[2024] JMFC Full 03

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU 2023 CV 02499

CORAM: THE HONOURABLE MRS. JUSTICE S. WINT-BLAIR
THE HONOURABLE MRS. JUSTICE S. WOLFE-REECE
THE HONOURABLE MRS. JUSTICE T. HUTCHINSON SHELLY

BETWEEN	PHILLIP PAULWELL	1ST CLAIMANT
AND	PETER BUNTING	2ND CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT

Mr B. St. Michael Hylton KC, Mr Kevin Powell, Mr Duane Allen & Ms Timera Mason instructed by Hylton Powell for the Claimants

Mr Alan Wood KC, Mr Ransford Braham KC, Mr Neco Pagon & Mrs Kathryn Williams instructed by Livingston, Alexander & Levy for the Defendant

Heard: November 20, 21, 22, 2023 & April 19, 2024

Constitutional Law – Constitutional Amendment to increase retirement age of the Director of Public Prosecutions – Whether the impugned Act is inconsistent with the supremacy clause and void – Whether the impugned Act amended the Constitution – Whether section 2 of the impugned Act may be struck down on the grounds of improper purpose as unconstitutional– Whether the impugned Act may be struck down for contravening the principle of separation of powers – Whether

section 2 of the impugned Act has the effect of circumventing the constitutionally mandated process for the extension of the term in office of a Director of Public Prosecutions - Whether the impugned Act applies to the incumbent Director of Public Prosecutions – Whether Parliamentary proceedings can be enquired into by a Court – Whether Speaker of the House of Representatives shall grant leave before evidence of proceedings in Parliament can be given in evidence

Constitution of Jamaica (Order in Council), 1962, sections 1, 2, 32, 48, 49, 79, 94, 96, 125

The Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023

Senate and House of Representatives (Powers and Privileges) Act, section 11

WINT-BLAIR, WOLFE-REECE & HUTCHINSON-SHELLY, JJ

This is the joint Judgment of the Court to which each member has contributed.

Background

[1] On July 25, 2023, a Bill to amend the retirement ages of the Director of Public Prosecutions and the Auditor General was tabled in the House of Representatives. The Bill was debated and passed in the House on 25 July, 2023 and in the Senate on 28 July, 2023, by majority vote in both Houses. The Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 ("the Act") was proclaimed in force on July 31, 2023.

[2] The incumbent Director of Public Prosecutions ("the DPP") was born in 1960. In 2020, the DPP attained the retirement age of sixty as provided in section 96(1) of the Constitution.

[3] In January of 2020, the DPP expressed a desire for continuation in office in writing. The Prime Minister in exercising his power under the proviso to section 96(1)(b) of the Constitution proposed an extension for the maximum permissible period of five

years and sought the agreement of the Leader of the Opposition. The Leader of the Opposition's responded some two weeks later with unequivocal disagreement to the proposal.

[4] The Prime Minister recommended to the Governor General that he permit the DPP's tenure to continue for a further three years and not the five years originally contemplated.

[5] The Governor General assented to that recommendation and the DPP elected to continue in office. The tenure of the DPP was extended for a further three years. This three year extension would have expired on or about September 21 2023.

[6] In February 2023 the DPP made an application for continuation in office. In a letter to the DPP in May 2023, the Public Service Commission responded stating that there could be no further extension as the tenure of the DPP had already been extended once pursuant to the relevant constitutional provisions. The PSC also told the DPP that the Prime Minister having considered legal advice had refused the extension.

[7] The Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 was then passed. The PSC recommended the appointment of the DPP to the Governor General. The DPP was thereafter appointed by the Governor General. The details of the documents setting out this chronology are dealt with later on.

The Claim

[8] The claimant's challenge the constitutionality of the Act and filed a Fixed Date Claim Form seeking the following declarations:

1) A declaration that section 2 of the Constitution (Amendment of sections 96(1) and 121(1) Act, 2023 ("the Act") was enacted for an improper purpose and is therefore inconsistent with the Constitution, null and void.

2) A declaration that section 2 of the Act was enacted in breach of the separation of powers principle and is therefore inconsistent with the Constitution, null and void.

3) A declaration that section 2 of the Act would have the effect of circumventing, undermining and/or contradicting the constitutionally mandated process for the extension of the term in office of a Director of Public Prosecutions, and is therefore inconsistent with the Constitution, null and void.

4) In the alternative, and/or furtherance of, and/or consequent upon the grant of the declarations at paragraphs 1,2 and/or 3, an order that section 2(1) of the Act is to be read and construed as not applying to a person who is the Director of Public Prosecutions as at the date of commencement of the Act, and that section 2(2) is to be struck out.

5) Such further and other relief as this Honourable Court deems appropriate or which may be necessary to give effect to the declarations granted.

6) Costs.

The Constitutional Challenge

[9] This claim challenges the constitutionality of section 2 of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 ("the Act"). Though the Act amends the retirement age of both the Director of Public Prosecutions ("the DPP") and the Auditor-General ("the Au-G") in similar terms, this claim challenges the provisions of section 2, which concerns only the DPP.

[10] The impugned Act seeks to amend section 96(1) of the Constitution of Jamaica (Order in Council), 1962 ("the Constitution") by increasing the retirement age of the DPP from sixty to sixty-five years and by giving the DPP the option to elect to retire "any time after attaining the age of sixty years" by writing to the Governor-General.

The provision also seeks to amend section 96(1)(b) of the Constitution by increasing the maximum age the DPP may be permitted to continue in office after attaining retirement age from sixty-five to seventy years.

[11] The essence of the claim is based on three substantive grounds. The first ground is that the real purpose of section 2 of the Act is to extend the term of the incumbent DPP and therefore it was enacted for an improper purpose.

[12] The second ground is that by enacting section 2 of the Act, Parliament conferred upon itself a power that is reposed in the executive, when it purported to amend section 96(1)(b) of the Constitution. The power to extend the term of the DPP involves the Governor-General, Prime Minister and Leader of the Opposition.

[13] The third ground is that section 2 of the Act is inconsistent with the objective of section 96(1)(b) of the Constitution which provides the process for the extension of tenure of a DPP who has attained the age of retirement.

The Defendant's Response

[14] The Defendant filed the affidavit evidence of Paul Bailey in response to the claim. The other affiants on behalf of the Defendant are Valrie Curtis, Paula Llewellyn KC (the incumbent DPP) and Aisha Wright.

[15] The Defendant's case in response, firstly, rejects the argument that the Court can ascertain and find an improper purpose in these circumstances, as the Claimants provided no evidence to support this submission. The only admissible evidence to ascertain the purpose of the Act is the Act itself, which does not suggest an improper purpose.

[16] Secondly, that there is no merit to the claimant's argument that section 2 of the Act violates the separation of powers principle implied in the Constitution, as the principle does not apply in circumstances where there is a legal or constitutional challenge to legislation. In support of this ground, the Defendant argued that

section 96(1) of the Constitution is not entrenched and therefore the required procedure was a simple majority vote under section 49 of the Constitution. This is the procedure Parliament took in implementing the Act.

[17] The Defendant's third argument is that to construe section 2 of the Act as inapplicable to the incumbent DPP would be beyond the powers of the Court as the rules of interpretation do not permit the reading in of words into a statute where the express words are plain and unambiguous. As the language of section 2 is unambiguous, the Court should not look beyond the Act to infer a different meaning as evidence to support the Claimants' contention that the real purpose of the Act was to circumvent the extension process under section 96(1) of the Constitution.

The Preliminary Point

[18] Before traversing the issues, the Defendant made the following preliminary point in respect of the affidavit evidence filed by the Claimants, in reliance on section 11 of the Senate and House of Representatives (Powers and Privileges) Act ("the SHRA") which provides:

> *11.-(1) No member or officer of either House and no shorthand writer employed to take minutes of evidence before either House or any committee shall give evidence elsewhere in respect of the contents of such minutes of evidence or of the contents of any document laid before the House of committee, as the case may be, or in respect of any proceedings or examination held before the House or committee, as the case may be, without the special leave of such House first had and obtained."*

[19] It was submitted that the Affidavits of Phillip Paulwell, Mikael Phillips, G. Anthony Hylton and Peter Bunting, all filed on 8th August, 2023 in support of the Fixed Date Claim Form ("the affidavits,") contain evidence of proceedings before the House of Representatives and the Senate which the Claimants and affiants have neither sought nor obtained the special leave of the House of Representatives nor Senate to give such evidence. Accordingly, the evidence of the proceedings before both Houses of Parliament contained in those affidavits ought to be struck out.

[20] The Defendant proposed no objection to the Hansard Reports for the Sitting of the House of Representatives and the Senate on 25 July 2023 and 28 July 2023 respectively, which were exhibited to the Second Affidavit of Peter Bunting filed on 18 October 2023.

[21] It was submitted that evidence of parliamentary process cannot be used to establish an improper motive to Parliament, as is being asserted in this case. Parliament, comprising His Majesty, a Senate, and a House of Representatives, was established by the Constitution.[1] The Constitution grants Parliament the authority to determine its privileges, immunities, and powers,[2] as well as the power for each House to regulate its own procedure.[3] These privileges are expressly recognised in common in the *"exclusive cognisance of proceedings* which means that Parliament is the master of its own proceedings,[4]

[22] To this end, it was held in **Bahamas District of the Methodist Church in the Caribbean and the Americas and others v Symonette and others**[5] that Parliament has exclusive control over the conduct of its own affairs and the Court will not allow any challenge to be made to what is said or done within the walls of Parliament in the performance of its legislative functions. Alleged irregularities in the conduct of parliamentary business are a matter for Parliament alone. In his

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[1] section 34

[2] section 48

[3] section 51 (1)

[4] Halsbury's Laws of England (Vol 78, 5th Edition) at para. 1081

[5] (2000) 59 WIR 1

judgment, Lord Nicholls referred to the case of **Prebble v Television New Zealand Ltd.**[6]

[23] The Defendant cites the words of Saunders J (as he then was) in **Hughes v Rogers**[7]: *"what is said and done within the walls of Parliament cannot be inquired into in a Court of law. The House is the sole judge of the lawfulness of its own proceedings."*

[24] It was contended that there is a specific prohibition on the giving of evidence of Parliamentary procedures imposed by section 11 of the SHRA. The Privy Council in **Toussaint v Attorney General of St. Vincent and the Grenadines**[8] accepted that a Court is precluded from enquiring into the propriety of the statements and proceedings of Parliament as was held in **Prebble** and **Symonette**. However, it was recognized that there were circumstances where permitting such evidence to be given would be necessary, to explain executive action and to enable its judicial review. (Per Lord Mance at paragraphs 10 and 24, 34.)

