compliance with a requirement of the Contractor-General under this section.**

***(5) No person shall, for the purpose of an investigation, be compelled to give any evidence or produce any document or thing which he could not be compelled to give or produce in proceedings in any court of law.***

(My emphasis)

[28] Whilst Digicel may be required to assist the Commission, Section 21 (5) of the INDECOM Act places limits on the kind of evidence and documents which can be required of it. Indeed, subsection (1) opens with the words “Subject to subsection (5)”. This means that subsection (1) is governed by subsection (5). Compellability in relation to the subject matter of the request is therefore a separate issue from the question of whether Digicel falls within the category of persons that subsection 21(1) provides for. It addresses the nature of the evidence, document or thing that a person is being required to give or produce. As Lawrence-Beswick J. in the ***Gerville Williams*** case stated at paragraph 80 of the judgment, it is only if the person could be compelled to give the evidence in a Court of law that he could be compelled to give the evidence for an INDECOM investigation. The same could be said for the production of documents which the section also addresses.

[29] Compellability refers to the extent to which a person can be legally required to provide evidence or produce documents in Court irrespective of their personal wishes. Compellability of a person can be restricted by statute, common law or the very Constitution itself. In order to determine whether Digicel is compellable to provide the information requested by INDECOM, regard must be had to a number of matters, including the content of the notice by which INDECOM had made the request and the effect of any statutory regime on the disclosure of such information. The content of the notice dated 28<sup>th</sup> September 2011 is set out below

***TAKE NOTICE that you are required to provide the office of the Independent Commission of Investigations...with a report in the form of a written statement pursuant to section 21 of the Independent Commission of Investigations Act, touching and concerning***

***particular information on the numbers below. You are required to bring along with you certified copies of all call data and subscriber details for said numbers for the period November 2009 to January (2010)...The call data must outline the numbers that received these calls and any SMS data available. The cell sites from which each call was transmitted must also be indicated.***

.....

[30] There is no dispute between the parties that the request made by way of the Notice concerns information that falls within Section 47 (1) of the Telecoms Act. However, Digicel's position is that pursuant to that section, it is prohibited from disclosing the information, especially since INDECOM is not among those persons enumerated in subsection 47 (2)(a) to which mandatory disclosure has to be made. Consequently, Digicel has, it argues, the protection of Section 21 (5) of the INDECOM Act in its defence for not complying with the request. Digicel is indeed correct that there is no positive duty imposed on it to disclose to INDECOM the information required. This is clear from the language of Section 47(1) of the Telecom's Act. However, the issue is whether this is an absolute bar to disclosure, which would prevent the Court from exercising its inherent power to compel the production of the information. In the same manner that there exist recognized exceptions to privileged communication which would give rise to compellability, can it be said that there may be valid circumstances in which the Court could compel the production of information which Digicel is mandated to regard and deal with as confidential and secret?

[31] The House of Lord's decision in ***Norwich Pharmacal Co. and Others v Customs & Excise Commissioners [1973] 3 W.L.R. 164*** which was cited by Mrs. Wilkinson, offers an example of a situation in which the Court ordered a third party to disclose information that was considered confidential. In that case Norwich Pharmacal had the patent for a chemical compound called "furazolidone". It was being alleged that certain importers were importing the chemical in breach of Norwich's patent. In an effort to initiate proceedings against the rogue importers, Norwich requested the names,

addresses and documents of the infringing importers from the Commissioners of Custom and Excise. The Commissioners however objected to disclosing the information sought, on the grounds that they were precluded from doing so and that if they were to so disclose the information, it would be injurious to the public's interest. This was because the information was furnished confidentially to them by importers pursuant to the Customs and Excise Act 1952. At first instance, the judge ordered the documents to be disclosed, but his decision was reversed by the Court of Appeal. The House of Lords, however, overturned the Court of Appeal's ruling. In a very detailed judgment, among the factors that their Lordships considered was whether the public interest required the names of the infringing importers to be disclosed. After analyzing the authorities, Lord Morris of Borth-y-Gest at paragraph C, at p. 175 said this:

***“The next step is to consider whether the court should make the desired order and whether it would be in the public interest or against the public interest to make the order. If there was some statutory prohibition (such as that contained in section 17 (2) of the Agricultural Marketing Act 1931: see Rowell v Pratt [1938] A.C. 101) then that, of course, would be conclusive. In the absence of any such prohibition it seems to me...the interests of justice warrant the court in making the desired order unless there are some features of the public interest which are of such weight as to outbalance the public interest of advancing the cause of justice.”***

(My emphasis)

[32] Mrs. Wilkinson also relied on the cases of ***Douglas Pindling [1996] 48 WIR 1*** and ***Parry-Jones v Law Society and Others [1967] 3 WLR 1305*** to further support her submission that disclosure could be required in the public's interest. However, Mr. Manning has argued in response that in these cases there was no specific legislation regarding disclosure and secrecy, while in this case the very data that is being sought to be disclosed is protected. In the ***Norwich*** decision, the House of Lords took the view that even though the information was protected, there was no complete statutory bar to

the information being disclosed. They found that under that statutory regime, the Commissioners were allowed to disclose that information in specified circumstances. In my judgment, in the present case, while Section 47 of the Telecoms Act does not prevent the disclosure of subscriber/call data absolutely, it seems to me that the specific legislation in the Telecoms Act and the Interception of Communications Act do spell out the circumstances in which the information can be given in evidence or disclosed and that these circumstances fall within narrow limits.

[33] In **Rowell v. Pratt** [1938] A.C. 101, referred to in **Norwich Pharmacal** certain information provided by farmers to the Agricultural Board was prohibited from disclosure and protected by secrecy save in certain circumstances. Disclosure outside of the limited purpose of proceedings under the Agricultural Marketing Act attracted criminal sanctions of fines and imprisonment. The question was whether a judge could compel disclosure for legal proceedings outside of being for the purposes of the Act. It was held that the Board could not be so compelled. At page 106 Lord Wright stated:

***The exception is limited by the superimposed limitation to legal proceedings under or in virtue of the Act. It is only within these narrow limits that the information may be disclosed. The present case seems to fall outside the precisely expressed limits of the proviso, and the proviso removes any doubt that there might be whether the main prohibition applies to disclosure for the purposes of legal proceedings. A judge cannot compel a man to commit a criminal offence.***

***.....In the Act in question, like other Acts of a similar character, an individual is required by law to disclose to the proper person or body certain information as to his private affairs. The Act proceeds to secure to him that this information shall be kept secret, save only in the one specially defined circumstance. So regarded, the provision is, in addition to being unambiguous, quite reasonable.***

(My emphasis)

[34] At pages 113-114, after discussing the reasons justifying the need for secrecy, Lord Maughan stated:

***It is not unimportant to note that sub-s 1 of s.17 prohibits the use of any information with respect to any undertaking without the consent of the owner, even in a report laid before Parliament in pursuance of the Act. I do not think that it can be doubted that the first part of sub-s. 2 impliedly prohibits the disclosure of any information such as that contained in a return for there are few better ways of prohibiting an action than by making the doer of it liable to fine and imprisonment.***

(My emphasis)

### **Interception of Communication Act**

[35] Mr. Manning had suggested that the information being requested by INDECOM could fall within the definition of 'Communication Data' as defined by section 16(1) of the Interception of Communications Act. The Interception of Communications Act makes it unlawful for persons to intercept communications being transmitted over a telecommunications network save in certain exceptional circumstances and at the behest of a very restricted group of persons. Section 2 of the Act defines "Intercept" as:

***"Intercept" in relation to a communication means the-***

***(a) Monitoring of transmissions made by wireless telegraphy to or from apparatus comprising in the network;***

***(b) Monitoring or modification of, or interference with, the network by means of which the communication is transmitted, so as to make some or all of the contents of the communication available, while being transmitted, to a person other than the sender or intended recipient of the communication, and "interception" shall be construed accordingly.***