[25] **Toussaint** has subsequently been applied in a series of cases where it has been held that parliamentary privilege does not operate as a bar to statements made in Parliament being relied on to explain conduct outside of Parliament (said conduct being the subject of the claim/action in question) however, it does operate as a bar to statements made in Parliament or parliamentary proceedings being challenged

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[6][1994] 3 All ER 407

[7] Civil Suits Nos. 99 & 101 of 1999, High Court (Saint Christopher, Nevis and Anguilla) (unreported) delivered 12th January, 2000) at page 9

[8] [2007] UKPC 48

for their veracity or propriety.[9] It is a fundamental principle of law that it is impermissible to use evidence of Parliamentary process to seek to establish an improper motive to the Parliament.

[26] The affidavits contain evidence of proceedings before the House of Representatives, related to the tabling of the Act. The Claimants are relying on this evidence to establish their claim that the Act was enacted for an improper purpose. They are not relying on this evidence to explain conduct outside of Parliament or to enable judicial review of executive action but to challenge the veracity or propriety of the parliamentary process, which is impermissible. In the circumstances, it is submitted that the following paragraphs ought to be struck out:

a. Paragraphs 9, 10 and 11 of the Affidavit of Phillip Paulwell in support of the Fixed Date Claim Form filed on 8th August, 2023;

b. Paragraphs 4, 7, 8, 9, 10, 11, 12, 13 and 14 of the Affidavit of Mikael Phillips in support of the Fixed Date Claim Form filed on 8th August, 2023;

c. Paragraphs 6, 7, 8 and 9 of the Affidavit of G. Anthony Hylton in support of the Fixed Date Claim Form filed on 8th August, 2023; and

d. Paragraphs 8, 9, 10, 11, 12 and 13 of the Affidavit of Peter Bunting in support of the Fixed Date Claim Form filed on 8th August, 2023.

[27] In addition, the Defendant submits that this Court ought not to consider the letter of Kathy-Ann Pyke dated 27 July 2023, as she is not a Court appointed expert. Her

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[9] Warsama et al v The Foreign and Commonwealth Office et al[9] which was upheld by the Court of Appeal in Warsama and another v Foreign Commonwealth Office and another (Speaker of the House of Commons, interested party.) [2020] EWCA Civ 142).

evidence is inadmissible and irrelevant as it does not assist the Court in determining the issues which arise for consideration on the claim. Equally, the DPP's letter dated 28 July 2023 in response to Ms. Pyke's letter, should not be considered by the Court.

Response to the Preliminary Point

[28] In response, the Claimants argue that in section 11 of the SHRA the words "*proceedings before the House*" does not include ordinary procedures in the House such as the public debate of a Bill.

[29] It is a general principle of construction, that when interpreting a statute, the Court may consider the non-enacting parts of the legislation, such as the headings. Section 11 of the SRHA falls under the heading "*Evidence*." That section of the SHRA deals with the power of each House of Parliament to order persons to give evidence before it, and how that evidence is to be taken, the words refer to those proceedings. There may be good reasons for the House to want to keep evidence taken in such proceedings confidential. By contrast, the interpretation the Defendant argues for would not be logical.

[30] It was submitted that when a Bill is publicly debated and the debate is broadcast live, as was the case with the Bill in the instant case, an interpretation that would prevent a member from giving evidence about those proceedings would serve no legitimate purpose. Further, such an interpretation would invite abuse as it could permit the Speaker to block members of Parliament from pursuing alleged unconstitutional action by Parliament in the Court.

[31] This view is supported by the Privy Council in **Toussaint v The Attorney General of St Vincent and the Grenadines**, a case cited by the Defendant. At paragraph 21, the Board had to consider a provision similar to section 11 of the SHRA. Their Lordships found that the requirement to obtain special leave from the Speaker

before relying on statements made in Parliament was not a settled rule of evidence and said:

> *"...the exclusion relied upon by the attorney general is not a settled rule of evidence as exercised on established principles. It depends on the unexplained and unchallengeable exercise of a discretion by the Speaker of the House of Assembly. Such an exclusion is in the Board's view inherently problematic in the context of a claim for judicial review of executive action. It involves a potentially very significant inroad into the doctrine of separation of powers, nothing in the nature of, or need to protect, parliamentary activity requires an officer of the Legislature to have so unconstrained a power over the use before the Courts, to explain and review executive actions, of statements made in Parliament."*

[32] It was submitted that there is no allegation of impropriety against any member of Parliament, so this would be an exception to the applicability of the Act. Therefore, even if the Court accepts the Defendant's interpretation and application of section 11 of the SHRA, the Claimants' submit that nothing prevents them from relying on the evidence contained in their affidavits.

[33] It is further submitted that the Defendant also relies on a common law rule known as the exclusive cognizance of proceedings and cited a number of cases. The Claimants' submit that there is no merit in that point and rely on **Toussaint**. The United Kingdom's ("UK") Parliament's claim to exclusive cognizance of its proceedings is based on its historical position in which Parliament is sovereign in that regime.

[34] The position in Jamaica is different, as Parliament is neither sovereign nor supreme. In Jamaica, the Constitution is supreme and the Courts not only have the right to inquire into the actions of Parliament in appropriate cases, they have a duty to do so.

[35] In **Symonette**, the Claimants had initiated proceedings before the law had been enacted, and the issue was whether the claim was premature. The comments about the position in the Bahamas on Article 2 would apply equally to Jamaica.

Section 2 of Jamaica's Constitution is in identical terms to Article 2 the Constitution of the Bahamas.

[36] It was argued that the Privy Council decision in **Prebble** is referred to in the case of **Symonette.** The Claimants submit that there are two short answers to that submission. The first sentence of Lord Browne-Wilkinson's opinion indicates the entirely different legal context of **Prebble**. He observed that Article 9 of the Bill of Rights (1688) "*precludes any Court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament.*" Like the UK, New Zealand does not have a written Constitution, and there is no equivalent to section 2 of the Constitution of Jamaica.

[37] The second answer can be found in **Symonette** itself. Lord Nicholls did indeed refer to **Prebble**, but he did so while explaining "*the basic position in the United Kingdon.*" **Prebble** is plainly of no relevance to the present proceedings, and neither is **Hughes v Rogers**. The only relevant authority cited by the Defendants is **Toussaint**, for the reasons advanced by the Claimants whom it actually assists. The Defendant's preliminary point should be dismissed for the foregoing reasons.

Discussion on the preliminary point

[38] It is accepted and the view of this Court that the Hansard provides the official record of proceedings before the Parliament. The affidavits contain exhibits which do not form a part of the Hansard. The parties have placed before the Court the Memorandum of Objects and Reasons in respect of both the Pensions Act and the Act under review. The letter of Kathy-Ann Pyke dated 27 July 2023, and the DPP's letter dated 28 July 2023 in response to Ms. Pyke's letter, need not be considered.

[39] In **Toussaint v Attorney General of St Vincent and the Grenadines** cited by both sides the facts were in 1990, Mr. Toussaint, who was then the Commissioner of Police of the Saint Vincent and the Grenadines Police Force, purchased 12,957

square feet of land in Canouan in the Grenadines from the Development Corporation for $6,478.50. The sale included covenants outlined in schedule 2, which restricted resale without the corporation's approval, required development within three years, and stipulated that failure to develop would result in the land reverting to the corporation at the original price. In 1993, Mr. Toussaint obtained a three-year extension for the development covenant, and in 1996, he acquired a deed of release from all schedule 2 covenants.

[40] Following a change in government, on March 26, 2002, the Attorney General, sent a letter to Mr. Toussaint, claiming that the land he had purchased had unrealized development potential and had been sold at an undervalued price due to his close ties with the previous government. The Attorney General demanded payment of $84,220.50, representing the alleged shortfall from the fair market value, along with stamp duty. When Mr. Toussaint did not comply, another letter was sent on May 9, 2002, offering him the option to return the land to the state and receive a refund of the purchase price.

[42] During the budget debate in the House of Assembly on December 5, 2002, the Prime Minister made a statement regarding the Cabinet's decision to compulsorily purchase Mr. Toussaint's land under the Land Acquisition Act. This decision was accompanied by the publication of an extraordinary Gazette effecting the declaration. Mr. Toussaint asserts that he watched the televised debate and later obtained a videotape of it, and the transcript which was presented before the Board.

[43] On the same day, the Prime Minister's Office released a declaration in the Government Gazette (Extraordinary), stating that, upon Cabinet advice and purportedly under section 3 of the Land Acquisition Act 1946, Mr. Toussaint's land was deemed necessary for a public purpose - specifically, to establish a learning resource centre for Canouan residents. The acquisition would take effect upon the second publication of the declaration, which occurred on December 10, 2002. However, the declaration did not specify any compensatory payment. Later, on

March 12, 2003, the Lands and Surveys Department informed Mr. Toussaint that $9,717.80 had been deposited in his name at the Treasury Department, representing the payment plus 5% interest over ten years for the land acquired in 1990. Notably, this compulsory acquisition was not based on the alleged market value but rather on the original purchase price plus simple interest at 5% per annum.

[44] Mr. Toussaint contends that the Prime Minister's statement during the budget debate on December 5, 2002, reveals the actual motives behind the land acquisition, which he asserts were politically driven. He further alleges that the stated public purpose of establishing a learning resource centre, as mentioned in the declaration, was merely a pretext designed to unlawfully deprive him of his land.

[45] Mr Toussaint claimed that the statement indicated political motives behind the land acquisition and sought to use it in his claim for constitutional relief against the government for alleged discriminatory or illegitimate expropriation. The Defendant moved to strike out the claim. The Court of Appeal of St Vincent and the Grenadines partially allowed the claimant's appeal. Toussaint appealed to the Privy Council. The Defendant argued not only an evidential bar under section 16 of the House of Assembly (Privileges, Immunities and Powers) Act but also a constitutional bar based on the Bill of Rights (1688), which safeguarded parliamentary freedom of speech and proceedings from being questioned outside Parliament since no permission had been given by the Speaker of the House of Assembly for the statement's use in Court.

[46] The Defendant argued that there was also a constitutional bar to any investigation of or reference to what the Prime Minister might or might not have said, based upon article 9 of the Bill of Rights (1688), which provided that the freedom of speech and debates or proceedings in Parliament were not to be impeached or questioned in any Court or place outside Parliament and the wider common law

principle concerning freedom of speech and parliamentary privileges and immunities.

[47] The claimant submitted that section 16 of the 1966 Act had to yield on the particular facts to his constitutional right to access to justice in respect of his complaint of discrimination and/or expropriation. Section 16 is similar to section 11 of the SHRA under review. At paragraph 21, the Board considered section 16. The decision of the Board was:

> *"The appeal was allowed. The statement was admissible in evidence in support of the claimant's claim, notwithstanding s 16 of the 1966 Act. The exclusion relied upon by the defendant depended on the unexplained and unchallengeable exercise of a discretion by the Speaker, which involved a potentially very significant inroad into the doctrine of separation of powers. Nothing in the nature of, or need to protect, parliamentary activity required an officer of the legislature to have so unconstrained a power over the use before the Courts, to explain and review executive action, of statements made in Parliament.*
>
> *Although the European Court of Justice (ECJ) had recognised both parliamentary and state immunity in various cases none of them had suggested that the ECJ would recognise an immunity in respect of statements made in Parliament upon which a citizen wished to rely to explain* ***the motivation of executive action taken outside Parliament****. Nothing in them suggested that the ECJ would accept that the effective pursuit of a claim for breach of fundamental rights could be made subject to the absolute discretion of the Speaker of a Parliament. On the facts of the instant case, the claimant's right of access to the Court for constitutional relief would be unduly and effectively undermined, if he were not able to rely upon the Prime Minister's statement in the budget debate. Section 16 had to be read subject to the modification, adaptation or qualification necessary to enable evidence relating to such a statement to be admissible, where necessary to explain executive action and to enable its judicial review." (Emphasis added.)*

[48] We note that **Toussaint** concerned the breach of a fundamental right which is another type of constitutional case. The instant case concerns actions which preceded the passage of the Act and actions taken afterwards. The legislative process is one part of the narrative of events upon which the Claimants' rely to establish their claim. It is the duty of the Court to review all of the conduct, policy

and motivation found to be relevant on this claim. We rely upon the following passage from the Board in **Toussaint**:

> *"17 In such cases, the minister's statement is relied upon to explain the conduct occurring outside Parliament, and the policy and motivation leading to it. This is unobjectionable although the aim and effect is to show that such conduct involved the improper exercise of a power "for an alien purpose or in a wholly unreasonable manner": **Pepper v Hart**, per Lord Browne-Wilkinson at p 639 A. The Joint Committee expressed the view that Parliament should welcome this development, on the basis that "Both parliamentary scrutiny and judicial review have important roles, separate and distinct, in a modern democratic society" (para 50) and on the basis[2007] 1 WLR 2825 at 2833that "The contrary view would have bizarre consequences", hampering challenges to the "legality of executive decisions ... by ring-fencing what ministers said in Parliament", and making "ministerial decisions announced in Parliament ... less readily open to examination than other ministerial decisions": para 51. The Joint Committee observed, pertinently, that "That would be an ironic consequence of article 9. Intended to protect the integrity of the legislature from the executive and the Courts, article 9 would become a source of protection of the executive from the Courts." (Emphasis added.)*
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> *18 In R (Asif Javed) v Secretary of State for the Home Department [2002] QB 129, the Court of Appeal of England and Wales addressed the position (not directly relevant in the present case) of subordinate legislation tabled and approved in Parliament. It said, correctly in the Board's view, that both article 9 of the Bill of Rights and the wider common law principle accommodate the right and duty of the Court to review the legality of subordinate legislation. The Court can review the material facts and form its own judgment on the legality of subordinate legislation tabled in both Houses of Parliament and approved there, even though the result might be discordant with statements made in parliamentary debate. (Emphasis added.)*

[49] The Board in **Toussaint** made it plain that even the material facts of the legality of subordinate legislation were capable of review in **R (Asif Javed)**, which was a case from the United Kingdom ("UK") a jurisdiction in which Parliament is sovereign. In our view, this position would apply with greater force to primary legislation seeking to amend the Constitution in a jurisdiction in which there is a written Constitution that is sovereign, and in which there is a duty on the Court to enquire into alleged unconstitutional action in a claim before it.

[50] While the Defendant in the instant case raises only an evidential bar and the Claimants have not identified the constitutional bar as applicable, it is a valid consideration for this Court, again for the reasons of the duty of constitutional scrutiny which is the role of the Court based on the supremacy of our written Constitution.

[51] Further, at paragraph 19 of **Toussaint**, it was argued on behalf of the claimant that the use of utterances by the Prime Minister in the House should be permitted as it was not being alleged that the Prime Minister had misled the house or acted improperly. Rather, the statement was being relied on for what it said as a matter of evidence.

[52] The case of **Symonette** concerned a private members bill and a pre-emptive strike against a Bill. The fact situation is distinguishable from the case at bar. The section under review in **Symonette** has its equivalent in section 55 of the Jamaican Constitution. That is not the section under review in the present case and the comments in **Symonette** concerning that section are inapplicable to this case. The holding of the Board in relation to the relationship between the Courts and the legislature was in respect of the sovereignty of the UK Parliament and the fact specific situation of the Bill under review. The Board said in **Symonette** that in other common law countries their written constitutions, are supreme and not Parliament. The applicable parts of the dicta of the Board would be the comments in respect of the supremacy clause.

[53] In addition, **Symonette** in our view, is authority for the proposition that Parliament is the master of its own procedure in respect of its own rules of procedure for the passage of legislation and the conduct of the business of either House but this would not apply to matters related to the validity of a statute which is the province of the Courts.

[54] The SHRA therefore has to be interpreted to gives effect to the supremacy of the Constitution of Jamaica. Any interpretation of the SHRA which would lend itself to

the creation of a constitutional bar or which would confer an unfettered discretion on either House to prevent evidence of parliamentary proceedings must yield to the right of access to justice and the provisions of the Constitution which protect access to the Court for constitutional relief.

[55] The SHRA must therefore be read in its literal context subject to any necessary modification, qualification and to the extent necessary to enable the evidence of unconstitutional actions to be adduced and admitted in this Court to enable constitutional review. Were this interpretation not so, then the SHRA would be inconsistent with the Constitution as it would oust the power of the Court to review actions taken in Parliament and would lend itself to the view that there is unchecked power over the members of Parliament for the purpose of cases before the Court. This is an interpretation this Court will decline to make. The Supreme Court is the guardian of the Constitution and recognizes that unfettered power has not been conferred by the Constitution on any branch of the State.

[56] Further, the cases cited by the Defendant support the UK position of parliamentary sovereignty. This is not the position in Jamaica which has long been that of constitutional supremacy.

[57] Finally, this Court is entitled to the best possible contemporaneous evidence, made in the most reliable context where a frank explanation would have been expected. The preliminary point is dismissed for the foregoing reasons.

Issues

[58] The issues for consideration are as follows:

1. Whether Section 2 of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 was enacted for an improper purpose.

2. Whether the enactment of section 2 of the Constitution (Amendment of Sections 96(1) and 121(1)) Act 2023, breaches the separation of powers principle and renders the amendment unconstitutional

3. Whether enacting Section 2 circumvents the process for the extension of the Director of Public Prosecution's term in office

4. Whether Parliament should have proceeded as if section 96(1) was an unentrenched or an entrenched provision.

5. Whether the Amendment properly applies to the incumbent office holder.

6. Whether the Court should read down the impugned provisions

The Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023

[59] The Act under review prescribes:

> *"2 (1) Section 96 (1) of the Constitution is amended by –*
>
> *(a) Deleting the words "sixty years" wherever they appear and substituting therefor in each case the words "sixty-five years;" and*
>
> *(b) Deleting the words "not exceeding sixty-five years" where they appear in paragraph (b) of the proviso and substituting therefor the words "not exceeding seventy years."*
>
> *(2) Notwithstanding anything in subsection (1), a person who is the Director of Public Prosecutions at the date of commencement of this Act may, by memorandum in writing given to the Governor-General, elect to retire at any time after attaining the age of sixty years."*

[60] The claimant distilled the grounds filed into the following four for argument, contending that:

i. Section 2 of the amending legislation ("the Act") was enacted for an improper purpose.

ii. By enacting section 2 of the Act, Parliament breached the principle of the separation of powers.

iii. Section 2 of the Act would have the effect of circumventing or undermining and/or contradicting the constitutionally mandated process for the extension of the term in office of a Director of Public Prosecutions. The Claimants relied on the Privy Council decision in **Independent Jamaica Council for Human Rights v Marshall-Burnett**[10] for the proposition that the Act is a direct attempt to circumvent other provisions of the Constitution.

iv. The passing of the Act constitutes a breach of the requirements or principles which are inherent in the structure and provisions of the Constitution such as has been set down by the Privy Council in the seminal case of **Hinds v The Queen**[11] and more recently by the Caribbean Court of Justice ("the CCJ") in **Belize International Services Ltd v The Attorney General of Belize**.[12] These principles are found in the necessary implication from the subject matter and structure of the Constitution and the circumstances under which it was drafted. These form its "basic deep structure" with certain non-derogable features, principles and values that underpin, inform and constitute the text of a Constitution.

[61] The Claimants argue that on any or all of the first three grounds, the claim should succeed and the Court should declare section 2 of the Act inconsistent with section 2 of the Constitution and therefore null, void and of no effect.

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[10] [2005] UKPC 3

[11] (1976) 1 All ER 353 at page 6

[12] [2021] LRC 36

Issue 1. Whether section 2 of the Constitution (Amendment of Sections 96(1) and (121)) Act, 2023 was enacted for an improper purpose

Claimant's Submissions

[62] Mr. Hylton KC's submission is that the government's real purpose in enacting section 2, is to extend the term of the incumbent DPP and this is an improper purpose or use of the legislation. For the meaning of an 'improper purpose,' King's Counsel relied on **Eclairs Group Ltd v JKX Oil and Gas Plc [2015] UKSC 71; Vatcher v Paul**[13] **and European Commission v Poland (Independence of the Supreme Court) Case C-619/18**.

[63] The term 'improper purpose' means "the power has been exercised for a purpose or with an intention outside the scope of or not justified by the instrument creating the power,"[14] Based on the judgment of Lord Sumption in **Eclairs**, the improper purpose is a concept concerned with the abuse or fraud (though not in the literal sense) on a power which has been conferred by an instrument.