However, in certain circumstances and in varying degrees, there are provisions in the Act which allow for the interception of communication and for disclosure of such information. Section 4(1) allows for an "authorized officer" to apply to a judge in chambers for a warrant authorizing the person named in the warrant to

intercept such communications as described in the warrant and to disclose to such persons and in such manner as prescribed in the warrant. An “authorized officer” is described in the Interpretation section, Section 2, as meaning the Commissioner of Police, the officer of the Jamaica Constabulary Force in charge of internal security or the National Firearm and Drug Intelligence Centre or any organization replacing the same, or the Chief of Staff, or the head of the Military Intelligence Unit of the Jamaica Defence Force. Thus, an authorized officer is by definition the same category of persons outlined in subsections 47(2)(a) (i),(ii) and (iii) of the Telecoms Act as being the persons to whom a telecoms provider is mandated to give disclosure.

[36] Section 16 deals with the disclosure of communication data already in the possession of a telecoms provider, rather than the actual interception of such data. Its ambit is also more specific and detailed than subsection 47(1) of the Telecoms Act which deals with information regarding the type, location, use, destination, quantity and technical configuration of services used by their customers. Unlike Section 4, disclosure as provided for in section 16 does not require an application to be made to a Judge.

***Disclosure of communications data***

***16-(1) In this section-***

***“communications data” means any-***

***(a) Traffic data comprised in or attached to a communication, whether by the sender or otherwise, for the purposes of any telecommunications network by means of which the communication is being or may be transmitted;***

***(b) Information, that does not include the contents of a communication (other than any data falling within paragraph (a)), which is about the use made by any person-***

***(i) of any telecommunications network; or***

- (ii) *of any part of a telecommunications network in connection with the provision to or the use by, any person of any telecommunications service;*

*“designated person” means the Minister or any person prescribed for the purposes of this section by the Minister by order subject to affirmative resolution;*

*“traffic data”, in relation to a communication, means any data-*

- (a) *identifying, or purporting to identify, any person, apparatus or location to or from which the communication is or may be transmitted;*

- (b) *identifying or selecting, or purporting to identify or select, apparatus through or by means of which the communication is or may be transmitted;*

- (c) *comprising signals for the actuation of-*

- (i) *apparatus used for the purposes of a telecommunications network for effecting, in whole or in part, the transmission of any communication; or*

- (ii) *any telecommunications network in which that apparatus is comprised;*

- (d) *identifying the data or other data as data comprised in or attached to a particular communication; or*

- (e) *identifying a computer file or computer programme, access to which is obtained or which is run by means of the communication, to the extent only that the file or programme is identified by reference to the apparatus in which it is stored, and references to traffic data being attached to a communication include references to the data and the communication being logically associated with each other.*

(2) *Where it appears to the designated person that a person providing a telecommunications service is or may be in possession of, or capable of obtaining, any communications data, the designated person may, by notice in writing, require the provider-*



- (a) to disclose to an authorized officer all of the data in his possession or subsequently obtained by him, or*
- (b) if the provider is not already in possession of the data, to obtain the data and so disclose it.*

*(3) A designated person shall not issue a notice under sub-section(2) in relation to any communication data unless he is satisfied that it is necessary to obtain that data-*

- (a) in the interests of national security; or*
- (b) for the prevention or detection of any offence specified in the Schedule, where there are reasonable grounds for believing that-*
  - (i) such an offence has been, is being or is about to be committed, and*
  - (ii) the sender or recipient of any communication, or the subscriber to the telecommunications service, to which the data relates, is the subject of an investigation in connection with the offence.*

*(4) A notice under subsection (2) shall state-*

- (a) the communications data in relation to which it applies;*
- (b) the authorized officer to whom the disclosure is to be made;*
- (c) the manner in which the disclosure is to be made,*
- (d) the matters falling within subsection (3) by reference to which the notice is issued;*
- (e) the date on which it is issued.*