[64] The Claimants contend that the Constitution establishes a regime to govern the extension of a DPP's tenure administered solely by the executive branch. Further, that regime includes certain protections aimed at preventing the erosion of the independence and integrity of the office of the DPP.

[65] Mr. Hylton KC cited the Privy Council decision in **Liyanage v The Queen**[15], in which the Board noted that the impugned Criminal Law (Special Provisions) Act was held as unconstitutional since it had the effect of the legislature usurping

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[13][2015] AC 372

[14] per Lord Parker of Waddington at page 378 in Vatcher v Paul.

[15] [1967] 1 AC 259

certain powers of the judiciary relating to the arrest, detention and sentencing of persons suspected of having committed an offence against the State.

[66] In **Liyanage**, a case from Ceylon, a country with a written Constitution based on the Westminster Model, the Privy Council held that the Acts of 1962 with which the Court was concerned were not for the general population but had been aimed at particular known individuals, named in a White Paper who were in prison awaiting their fate.

[67] The instant case targets a specific person that is the incumbent DPP. The only difference between the legislation in **Liyanage** and the Act in the present claim, is that the former was intended to prejudice the targeted persons while the latter was intended to benefit the targeted person. Both are equally improper purposes.

[68] The principle of constitutionalism is universal, extending to the Strasbourg jurisprudence. In the **European Commission v Poland Independence of the Supreme Court.**[16] The Court was faced with a similar situation to that in the instant case and had to consider whether legislation enacted by Poland, "the New Law" was inconsistent with the Constitution of Poland. Article 183(3) of Poland's constitution provided that the First President of the Supreme Court was appointed for a six-year term. The retirement age for judges of the Supreme Court before the New Law was seventy, with the possibility of extension to seventy-two. The New Law sought to lower the age to sixty-five across the board with the possibility of a maximum of two discretionary extensions. The Court held that the amendment was unconstitutional.

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[16] Case C-619/18

[69] Accordingly, the Claimants submit that section 2 of the Act was enacted in breach of the proper purpose principle and should be declared null and void.

Defendant's Submissions

[70] Mr. Wood KC submitted that in order to determine improper purpose, the Court must apply an objective test to ascertain the mischief Parliament intended to address. In doing so, the Court need not look beyond the long title of the Act and the Memorandum of Objects and Reasons in the 2023 Bill, which set out the legitimate objects of the Act.[17]

[71] King's Counsel further argued that whether a legislation was enacted for an improper purpose is a distinct question from the proportionality test in **Oakes** referred to by Sykes CJ in **Julian Robinson v Attorney General**.[18] The Claimants' reliance on authorities in line with **Julian Robinson** is therefore misguided, as outside the sphere of the proportionality test, there is no constitutional principle of improper purpose of legislation. If, however, the Court exercises its jurisdiction to question the purpose of the Amendment Act, it should do so objectively by not going beyond the Act to look into individual motives of Parliamentarians, which based on the authority of **Ferguson** is inconsistent with the objectivity test when considering the object and purpose of legislation.

[72] It was submitted that the Court did not have the power to make a finding that the Act had been amended by for an improper purpose as the Court in its limited role could not enquire into the expediency or propriety of the amending legislation nor

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[17] Ferguson v Trinidad and Tobago [2016] UKPC 2, 2 LRC 621.

[18] [2014] JMFC Full 04

place any limitation on the Parliamentary power to amend the Constitution in reliance on **Hinds v The Queen**[19].

[73] It was further submitted that the Court should apply the "presumption of constitutionality" principle, as the amendment was valid unless it could be shown that Parliament was acting either in bad faith or had misinterpreted the provisions of the Constitution under which it purported to act.

Discussion

[74] It is an accepted principle of constitutional review that the presumption of constitutionality is generally rebuttable. In this case it would be rebutted if the purpose of the Act rendered it invalid, whether it was intended to do so or not.

[75] We rely on the text Commonwealth Caribbean Public Law[20] which says:

> *"Improper purposes is merely an aspect of irrelevant considerations and only a thin line divides them.... Purpose in this context refers to the intention of a statute. A statutory power must be exercised for the purpose for which it was intended. Accordingly, if the proper purpose of the statute is not served then, the functionary would have acted ultra vires.... Improper purposes may also be reflected in the pursuit of a wrong object."*

[76] Ultimately, to determine the purpose of section 2 of the legislation, this Court must have regard to all relevant evidence. Since the House of Lords decision in **Pepper v Hart**[21], it is accepted that a Court may consider external sources to the legislation to aid in its construction in search of its purpose.

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[19] [1976] 1 All ER 353

[20] Professor Albert Fiadjoe, 3rd ed., p. 40, 41

[21] (1993) AC 593

[77] Mr. Bunting's affidavit exhibits the Hansard reports for the sittings of the House of Representatives and the Senate. In her affidavit, Ms. Wright exhibited myriad documents that were relevant in the process of enacting section 2 of the Act such as the Options for Reform of the Public Sector Pension System (Green Paper), The Report of the Joint Select Committee, The Reform of the Public Sector Pension System (White Paper), The Memorandum of Objects and Reasons in the 2017 Pensions (Public Service) Bill.

[78] The Court also considered the long title to the Act and the Memorandum of Objects and Reasons in the 2023 Bill. Upon reviewing of all of the evidence, the objective of section 2 of the Act is as its long title suggests, which is to amend the Constitution to provide for an increase in the retirement age of the DPP.

[79] We accept and find that this objective is consistent with Parliament's intent to increase the retirement age of public officers from sixty to sixty-five years old throughout the public sector. The Report of the Joint Select Committee noted that as public offices, such as the DPP were created under the Constitution, increasing the retirement age of that post required amending the Constitution. Following that recommendation, the Ministry of Finance drafted the White Paper which implemented the recommendation to gradually increase the retirement age from sixty to sixty-five years throughout the public sector to provide a more efficient pension system and to harmonize the retirement ages between men and women.

[80] The Memorandum of Objects and Reasons contained in the 2023 Bill exhibited in Ms. Curtis' affidavit is plain, the purpose of the Act is to: (i) amend the Constitution of Jamaica to increase the retirement age of the DPP and the Au-G to sixty five years; and (ii) maintain the extension mechanism currently provided in the Constitution in relation to those offices, but to increase the age to which those officers may continue in office, after attaining the retirement age, from sixty-five years to seventy years.

[81] The agreed evidence supports the inference that the Act was enacted for a proper purpose, which is in furtherance of harmonising the retirement ages of public sector officers throughout the public sector as well as the pursuit of a more efficient pension system, consistent with the powers of the legislature imposed under section 48 of the Constitution.

[82] Courts take great care to respect "parliamentary privilege" and to distinguish between matters concerning the institutional characteristics of Parliament over which the Parliament has control and matters which are within the province of the Court. It has already been shown that the exercise of a parliamentary privilege cannot in any way undermine constitutional values.[22]

[83] The Claimants have failed to discharge their burden of rebutting the presumption of constitutionality of section 2 of the Act and therefore this ground fails. In light of this conclusion that there is no evidential basis for finding that section 2 of the Act was enacted for an improper purpose, this ground forms no basis for making an order for a declaration that section 2 of the Act is void and of no effect.

Issue 2: Whether the enactment of section 2 of the Constitution (Amendment of Sections 96(1) and 121(1)) Act 2023, breaches the separation of powers principle and renders the amendment unconstitutional

Claimant's Submissions

[84] The Claimants contend that by enacting section 2 of the Act, Parliament breached the separation of powers principle by exercising a power vested by section 96(1) of the Constitution in the executive branch. The power to extend the term of office

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[22] Toussaint v. AG. supra

of the DPP resides in the Governor General, the Prime Minister and the Leader of the Opposition.

[85] It is an established constitutional principle that where the Constitution grants power to specified persons, other persons cannot exercise those powers. In **Hinds**. The Privy Council held that although the Constitution of Jamaica does not expressly provide for the separation of powers, and in fact that phrase does not appear in the Constitution at all, the requirement for the separation of powers is implicit in the constitutional structure. In **Hinds**, the Privy Council struck down legislation as powers that were traditionally exercised by the judiciary were being vested in members of the executive branch of government.

[86] The same principle applies to the other branches of government. It is submitted that in enacting section 2 of the Act, the Parliament breached the separation of powers principle by exercising a power that the Constitution vests in specific members of the executive, i.e., the Prime Minister, the Opposition Leader and the Governor General.

[87] The framers of the Constitution in recognising the importance of insulating the office of the DPP from political influence (or even the appearance thereof) assigned no role to the Parliament in relation to the holder of that office. The office of DPP was created by section 94(1) of the Constitution which states: *"There shall be a Director of Public Prosecutions, whose office shall be a public office."* Appointments to that office are by way of section 125(1) and (5) of the Constitution which state:

> *"125-(1) Subject to the provisions of this Constitution, power to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in any such offices is hereby vested in the Governor General acting on the advice of the Public Service Commission.*
>
> *(5) Except for the purpose of making appointments thereto or to act therein or of revoking an appointment to act therein, the provisions of this section shall not apply in relation to the office of the Director of Public Prosecutions."*

[88] The Governor General appoints the DPP on the advice of the Public Service Commission; an incumbent DPP's term of office can only be extended by a process involving the Governor General, the Prime Minister and the Leader of the Opposition. The DPP can only be removed from office on the recommendation of a tribunal comprising members or former members of the judiciary.

[89] It is submitted that Parliament appropriated and exercised the power to extend the sitting DPP's tenure by enacting section 2 of the Act. The Constitution is the last line of defence against a government's ability to act with impunity. The separation of powers principle is a part of the basic deep structure of the Constitution which this Court should uphold. Section 2 should be declared null and void on the basis that the section breaches the separation of powers principle.

Defendant's Submissions

[90] Mr. Wood KC submitted that the principle of separation of powers is inapplicable where there is a legal or constitutional challenge to legislation. It was submitted that though **Hinds** remains useful for the authority that there is a separation of powers within our Constitution, multiple decisions post-**Hinds** provide a more expansive and generous application of the principle. Mr Wood KC relied on **Chandler v Trinidad v Tobago [2022] 3 WLR 39, [2022] UKPC 19**; **Ferguson**; **Watt v Prime Minister** and **Astaphan v Comptroller of Customs (1996) 54 WIR 153**.

[91] King's Counsel referred to the judgment of Sir Vincent Flossiac CJ in **Astaphan**, who stated that sometimes the legislature will delegate some of its functions to the executive, which is inconsistent with the separation of powers principle.

[92] It was submitted that the separation of powers principle cannot be so rigidly applied to our Constitution such that it can be said that there can never be a sharing or overlap between the functions and powers of the executive and the legislative. The powers and functions of these two branches of government are too closely

connected for such a restrictive approach to constitutional interpretation. The authorities therefore suggest that there can be a sharing, delegating or transfer of some of the functions between the executive and the legislature, but this must be done constitutionally and within the confines of the law.

[93] Mr. Wood KC further submitted that section 96(1) of the Constitution can only be altered in accordance with the provisions of section 49 of the Constitution. Section 96(1)(b) of the Constitution, which confers the power to extend the term of office of the DPP after attaining retirement age, upon the Governor-General, Prime Minister and Leader of the Opposition is not entrenched and was therefore, properly amended by section 2 of the Act after following the correct process of a simple majority vote in Parliament.

Discussion

[94] The first consideration is whether, on a reading of the text of section 2 of the Act, the language is such that it is inconsistent with section 2 of the Constitution, in that, the Act removed the power to extend the term of the DPP from the Governor-General, Prime Minister and Leader of the Opposition and conferred it upon the legislative branch.

[95] It is a cardinal rule of statutory interpretation that in construing a statutory provision, the words used in the text should be given their natural or ordinary meaning. There is no such language used. The express intent of Parliament is seen in section 2(1) of the Act, which states that the words "sixty years" anywhere they appear are to be deleted and substituted with "sixty-five years" and at the same time, "not exceeding sixty-five years" anywhere they appear, are also to be deleted and substituted with "not exceeding seventy years".

[96] Any other interpretation, in which section 2(2) amends the extension mechanism as provided in section 96(1)(b) of the Constitution would be an improper use of the canons of construction to achieve a result that Parliament, based on the text, did

not intend when it passed the Act. This is against the background of the purpose of the Act which we have found to be to amend the retirement age of the DPP to be in line with all other public officers. In light of the plain and unambiguous language used in the Act, it would be unreasonable to infer that Parliament's intent is to remove the powers conferred in section 96(1)(b) of the Constitution.

[97] In our view, on an ordinary and literal reading of the Act, the submission that Parliament removed the powers conferred upon the senior members of the executive by section 96(1)(b) of the Constitution is without merit.

[98] Since section 2(2) of the Act did not alter, amend or remove any part of section 96(1)(b) of the Constitution, the Claimants have also failed to establish on a balance of probabilities that section 2(2) of the Act was enacted in breach of the separation of powers principle.

Issue 3: Whether enacting Section 2 circumvents the process for the extension of the Director of Public Prosecution's term in office

Claimant's Submissions

[99] Mr. Hylton KC contended the process mandated by the Constitution to extend the term of office of a sitting DPP is set out in the proviso to section 96(1)(b) of the Constitution. The Act circumvented this process by excluding both the Governor General and the Leader of the Opposition, resulting in the Governor General when asked to stay his hand, concluding in a letter to the Claimants, that he had no option but to assent to the Act.

[100] It was submitted that the process to extend the tenure of the DPP and the process of amending section 96(1) are not the same and are to be exercised by different persons. *"Parliament cannot evade a constitutional restriction by a colourable*

device.[23]*"* It is the Constitution that as the supreme law of the land *"gives protection against governmental misbehaviour.*[24]*"*

[101] It is submitted that, any enactment aimed at extending the retirement age of the DPP would necessitate consultation with the Leader of the Opposition which was not done in this case. The Defendant's suggestion that consultation was at the Pensions Act reform stage and there was no need for further consultation is misconceived. The Pensions Act related to ordinary legislation. This consultation should be even more so in the case of legislation to amend the Constitution as the office of DPP is a constitutionally created post. A decision affecting this office should be given more serious consideration.

[102] Further, where an amendment will affect an entrenched (or deeply entrenched) provision, the required procedure for amendment is the same procedure as to amend an entrenched (or deeply entrenched) provision.

[103] In the instant case, the amendment to section 96(1) affects section 94(6) which is an entrenched provision of the Constitution. Pursuant to section 49(2)(a), section 94(6) of the Constitution is an entrenched provision which prescribes:

> *"In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."*

[104] The amendment to section 96(1) affects the basic deep structure of the Constitution as the independence and impartiality of the office of the DPP is a fundamental part of the structure of our Constitution. The Claimants rely on the

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[23] Hinds at page 371

[24] Independent Jamaica Council for Human Rights (1998) Ltd and others v Marshall-Burnett and another [2005] AC 356 at para 21

case of the **Independent Jamaica Council of Human Rights v Marshall**[25] **Burnett** case for the proposition that the Act "ha[s] the effect of undermining the protection given to the people of Jamaica by the entrenched provisions."

[105] It is argued by the Claimants that as the Privy Council said in **Marshall Burnett**, the amendment to section 96(1) should have followed the procedure set out for amendments to entrenched provisions. That means there should have been both:

a) a two-thirds majority vote of all the members of each House and

b) a three month period between the introduction of the Bill in the Lower House and the commencement of debates; and

c) another three months between the conclusion of the debate and the passage of the Bill.

[106] The failure to follow this procedure, which would have ended in January 2024, has circumvented the constitutionally mandated process for amending section 96(1) of the Constitution.

The Defendant's Submissions

[107] The Defendant contends that the Bill was debated and passed in the House on 25 July, 2023 and in the Senate on 28 July, 2023. The Bill was passed in both Houses by majority vote. The Act took effect on 31 July, 2023 and increased the retirement age of both the Director of Public Prosecutions and the Auditor General to 65 years to bring the same into alignment with the general policy of the Government to increase the normal retirement age for all public officers.

[108] The long title of the Act states that its purpose was *"to Amend the Constitution of Jamaica to provide for an increase in the retirement age of the Director of Public*

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[25] [2005] 2 WLR 923

Prosecutions and the Auditor-General, and for connected matters." This purpose was further elaborated in the Memorandum of Objects and Reasons as set out in the 2023 Bill which reads as follows:

> *"At the time of promulgation of the Pensions (Public Service) Act, 2017, which gradually increased the retirement age of public officers to sixty-five years, it was recommended that a similar amendment should be made to the Constitution of Jamaica, in respect of the retirement age of those public officers whose tenure is governed by the Constitution and stipulated to be at the age of sixty years.*
>
> *A decision has therefore been taken to –*
>
> *(a) amend the Constitution of Jamaica to increase the retirement age of the Director of Public Prosecutions, and the Auditor-General, to sixty-five years; and*
>
> *(b) maintain the extension mechanism currently provided in the Constitution in relation to those officers, but to increase the age to which those officers may continue in office, after attaining the retirement age, from sixty-five years to seventy years.*
>
> *This Bill seeks to give effect to that decision.*
>
> *DELROY CHUCK*
>
> *Minister of Justice"*

[109] The background to the passing of the 2023 Act is chronicled in the various affidavits filed on behalf of the Defendant on 9th October, 2023, namely: The Affidavit of Paul Bailey in Response to Fixed Date Claim Form and the Affidavits of Aisha Wright, Paula Llewellyn KC and Valrie Curtis.

[110] In summary:

a) The retirement age of 60 years for the DPP and the Auditor General was first set out in the 1962 Constitution.

b) Between 2011 and 2013, the government of Jamaica embarked on the process of reforming the public sector's pension scheme which involved the increase of the normal retirement age for all public officers from sixty years to sixty-five years. This resulted in the publication of a Green Paper,

a White Paper and the establishment of a Joint Select Committee of Parliament.

c) In 2015, Dr. Peter Phillips, the then Minister of Finance and Planning, tabled a Bill being the Pensions (Public Service) Act (referred to as the "2015 Pensions Bill"). The Memorandum of Objects and Reasons for the 2015 Pensions Bill stipulated that the proposed act "*seeks to give effect to the proposal to reform the arrangements for the public sector pension scheme by… gradually increasing the retirement age to sixty-five years*" and "*harmonizing the legislation governing public sector pensions*".

d) In 2017, the Pensions Bill (with amendments) was tabled in Parliament by Mr Audley Shaw, the Minister of Finance and the Public Service (the "2017 Pensions Bill"). The Memorandum of Objects and Reasons remained as it was in 2015. That is to say, in 2017 the objective remained to gradually increase the normal retirement age of all public officers from sixty years to sixty five years.

e) The Pensions (Public Service) Act, 2017 came into effect on 1 April 2018.

f) In the pensions reform process that led to the promulgation of the Pensions (Public Service) Act it was always contemplated that the increase in the normal retirement age was to be effected for all public sector officers, including the DPP and Auditor General.

[111] The amendment of sections 96(1) and 121(1) of the Constitution by virtue of the Act, has brought the Constitution into alignment with the government's public reform policy to increase the normal retirement age of public officers to 65 years. Prior to the amendment, there was no justification for the disparity that existed between the age of retirement for public officers and that of the DPP and the Auditor General.

[112] Upon the Act coming into effect, the DPP elected to remain in office for the next two (2) years, until she attained the retirement age of 65 years. This was approved by the Governor General.

Discussion

Should the Court construe the Act as having altered section 96(1) of the Constitution

[113] The Constitution prescribes the method for its alteration, with certain built in safeguards. What are these safeguards? They are the provisions related to entrenchment. The provisions regarding entrenchment were built into the Constitution of Jamaica by the drafters to guide future alterations of its provisions.

[114] It is legally permissible to alter the Constitution. The Constitution is the supreme law, and the method of altering it is regulated to ensure that it is more difficult to do so than to pass ordinary legislation. This is what is known as entrenching the provisions in the Constitution. The Constitution cannot be construed as being impervious to change or immutable, there must be construed within the flexibility for change to meet the maturity and growth of the nation as Jamaicans desire it.