*(5) A notice under this section shall not require-*

- (a) any communications data to be obtained after the end of the period of one month beginning on the date on which the notice is issued; or*
- (b) the disclosure, after the end of such period, of any communications data not in the possession of the provider of the telecommunications service, or required to be obtained by him, during that period.*

**(6) The provisions of sections 9 and 10 shall apply, with the necessary modifications, to the disclosure of data pursuant to a notice issued under this section.**

**(7) Subject to subsection (8), a provider of a telecommunications service, to whom a notice is issued under this section, shall not disclose to any person the existence or operation of the notice, or any information from which such existence or operation could reasonably be inferred.**

**(8) The disclosure referred to in subsection (7) may be made to-**

**(a) an officer or agent of the service provider, for the purpose of ensuring that the notice is complied with,**

**(b) an attorney-at-law for the purpose of obtaining legal advice or representation in relation to the notice,**

**And a person referred to in paragraph(a) or (b) shall not disclose the existence or operation of the notice, except to the authorized officer specified in the notice or for the purpose of-**

**(i) ensuring that the notice is complied with, or obtaining legal advice or representation in relation to the notice, in the case of an officer or agent of the service provider; or**

**(ii) giving legal advice or making representations in relation to the notice, in the case of an attorney-at-law.**

**(9) An authorized officer shall not disclose any communications data obtained under this Act, except**

**(a) as permitted by the notice;**

**(b) in connection with the performance of his duties; or**

**(c ) if the Minister responsible for national security directs such disclosure to a foreign government or agency of such government where there exists between Jamaica and such foreign government an agreement for the mutual exchange of that kind of information and the Minister considers it in the public interest that such disclosure be made.**

**(10) A person who contravenes subsection(7), (8) or (9) commits an offence and is liable on summary conviction in a Resident magistrate's Court to a fine not exceeding five years or to both such fine and imprisonment.**

(My emphasis)

[37] Section 15 of the Interception of Communications Act is also instructive. That section deals with offences; subsection 15(2) states:

**15(2)- A person who intentionally discloses the contents of any communication-**

**(a) Obtained by means of a warrant, to a person to whom he is not authorized to disclose the communication; or**

**(b) Obtained in contravention of this Act,**

**commits an offence and is liable upon summary conviction in a Resident Magistrate's Court to a fine not exceeding five million dollars or to imprisonment for a term not exceeding five years, or to both such fine and imprisonment.**

.....

[38] Since sub-section 16(2) seems to relate to data in the possession of the Telecom's Provider, it is understandable why Mr. Manning raised the issue as to whether the Defendant is a designated official under the Interception of Communications Act for the purposes of issuing a notice for disclosure of communication data. There has been no evidence which would suggest that INDECOM has such a designation. It therefore means that INDECOM could not have issued any notice pursuant to this section for Digicel to provide the kind of information requested, nor can INDECOM be regarded as an "authorized officer". It is therefore clear why INDECOM would not have made any request pursuant to the Interception of Communications Act.

[39] In my judgment, in so far as INDECOM'S Notice does seek to obtain communication and traffic data, Mr. Manning is correct in his submission that it is significant, and it does make a difference, that Digicel is actually required under a

Statute, the Telecoms Act, to keep and deal with the subject data and information as secret and confidential. Further, that Parliament has passed specific legislation that deals with the very limited circumstances and the very select group of persons to whom the information must be provided and disclosed. I am of the view that the reasoning in Roward v. Pratt, which was described in Norwich Pharmacal as a statutory prohibition against the disclosure, is also conclusive in this case with regard to the question of compellability. As in Roward v. Pratt, Parliament has decreed that the information as to the call data is to be kept secret and it is only within the narrow limits as set out in Section 47(2)(a) of the Telecoms Act and Section 16 of the Interception of Communications Act that this secret information must be disclosed. Sub-Section 15(2) of the Interception of Communications Act to my mind demonstrates that disclosure outside of the specially defined circumstances and specifically defined persons is prohibited, and indeed is an extremely serious offence, carrying with it a sanction for the person who commits the offence. The offender is liable to a relatively steep fine, or imprisonment or both. As stated by Lord Wright in Rowell v. Pratt, “a court cannot compel a man to commit a criminal offence”.