[115] The Constitution prescribes how section 96(1) should be altered. Under Part 2 entitled " *Powers and Procedure of Parliament*" there are sections 49(1), (2) and (4) which prescribe:

> *(1) "Subject to the provisions of this section Parliament may by Act of Parliament passed by both Houses alter any of the provisions of this Constitution or (in so far as it forms part of the law of Jamaica) any of the provisions of the Jamaica Independence Act, 1962.*
>
> *(2) In so far as it alters –*
>
> *(a) section 94...subsections (2), (3), (4), (5), (6) or (7) of section 96, ..."*
>
> *(b) section 1 of this Constitution in its application to any of the provisions specified in paragraph (a) of this subsection,*

> *a Bill for an Act of Parliament under this section shall not be submitted to the Governor General for his assent unless a period of three months has elapsed between the introduction of the Bill into the House of Representatives and the commencement of the first debate on the whole text of that Bil in that House and a further period of three months has elapsed between the conclusion of that debate and the passing of that Bill by that House.*
>
> *(4) A Bill for an Act of Parliament under this section shall not be deemed to be passed in either House unless at the final vote thereon it is supported –*
>
> *(a) in the case of a Bill which alters any of the provisions specified in subsection (2) or subsection (3) of this section by the votes of not less than two-thirds of all the members of that House, or*
>
> *(b) in any other case by the votes of a majority of all the members of that House."*

[116] Sections 94 to 96 deal with the Office of the DPP. Section 96(1) is conspicuously absent from the entrenched provisions that must be altered by the votes of not less than two-thirds of all the members of that House. This was how the Act became law, the Defendant argues, as that is the procedure that was followed.

[117] Section 1 of the Constitution of Jamaica defines "*Act of Parliament*" to mean "*any law made by Parliament*"; and defines the word "law" as *"includes any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly*;

[118] The supremacy of the Constitution means that any Act of Parliament is subject to law as defined in section 1. Law includes any unwritten rule of law such as the separation of powers principle which is implied but not expressly stated in the Constitution of Jamaica. In construing any Act of Parliament said to be altering the Constitution, the Court in considering the meaning and effect of the word "law" should consider that Parliament is required as prescribed by section 1, to alter the Constitution in a "lawful" manner.

[119] **Hinds** expressly stated that it was the protection of the law given to the people of Jamaica that was the concern of the Board not the protection given to the Courts. The Courts of Jamaica retained their constitutional protection while the people of Jamaica would have lost theirs under the legislation as it then stood.

[120] In construing any single provision, the entire Constitution has to be viewed as a whole. This means any alteration of provisions relating to the Office of the DPP have to be read as a whole. The framers of the Constitution did not entrench section 96(1) concerning the resignation from office or an extension of term in office after age sixty for a DPP.

[121] Sections 96(2) to (7) are entrenched and these sections concern actions taken by the DPP after attaining the age of retirement, vacancies in the office, removal from office for inability to discharge the functions of the office. Section 96(8) concerning suspension of a DPP is not entrenched. The intention of the framers of the Constitution has to be viewed against the procedure for alteration and the machinery for entrenchment.

Issue 4: Whether Parliament should have proceeded as if section 96(1) were an unentrenched provision or an entrenched provision

[122] The Claimants argue that the Parliament should have followed the procedure for amending entrenched provisions of the Constitution, as section 96(1) while not itself an entrenched provision, affects section 94(6) which is an entrenched provision.

[123] The Defendant argues that the correct procedure was followed as section 96(1) is not an entrenched provision. The amendment promulgated on July 31, 2023 needed only to have been passed by a majority of the members of each House of Parliament. The Act is therefore validly passed and the Constitution thereby validly amended. The Defendant contends that the provisions of sections 96(1) of the Constitution are therefore duly altered in accordance with section 49(4)(b) of the

Constitution. Once the enactment was promulgated in accordance with section 49(9)4(b) of the Constitution, the amendments took effect as part of the Constitution.

[124] It is useful to start the analysis with the case of the **Independent Jamaica Council for Human Rights v Marshall-Burnett**[26] cited by both sides. This case concerns the alteration of constitutional provisions and sets out the constitutional scheme for doing so. The approach commended by the Board in **Marshall Burnett** is that which was set out by Lord Diplock in **Hinds** at pp 211-214.

[125] Both sides have cited **Hinds** and on that authority, although the Constitution does not expressly prescribe the separation of powers, and in fact, that phrase does not appear in the text of the Constitution itself, the requirement for a separation of the powers is implicit in the structure of the Jamaican Constitution. In **Hinds**, the Privy Council struck down legislation as powers that were traditionally exercised by the judiciary were being vested in members of the executive branch of government which was a clear breach of the separation of powers.

[126] It is our view what was said in the case of the **Independent Jamaica Council for Human Rights v Marshall Burnett,**[27] by the Board amounts to this, the legislative aim or motive, was to pass a law to substitute the final Court of appeal. That aim or motive could not be realized by means of ordinary legislation which undermined the protection provided by the entrenched parts of the Constitution. The alteration of entrenched provisions being specifically prescribed in the Constitution itself.

[127] It was successfully argued before the Board that the repeal of section 110 of the Constitution providing for appeal to the Privy Council without more would not

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[26] [2005] 2 WLR 923

[27] [2005] 2 WLR 923

weaken the guaranteed protection which the Constitution set out for the benefit of the Courts themselves but rather such repeal would weaken the protection accorded to the people of Jamaica by the machinery for entrenchment. In reliance on **Hinds**, the Board said the present situation had to be approached as one of substance and not one of form as the three impugned Acts under review impliedly altered entrenched provisions of the Constitution within the meaning of section 49(9)(b)b of the Constitution.

> *"An important function of a constitution was to give protection against governmental misbehaviour, and the three Acts gave rise to a risk which did not exist in the same way before. The three Acts taken together had the effect of undermining the protection given to the people of Jamaica by entrenched provisions of Ch VII of the Constitution. It followed that the procedure appropriate for amendment of an entrenched provision should have been followed. In the instant case Parliament had legislated not simply to revoke the right of appeal to the Privy Council but to replace it with a right of appeal to the CCJ.*[28]

The Hinds Analysis

[128] In **Hinds**, Lord Diplock was not addressing the issue of an amendment to the Constitution of Jamaica in the context of the contravention of a fundamental right. **Hinds** was not dealing with a constitutional amendment at all, rather **Hinds** was a case which dealt with ordinary legislation which established the Gun Court and whether that law was consistent with the Constitution. The Privy Council looked at the Gun Court Act and examined it for its constitutional validity.

[129] The statement by Lord Diplock reproduced below would therefore be obiter in a case dealing with a constitutional amendment and would apply to a set of factual circumstances where the Court was reviewing ordinary legislation said to be inconsistent with the Constitution:

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[28] [2005] All ER (D) 51 (Feb)

> *Where... a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the Constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms, or to the stratum of government and the allocation to its various organs or legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specific majorities, which is generally all that is required.*[29]

[130] Having said that, both the binding authorities of **Marshall Burnett** and **Hinds** support the claimant's contention that the Act under review is an ordinary Act of Parliament which purports to amend the Constitution based on the reasoning of the Board in **Marshall Burnett** as applied in **Hinds**. Both cases concerned ordinary legislation purporting to alter the Constitution. The constitutionality of those statutes were challenged as to whether they had the **effect** of altering the Constitution and were held not to have done so, the proper procedure having not been followed.

[131] The importance of **Hinds** to the instant case however is the principle that the legislation under review could be and was invalidated on the separation of powers principle said to by the Privy Council to be found within the structure of the Constitution itself, "implicit in a constitution based on the Westminster model." A principle also recognized in **Astaphan v Comptroller of Customs**[30]

[132] Further, in terms of the construction of section 96(1), the Constitution allows for the DPP's continuation in office by the Governor General acting on the recommendation of the Prime Minister after consultation and agreement with the Leader of the Opposition before the DPP attained sixty years of age. These actions are specifically and expressly prescribed for the most senior members of the

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[29] page 214

[30] (1996) 54 WIR 153

executive. The legislature plays no role. The reason for this in our view, is that in Jamaica the Constitution is sovereign, whereas in other jurisdictions Parliament is sovereign. In the seminal work by Dr Lloyd Barnett, The Constitutional Law of Jamaica the learned author writes[31]:

> *"The historical, political and legal factors underlying the doctrine of Parliamentary sovereignty which constitutes the ultimate legal principle of the British Constitution and juristic order are not applicable to Jamaica. The local legislature prior to Independence was always subordinate to the Imperial Parliament and the Parliament established at Independence owes its existence to and became part of a legal regime which limits its competence. Its present limitations are however not due to any countervailing powers possessed by a foreign legislature but to the fundamental rules of the legal system within which it operates...The local Courts exist and operate within the local constitutional system and it seems, would have no alternative but to disregard any measure which is repugnant to the ultimate local principle or grundnorm.*
>
> *The action taken at Independence leaves no room for doubt as to what was intended... the local Parliament does not enjoy unrestricted supremacy. It is circumscribed by the provisions of the Constitution which marks out the extent of its legislative authority. The Jamaica Independence Act provides*[32] *'that nothing contained in that enactment shall confer on the legislature of Jamaica any power to repeal, amend or modify the constitutional otherwise than in such manner as may be provided for in those provisions.' Parliament is therefore subject to the Constitution which constitutes the suprema lex of Jamaica and can only be altered in accordance with the procedure which is contained in its own provisions or by a breakdown of the legal order on which the State is founded.*
>
> *There is no implied limitation on the powers of Parliament. The Courts can only declare legislation invalid if it is clearly inconsistent with the express terms or* ***necessary implication of the Constitution****...*
>
> *The judicial power to pronounce on the question of vires is limited to the determination of whether or not Parliament has contravened the Constitution. The scope of Parliament's powers will of course be affected by the nature of the judicial approach to the task of constitutional*

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[31] page 249

[32] First Schedule paragraph 6(1)

> *interpretation, but this will in turn be influenced by established legal principles and precedents." (Emphasis added.)*

[133] The learning extracted from this text is similar in nature and quality to the judgments of the Privy Council in **Hinds** and **Marshall-Burnett**. By necessary implication and unwritten law, the Constitution contains within its four corners, the principles of constitutionalism, the separation of powers, the rule of law, an independent and impartial Judiciary and we would make bold to say the protection of the people of Jamaica within the meaning of the word "law." The words "necessary implication" were used in **Hinds** with regard to the presence of these unwritten laws in the Constitution:

> *"In seeking to apply to the interpretation of the Constitution of Jamaica, what has been said in particular cases about other constitutions, care must be taken to distinguish between judicial reasoning, which depended on the express words used in a particular constitution under consideration and reasoning, which depended on what, though not expressed, is nonetheless a* ***necessary implication from the subject matter and structure of the Constitution and the circumstances in which it had been made...***
>
> *...*
>
> *...Because of this, a great deal can be, and in drafting practice of is, left to* ***necessary implication*** *from the adoption in the new constitution of a governmental structure which makes provision for a legislature, and executive judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government....*

[134] These unwritten laws engage the reasoning of the Privy Council in **Marshall-Burnett**. In that case, the then Government of Jamaica introduced legislation to amend the Constitution to replace the right of appeal to the Judicial Committee of the Privy Council with a right of appeal to the Caribbean Court of Justice by means of ordinary legislation with a simple majority vote. The legislation was challenged and it was argued that the effect of the legislation proposed would have been to establish a Court of superior jurisdiction which could overturn decisions of the Supreme Court and Court of Appeal of Jamaica which enjoyed constitutionally protected terms and conditions of service and guaranteed security of tenure which could only be altered by a Bill which had secured the support of not less than two

thirds of all members of both houses of Parliament. The final Court sought to replace the Privy Council was not itself entrenched under Chapter VII of the Constitution.

[135] What is seen in **Marshall-Burnett** is a distinction between the provisions of the Constitution over which Parliament governs its own procedure. (Chapter III and enactments to which section 50 refers) and the rest of the Constitution to which the Constitution is sovereign and section 2 applies.

[136] Section 96(1) falls within Chapter VI entitled "Executive Powers." The office of the DPP was enacted within this Chapter which establishes the office of Prime Minister, Ministers of Government, the Privy Council inter alia.

[137] The exercise of the powers of the office of the DPP is conferred only upon the holder of that office, and the DPP is not subject to the control of any other person or authority,[33] which is an entrenched provision.

[138] Chapter V is entitled "Parliament." The Defendant argues that section 96(1) is within the Parliamentary power as it is not entrenched, and so section 49(1) gives Parliament the power to alter section 96(1) as it falls under section 49(2) and therefore within the broad meaning of section 49(9)(b).

[139] There is no nexus in this case between extending the tenure of the DPP and any control or influence by Parliament or the Executive on that office. It is being argued by the Claimants as we understand it, that there is a risk; a risk such as the one identified in **Marshall-Burnett**, which despite the constitutional protection afforded to the office of DPP, if the Act under review is valid, would mean that by simple Parliamentary majority, the extension of a term in office of the DPP, may be altered.

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[33] section 94(6)

This in turn gives rise to a risk to the independence of the DPP's office. We disagree with this submission as there is no evidence upon which to make a finding that such a risk currently exists or will exist in the future.

[140] The effect of the Act, on the sections of the Constitution concerning the office of the DPP when viewed objectively does not present a risk to the exercise of the powers of, or the role and function of the DPP.

[141] The fact is that section 94 concerning the powers of the DPP is entrenched but section 95 concerning remuneration and the terms of service of the DPP is not. Ordinary legislation may be passed by Parliament altering the DPP's emoluments and terms and conditions of service. This arguably also presents a risk, that risk assessment is not the task of this present Court.

[142] The risk of constitutional protection against governmental misbehaviour is fundamentally different in the case of a final appellate Court reviewing the decisions of the Judiciary whose powers and tenure are constitutionally protected and who are not public officers and the DPP who is a public officer.

[143] While some of the protections afforded to the Judiciary were expressly provided for in relation to the office of the DPP, the framers of the Constitution did not accord the same protection to that office as has been prescribed in Chapter VII for the Judicature.

[144] Why was this so? It is clear that the intention of the framers of the Constitution was that upon attaining the age of retirement, the decision for the continuation in office of the DPP rested in the hands of the most senior leaders of the executive. The drafters of our Constitution quite specifically did not allow for correspondence passing between the Prime Minister and Leader of the Opposition regarding the office of the DPP to be tabled in Parliament. There was to be no debate in either House. There is a process set out which involved no Parliamentary input. This is understandable.

[145] The office of DPP is not an elected position. Public officers are appointed in a particular manner which is not the subject of this decision, the DPP is a public officer appointed in like manner. While the drafters sought to insulate the office, from influence and control, they did so without entrenching the provision involving the retirement of the DPP. This is a signal that they did not construe the issue of retirement one which required protection, as the senior members of the executive upon whom the powers to extend the tenure of the DPP were granted, were also entrusted to exercise that power in a manner which was lawful.

[146] In the instant case, the powers and functions of the DPP stand whether or not the holder of that office is 60, 65 or 70. There is no nexus on the case presented to us between being appointed to hold the office and a lack of independence or any influence being brought to bear upon the office arising merely from the fact of continuation after retirement.

[147] This means that section 96(1) as an untrenched provision has not been shown to have "infected" another entrenched provision, particularly section 94(6) triggering the requirement for the process of alteration to be by way of the entrenched provisions.

The Test

[148] The correct test is whether the Act as ordinary legislation is in substance different from that which was originally contemplated by the drafters of section 96(1) or whether it alters what section 96(1) had originally said in the Constitution.

[149] The terms and conditions of service of the DPP may be changed by the legislature. We find that Parliament was not required to follow the mandated process for entrenched provisions as there was no demonstration of how the Act affected the entrenched provisions of section 94 which concern the establishment of and powers of the office of DPP or the effect on sections 96(2), (3), (4), (5), (6), & (7), all of which concern the removal from office of the DPP.

[150] The Act concerns the retirement age of the DPP. Section 96(1) is not entrenched. The risk that section 94(6) which is an entrenched section will be undermined has been raised without more. It is for the Claimants who assert that this risk exists to show the Court why they say so by evidence. There is no evidence on an objective test that can be viewed as an assail on the protections accorded to that office by the Constitution. The effect of this is that the Act was validly passed and has amended the Constitution.

[151] Section 2(2) of the Act

> *"(2) Notwithstanding anything in subsection (1), a person who is Director of Public Prosecutions at the date of the commencement of this Act may, by memorandum in writing given to the Governor General, elect to retire at any time after attaining the age of sixty years."*
>
> *"Notwithstanding" is defined as despite; in spite of. Not opposing; not availing to the contrary.*[34]
>
> *"Election" is defined as 1. The exercise of a choice., esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies*[35]*. 2. The doctrine by which a person is compelled to choose between accepting a benefit under a legal instrument and retaining some property right to which the person is already entitled; an obligation imposed on a party to choose between alternative rights or claims, so that the party is entitled to enjoy only one. 3. The process of selecting a person to occupy an office."*[36]

[152] This subsection was not previously known to the Constitution.

[153] The Claimants argue the Defendants submission misconstrues their position on the declarations sought. The Claimants are not asking the Court to declare certain provisions of the Constitution unconstitutional, rather they are asking the Court to

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[34] Black's Law Dictionary, 10th ed.

[35] Julian Depot Miami, LLC v. Home Depot U.S.A., Inc., No. 18-15221 (11th ...")

[36] ibid

find that the attempt to amend the Constitution was ineffective and as a consequence, section 96(1) remains unamended.

[154] They rely on **Marshall-Burnett** for the contention that in that case, Parliament did exactly what has been done in the instant case and the Board held that section 2 of the Constitution applied and the amending legislation was unconstitutional.

[155] The Claimants submit that section 2(2) only affects the DPP whereas it also affects the Auditor General yet that should be ignored. This is anomalous as both offices are similarly protected and the wording is basically the same in respect of the provisions affecting both offices.

[156] The Defendant argues that a law validly passed cannot be invalidated by principles such as the deep structure or separation of powers doctrines or concerns about the propriety or expediency of the law. Section 2(2) was not a part of the original section 96(1). Reading down is inapplicable as the Court would first have to make a finding that the Act is unconstitutional, then look at whether there are parts that could be saved.

Discussion

[157] The evidence before this Court is set out below:

1. January 14, 2020, letter from DPP to the PSC seeking an extension in office, retirement date September 21, 2020.

2. February 7, 2020, letter from Prime Minister to Opposition Leader proposing to recommend continuation in office of the DPP to age 65 to the Governor General.

3. March 2, 2020, letter from Opposition Leader to Prime Minister refusing to agree with recommendation proposed by Prime Minister.

4. August 26, 2020, gazetted notice published setting out extension in office for three years effective September 21, 2020.

5. February 6, 2023, letter from DPP to PSC applying for extension in office.

6. May 26, 2023, letter from the PSC indicating the DPP's application for extension was under consideration by the Prime Minister who had taken legal advice and refused the extension.

7. The Memorandum of Objects and Reasons states:

> *...A decision has therefore been taken to –*
>
> *amend the Constitution of Jamaica to increase the retirement age of the Director of Public Prosecutions, and the Auditor-General, to sixty-five years; and*
>
> ***maintain the extension mechanism currently provided in the Constitution in relation to those officers,*** *but to increase the age to which those officers may continue in officer, after attaining the retirement age, from sixty-five years to seventy years." (Emphasis added.)*

8. Act No. 10 of 2023 (the Act) is passed and proclaimed in force July 31, 2023.

9. August 15, 2023, letter from the DPP to the PSC addressing the promulgation of the Act and electing to continue in office until age sixty-five.

10. September 21, 2023, letter from the PSC to the DPP, advising that further to the passage of the Act the PSC agrees to the continuation in office for a further two years with effect from September 21, 2023 as approved by His Excellency, the Governor General.

11. The gazette notice of September 21, 2023 reads: "*The Governor General acting on the recommendation of the Public Service Commission (further to a request by Miss Paula Llewellyn, KC, Director of Public Prosecutions, on August 15, 2023 to continue serving in the post, subsequent on an amendment to section 96(1) of the Constitution, effective July 31, 2023),*

has approved the continuation in office of Miss Paula Llewellyn, KC, Director of Public Prosecutions, for an additional two (2) years, with effect from September 21, 2023."

[158] The language used by the Chief Justice in Julian Robinson is instructive on this point. *"... There is always a distinction between enacting a law for a proper purpose and using the proper means via the enacted law to achieve that purpose."*

[159] The evidence supports the view that the Public Service Commission upheld the law as it stood as the second application for an extension by the incumbent DPP could not be granted. The Act therefore permits what was not permitted before.

[160] The Memorandum of Objects and Reasons clearly stated that the aim was to ***maintain the extension mechanism currently provided in the Constitution in relation to those officers***... This language is clear and these clear words have a clear meaning. This subsection could not be consistent with the stated objective if it sought to amend the existing extension mechanism. This means that the process of extension of tenure remains unchanged as it was never intended to be changed. Parliament had no such intent at the Bill stage, during the passage of the Act, to its proclamation in force. The only lawful way to extend the tenure of a DPP is by way of an agreement between the Prime Minister and Opposition Leader.

[161] In applying the test to the addition of section 2(2) on an objective standard: whether the Act is in substance different from that which was originally contemplated by the drafters of section 96(1) the answer is yes; or whether the Act alters what section 96(1) had originally said in the Constitution the answer is also yes.