[40] There is a presumption of statutory interpretation fashioned in the latin maxim – *generalia specialibus non derogant*. The effect of this maxim is that where Parliament has dealt with a special subject or made provisions for a particular case, this raises a presumption that an enactment of a general character would not have intended to interfere with that provision unless a clear intention to do so is specifically declared.

[41] In his written submissions, Mr. Manning referred to the fact that courts are cautious in their interpretation of very broad provisions and that without more, the general words of a later enactment do not repeal or alter earlier statutes dealing with specific subjects. Counsel referred to the leading case of “**The Vera Cruz**” (1884) 10 A.C. 59 where Earle of Selborne L.C. at page 68 stated:

**Now if anything is certain, it is this. That where there are general words in a later Act, capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier**

**legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so..**

[42] Mr. Manning is indeed correct that there is no express or clear and specific reference in the INDECOM Act, which can be said to show Parliament's particular intention to abrogate or alter the regimes of confidentiality, secrecy, and disclosure in the Telecoms Act and the Interception of Communications Act. For example, there is no provision in the INDECOM Act which is identical to, or of the same effect as section 18(4) of the Contractor-General Act. This further confirms why Digicel is not compellable by INDECOM to produce the information to it. It might well be quite a different matter if it was the Contractor- General acting under his statutory powers who had required the information and data specified in the subject Notice and not Indecom. In my judgment, subsection 18(4) of the Contractor-General Act by way of the contrast that it provides, makes the position abundantly plain and conclusive. It seems irresistible logic to me that if Parliament had intended INDECOM to be able to compulsorily obtain from Digicel or any other Telecoms Provider information which by section 47(1) of the Telecoms Act, the Provider is required by Statute to keep secret, and in respect of the disclosure of which the Interception of Communications Act provides for limited circumstances, then they would have legislated for the same type of provision in the INDECOM ACT as exists in the Contractor-General's Act. That is, there would have been a provision that any obligation to maintain secrecy or any restriction on the disclosure of information should not apply to the disclosure of information or the production of any document to INDECOM for the purpose of an investigation. Further, that no person would be liable to prosecution by reason only of complying with a request by INDECOM made under section 21 of the INDECOM Act.

**Whether Digicel can be compelled pursuant to Section 21 (4) INDECOM Act**

[43] In an effort to strengthen the investigative armoury of the Commission, Parliament has given INDECOM powers like that of a Supreme Court Judge in relation

to the attendance and examination of witnesses and the production of documents (Sub-Section 21(4)). However, Digicel would not be compellable by a judge to give the information or produce the documents to INDECOM except within the confines of Section 47 of the Telecoms Act and Section 16 of the Interception of Communications Act. Therefore, Digicel is correct that Subsection (5) of Section 21 of the INDECOM Act protects its stance of not being prepared to provide the information, statement or documents.

**Whether Digicel should have exercised its discretion in favour of INDECOM's request under The Telecommunications Act**

[44] I have already found that Digicel is not compellable to give the information data and documents. However, one of the questions posed was whether Digicel could have exercised its discretion pursuant to Section 47 (2) (b) (i) of the Telecoms Act in favour of granting the request.

[45] The sub-section provides that a carrier or service provider “may disclose” subscriber information “***pursuant to the provisions of any law for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence.***” Mr. Manning has argued that for the Claimant to exercise its discretion, the law in question under which the request is made must be a specific law which speaks to the disclosure of the specific information described in Section 47 (1). Mrs. Wilkinson on the other hand did not agree with this submission and argued that it is the purpose for which the request was made that was critical to the exercise of the discretion.