[162] We find that the Act has added the DPP's election as a procedural step in the retirement process. A DPP had no need to elect to retire before the Act was passed, retirement at sixty was automatic. As section 2(1) of the Act has been passed for the retirement age to be increased to sixty-five then the need for section 2(2) which provides an election for a DPP to retire after age sixty would be

inconsistent with section 2(1) which is the section that extends the age a DPP can remain in office after age sixty-five.

[163] In our view, the addition of the words *notwithstanding* or *election* to subsection 2(2) do not address a need or desire to retire for an office holder who is under age sixty five.

[164] The incumbent occupies the unique position of having attained the age of retirement at sixty and having been the beneficiary of an extension. Section 2(2) remedies the situation that the PSC could not. Parliament has legislated for the retirement of the DPP in a way that lends itself to the interpretation that it has permitted a second extension for the incumbent.

[165] However, we maintain that the Act has not altered the **process** for the extension in office of a DPP who has attained the age of retirement. Section 96(1)(b) prescribes that there still has to be agreement between both Prime Minister and Leader of Opposition, and this is still constitutionally required as this provision has not been repealed and has to be read together with section 2(1) of the Act.

[166] In relation to the incumbent, section 2(2) of the Act provides that the DPP may elect to retire at any time after age sixty "notwithstanding" or despite this agreement. This is viewed as a material addition to the original provision and there has been no submission before us as to the reason for this inclusion which looks to age sixty for its benchmark application.

[167] The Court finds that the powers conferred on the Governor General, Prime Minister and Leader of the Opposition by the Constitution have not been relegated to the election of the DPP, as the Act has not usurped their functions.

[168] The framers of the Constitution did not empower the DPP as a public servant, to decide on the terms and conditions of service nor on retirement from office. Parliament has sought in passing the Act to confer a power on the incumbent DPP

which was never contemplated by the drafters of the Constitution for these reasons:

1. Firstly, section 96(1) was not entrenched in the Constitution. That section was not entrenched for the reason that the power had been entrusted to the most senior leaders of the executive who had first to consult and agree.

2. Secondly, the office of the DPP was not given Chapter VII protection as the office while insulated in its function, is within the public service by way of appointment.

3. Thirdly, no public servant has been given this enlarged and enhanced power.

4. Fourthly, the DPP which falls within the executive branch in the provisions of the Constitution, but also within the public service and therefore under the legislature for the terms and conditions of service.

5. Finally, the DPP has no right to remain in office after the retirement age. The use of the word "election" in section 2(2) of the Act has conferred a right where none existed before. This is not only anomalous, but in the context of a constitutional amendment, is a fundamental departure from what was intended by the framers of the Constitution. This section has created a power which the incumbent DPP would enjoy to the exclusion of the Opposition Leader given the manner of appointment to the office, namely by way of the PSC and the Governor General.

[169] Parliament is empowered by the Constitution to alter the Constitution under section 49(9)(b) once it is lawfully done. We are not satisfied that the power to enlarge the terms and conditions of service or the retirement age of the DPP can be conferred upon the DPP by way of an election, as there is no right to remain in office beyond the prescribed age of retirement. An election suggests that such a right had previously existed, whereas in our view there was no such right.

[170] That is the reason the DPP is required to make the application to extend, if it was as of right, then ipso jure, the tenure of the DPP would be extended by way of section 32(5) of the Constitution rather than by section 96(1).

[171] We are of the view that it is reasonable to conclude based on all the evidence, that the effect of section 2(2) of the Act resulted in the PSC forming the view that the DPP having elected to remain in office, gave it no alternative but to advise the Governor General to make the appointment and the Governor General in turn had no alternative but to appoint.

Issue 5: Whether the Amendment properly applies to the incumbent office holder

[172] Having found that the Act was passed using the proper procedure laid down in the Constitution can its provisions be applied to the incumbent DPP? The incumbent had already attained the (pre-amendment) age of retirement and at the time of the amendment was nearing the completion of the period of extension. The provisions of section 2(2) cannot be lawfully applied to lead to a further extension in office by way of an election on the part of the incumbent.

Issue 6. Whether the Court should read down the impugned provisions

Claimant's Submissions

[173] Mr. Hylton KC submitted that the Court has the power to read down offending statutory provisions to bring them in conformity with the Constitution and to strike them out where necessary (**Attorney General of Ontario v G (Attorney General of Canada and others intervening)**[37].

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[37] (2020) 50 BHRC 422

[174] In the alternative to a declaration that section 2 is null and void, the Claimants seek an order that section 2(1) be read down as opposed to striking it out completely and to be read and construed as not applying to the incumbent DPP and that if section 2(1) is read down then section 2(2) is struck out.

Defendant's Submissions

[175] Mr. Wood KC's submission is that section 2(2) of the Act preserves the right of the office holder of the office of the DPP at the date of the commencement of the Act to elect to retire at any time after attaining sixty years old. To interpret the Act as not applying to the incumbent DPP means the Court will have to insert words to that effect in the Act because as at the date of commencement of the Act the incumbent had already passed sixty years old. Since the language in the Act is plain and unambiguous there is no need to go behind the plain meaning of the legislation to infer an improper purpose of circumventing the Constitution. Counsel relied on **Liyanage v The Queen**; **Maurice Tomlinson v The Attorney General of Jamaica et al**[38] and **Day v Governor of the Cayman Islands**[39] among others.

[176] The Court has the power to read down section 2(1) which would save the constitutional parts of the Act. This modification would not offend Parliament's intention which is to increase the retirement ages of the DPP and the Auditor General.

Discussion

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[38] [2023] JMFC Full 5

[39] [2022] UKPC 6,

[177] In the **Attorney General for Ontario v G (Attorney General of Canada and others intervening)**,[40] the Supreme Court of Canada held:

> *[113] Reading down is when a Court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when "the offending portion of a statute can be defined in a limited manner" (Schachter, at p. 697). Inversely, reading in is when a Court broadens the grasp of legislation by declaring an implied limitation on its scope to be without force or effect. Reading in is an appropriate remedy when the inconsistency with the Constitution can be defined as "what the statute wrongly excludes rather than what it wrongly includes" (Schachter, at p. 698 (emphasis in original)). Severance is when a Court declares certain words to be of no force or effect, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation's reach. Severance is appropriate where the offending portion is set out explicitly in the words of the legislation. These forms of remedy illustrate a Court's flexibility in responding to a constitutional violation.*
>
> ...
>
> *[116] In sum, consistent with the principle of constitutional supremacy embodied in s. 52(1) and the importance of safeguarding rights, Courts must identify and remedy the full extent of the unconstitutionality by looking at the precise nature and scope of the* Charter *violation. To ensure the public retains the benefit of legislation enacted in accordance with our democratic system, remedies of reading down, reading in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved (Schachter, at p. 700; Vriend, at paras. 149-50). To respect the differing roles of Courts and legislatures foundational to our constitutional architecture, determining whether to strike down legislation in its entirety or to instead grant a tailored remedy of reading in, reading down, or severance, depends on whether the legislature's intention was such that a Court can fairly conclude it would have enacted the law as modified by the Court. This requires the Court to determine whether the law's overall purpose can be achieved without violating rights. If a tailored remedy can be granted without the Court intruding on the role of the legislature, such a remedy will preserve a law's constitutionally compliant effects along with the benefit that law provides to the public. The rule of law is thus served both by ensuring that legislation*

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[40] 2020 SCC 38, [2020] 3 S.C.R. 629

> *complies with the Constitution and by securing the public benefits of laws where possible."*

[178] The fact that the **AG of Ontario** case concerned a fundamental rights violation does not affect the holding of the Court in relation the available remedies. The written Canadian constitution contains a supremacy clause in section 52(1) of the Constitution Act, 1982, which is similar to our section 2.

[179] Given the language of section 2 of our Constitution, a Court faced with a constitutional challenge to a law must determine to what extent there is unconstitutionality and make a declaration to this effect. This involves the application of a discretion in determining the remedy where there is inconsistency between the impugned legislation and the Constitution.

[180] The Court must strike a balance in the fashioning of a remedy bearing in mind that:

> *[97] Legislation is enacted by the legislature, which is sovereign in the sense that, within its constitutional ambit, it has "exclusive authority to enact, amend, and repeal any law as it sees fit" (Reference re pan-Canadian securities regulation, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 54 (emphasis in original);* Constitution Act, 1867, ss. 91 *to* 95*;* Constitution Act, 1982, ss. 44 *and* 45*). This fact serves as an important constraint on Courts' exercise of their remedial authority. Parliamentary sovereignty is an expression of democracy, because it accords exclusive legislative authority to Parliament and the provincial legislatures, each of which includes an elected chamber without whose consent no law can be made (*Constitution Act, 1867, ss. 17, 40, 48, 55 *and* 91*;* Charter, ss. 3 *and* 4*; Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at paras. 62-65).*
>
> *[98] Even so, the Courts remain "guardians of the Constitution and of individuals' rights under it" (Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 169) — "[d]eference ends. .. where the constitutional rights that the Courts are charged with protecting begin" (Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 36). This is because "[i]t is emphatically the province and duty of [the*

> *Courts] to say what the law is" (Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), at p. 177).*[41]

[181] Section 2(1) as it is drafted has only increased the retirement age. Any extension of tenure sought under this section will have to follow the identical process as had been laid down in section 96(1)(b) which remains unchanged. Section 2(1) has validly amended the Constitution having been accorded the proper legislative process.

[182] In our view, section 2(1) need not be read down. In our view, severing section 2(2) from the Act removes the offending provision and it will be struck down as inconsistent with the supremacy clause.

Conclusion

[183] This Court finds that section 2(1) of the Act is valid and consistent with the Constitution. The Court finds also that section 2(1) of the Act has amended the Constitution. Further, with regard to Section 2(2) of the Act which purportedly amended the Constitution we find that Section 2(2) is invalid and as a consequence it is severed from the Constitution and struck down as unconstitutional null, void and of no legal effect.

Orders:

1. Judgment for the Claimants.

   The Court declares as follows:

2. Section 2(1) of the Act is a valid constitutional amendment.

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[41] AG of Ontario

3. Section 2(2) of the Act is an invalid constitutional amendment, as a consequence Section 2(2) is severed from the Act and is struck down and declared as unconstitutional, null, void and of no legal effect.

4. Parties shall file and exchange written submissions on costs no later than seven days of the date hereof. Such submissions shall be heard on paper.

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S. Wint-Blair, J

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S. Wolfe-Reece, J

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T. Hutchinson-Shelly, J