[46] Section 4(1) of the INDECOM ACT sets out the functions of INDECOM, one of which is to conduct investigations. Investigations can be carried out by the Commission on its own initiative (Section 13) or as a direct result of a complaint being made (Section 10 (1)). In the case of the latter, the Commission may enquire into allegations that -

*“... involve misconduct of a member of the Security Forces or of a specified official –*

*(a) resulting in the death of, or injury to, any person or that was intended or likely to result in the death of, or injury to, any person;*

*(b) involving sexual assault;*

*(c) involving assault or battery;*

*(d) resulting in damage to property or the taking of money or other property*

*(e) although not falling within paragraphs (a) to (d), is, in the opinion of the Commission, an abuse of the rights of a citizen.*

[47] While the INDECOM Act, as rightly observed by my brother Sykes J. in the **Gerville Williams** decision, does not specifically mandate INDECOM to investigate solely alleged criminal acts committed by the Security Forces, based on what is set out in Section 10 (1) (a-c), a substantial part of the remit of INDECOM is to look into circumstances in which certain criminal offences may have been committed. When one considers the scope of investigations undertaken by INDECOM, It could reasonably be interpreted that Section 21(1), and the related sections of the INDECOM Act are wide enough to be read as requiring a person to disclose information to the Commission for the purposes of investigating a criminal offence. The Preamble, the mischief that the INDECOM Act was designed to cure, including Jamaica’s human rights’ obligations, and the fact that matters potentially involving criminal offences are listed early in sub-section 10(1), suggest that the investigation of criminal offences is one of the crucial and principal functions that Parliament intended Indecom to perform. I am also of the view that subsection 47(2)(b)(i) does not require that the law “for the time being in force which requires such disclosure for the purpose of the investigation or prosecution of a criminal offence” be a law that requires that the investigating body be empowered solely to investigate or prosecute criminal offences. I do not consider the point to be free from difficulty, but on balance, I would agree with Mrs. Wilkinson that for the Claimant’s discretion to be triggered, the provision(s) of the law on which the request is made must require disclosure for the **purpose** of investigating or prosecuting a criminal offence. I

think once the statute is clear and one of the purposes for which disclosure of information of whatever kind is sought is for investigating or prosecuting a criminal offence, it can fall within Section 47 (2) (b) (i). In other words, even though in my judgment the INDECOM Act also established Indecom for wider and other purposes, that does not prevent it being, or take away from the fact that it is an Act that requires disclosure for the investigation or prosecution of criminal offences. I also disagree with Mr. Manning that the particular law would have to be specifically directed at specific information such as that dealt with in section 47(1) of the Telecoms Act. If that were so, it would seem to me that there would be little point in providing the carrier with a discretion since the particular specific legislation would likely already have dealt with the subject matter, and circumscribed the ambits within which carriers would be required to provide disclosure.

[48] Digicel is licensed to provide telecommunications services to the public of Jamaica. It must exercise its discretion in a reasonable manner. In cases where a discretion is conferred on a public official, it is required that such discretion be exercised in a manner that is lawful, fair, reasonable, and rational having regard to the circumstances. Likewise, in cases where a private citizen, such as Digicel has duties to perform where Statute governs the framework for its operations, outlines its duties to the public, and confers upon it a discretion, the same principles of lawfulness, fairness, reasonableness and lack of arbitrariness seem to me to be applicable as well.

[49] However, it is to be noted that under the Interception of Communications Act, subsection 16 (4) (d), a Notice by a designated person requiring disclosure of communication data must state the matters falling within subsection (3) by reference to which the notice was issued. Sub-section (3) states:

***A designated person shall not issue a notice under subsection (2) in relation to any communications data unless he is satisfied that it is necessary to obtain that data-***

***(a) In the interests of national security;***



***(b) For the prevention or detection of any offence specified in the Schedule where there are reasonable grounds for believing that-***

***(i) Such an offence has been, is being or is about to be committed; and***

***(ii) The sender or recipient of any communication or the subscriber to the telecommunications service, to which the data relates, is the subject of an investigation in connection with the offence.***

[50] In my judgment, although I cannot trace any such express statutory requirement in the INDECOM Act, it would have been appropriate for INDECOM to also state in the Notice which it directed to Digicel, in a general, brief but sufficient way the matters which led to the issue of the Notice so that it could readily be seen by Digicel that the information is required for the purpose of investigating a criminal offence. For example, the Notice should have stated even as a bare minimum simply that the information or documents requested are required for the purpose of investigating a criminal offence. By way of contrast, let us suppose INDECOM had required the information, for the purposes of an investigation into the question of whether there was damage to a citizen's property, or abuse of a citizen's rights, not amounting to a criminal offence. In those circumstances, Digicel would have had no proper basis upon which to have exercised its discretion under section 47(2)(b)(i). This is yet another reason why in my judgment the Notice from INDECOM should have specifically addressed the purpose for which the information was sought. This does not mean that there could not be other communication or correspondence between INDECOM and the telecoms provider in which INDECOM could indicate the requisite purpose. However, the Notice seems the logical choice of communication between INDECOM and the telecoms provider that should trigger the exercise of the discretion, or at any rate, set it in train. This is readily apparent if one looks at the intendment behind the issue of Notices by those authorized so to do pursuant to sub-section 16(4)(d) of the Interception of Communications Act referred to above. The inadequacies of the Notice issued by INDECOM may well have contributed to the perfectly understandable dilemma in which Digicel found itself.

[51] Having regard to the public's interest, it is my view, that had the Notice issued by Indecom properly specified that the information was required for the purposes of investigating a criminal offence, Digicel could lawfully have exercised its discretion in favour of INDECOM in providing the requested information. In so doing it would be squarely protected under sub-section 47 (2) (b) of the Telecoms Act. Indeed, subsection 47(3) provides that a service carrier shall not be liable to any action or suit for any injury, loss or damage resulting from a disclosure of information made pursuant to subsection (2). In my judgment, this suggests that the carrier would be allowed a certain amount of leeway and latitude in exercising its discretion under sub-section 47(2)(b)(i).

[52] Having considered all the issues, I make the following declarations:

1. Digicel is restricted from providing subscriber information regarding the use of its services by third parties to INDECOM pursuant to sub-section 47 (1) of the Telecommunications Act.
2. INDECOM is not an authorized officer or a designated person within the meaning of section 16 of the Interception of Communications Act.
3. Digicel is not compellable under section 21(1) of the Independent Commission of Investigations Act to provide customer/subscriber information and/or traffic data to INDECOM.
4. Digicel is not compellable under section 21 (4) of the Independent Commission of Investigations Act to produce customer/subscriber information and/or traffic data to INDECOM.
5. The Independent Commission of Investigations Act is a law which contains provisions which would require the disclosure of the subscriber information for the purpose of investigating a criminal offence.
6. Whilst INDECOM is not entitled to the subscriber information, as Digicel has a discretion pursuant to sub-section 47(2)(b)(i) in respect of disclosure , in appropriate circumstances, such as if the Notice had properly specified the purpose for which the Notice was issued, which purpose was the

investigating of a criminal offence, Digicel could have exercised its discretion in favour of INDECOM's request.

[53] In light of the circumstances I consider it appropriate that each party should stand its own costs.

[54] No doubt Parliament has its own reasons for wanting to give Telecoms Providers the type of discretion which it has entrusted upon them and conferred under section 47 (2) (b)(i). However, in my judgment, if Parliament intends to confer upon INDECOM the power to compel the data, information, statements or documents sought, then Parliament should consider amending the Interception of Communications Act, and the Telecoms Act to specifically name Indecom as authorized to mandate disclosure. Alternatively, Parliament should consider amending the INDECOM Act to include the same type of provision found in sub-section 18(4) of the Contractor-General Act.