COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL DIVISION

CRI/CON/

In The Matter of the Provisions of the Constitution of The Commonwealth of The Bahamas in particular Articles 17(1), 19(1) and 20(1)

Between

MAURICE GLINTON

Applicant

v.

THE PRIME MINISTER

First Respondent

THE ATTORNEY-GENERAL

Second Respondent

THE PRESIDENT OF BAR COUNCIL AND OFFICERS OF THE BAR ASSOCIATION

Third Respondent

Appearances: Mr. Maurice Glinton pro se.
Mr, Loren Klein for the First and Second Respondents.
Mr. Thomas Evans, Q.C. and Miss V. Evans for the Third Respondent.

Hearing Date: 20th November, 2009;3rd December, 2009; 25th January, 2010; 1st, 8th, 9th, 11th, 22nd, 23rd, 24th, February, 2010; 1st, 10th, 11th, 16th, 23rd and 26th March, 2010; 1st, 27th and 30th April, 2010

DECISION

Isaacs, Sr. J:

1. Maurice Glinton, Esq., the Applicant, has brought a judicial review application to challenge the omission of his name from a list of persons (hereinafter referred to as ***"the List"***) recommended by the Attorney-General, the Second Respondent, to the Prime Minister, the First Respondent, to be made one of Her Majesty's Counsel (hereinafter referred to as ***"a QC"***) when the Prime Minister tendered his advice to the Governor-General. On 30 April 2010, I promised to render a decision in writing; and I do so now.

2. The application arises out of an exercise embarked upon by the then Attorney-General, Michael Barnett (hereinafter referred to as ***"the AG"***) to recommend the appointment of the Applicant as a QC. The Applicant's name was included in the List which contained twelve other names. The names of the other persons are of no moment to the present application on the view that I take of the issues in this case. A striking feature of this case is that the Applicant was approached by the AG to apply for appointment as a QC; and only did so after receiving certain assurances from the AG pertaining to, inter alia, matters of precedence and seniority.

3. On 20th November 2009, the Applicant applied for and was granted leave to bring the present application. His Statement sets out the basis for the application and the reliefs he seeks. The reliefs are set out below:

"(1) a declaration that the applicant was entitled to his name remaining on the list among those recommended by the Attorney-General to the Prime Minister for appointment as one of Her Majesty's Counsel in accordance with the provisions of sect. 15 of the Act; further or alternatively,

(2) a declaration that the applicant was entitled to retain his seniority status at the Bar vis-a vis the lawyers (including two lawyers less senior than he at the Bar) who were actually appointed from the purged Attorney-General's list of recommended appointees; further or alternatively,

(3) a declaration that the applicant is entitled to his name remaining on the Attorney-General's list and to it being restored thereto as if it had not been removed therefrom; further or alternatively,

(4) an Order of mandamus directed to the Attorney-General that he restore or cause to be restored to the said list of appointees as one of Her Majesty's Counsel the name of the applicant as recommended by then Attorney-General Michael L. Barnett with rights and privileges of seniority vis-à-vis lawyers (including two lawyers of lesser seniority at the Bar) actually appointed from among those named in the Attorney-General's list from which the applicant's name was removed; further or alternatively,

(5) a declaration that revocation of the Attorney-General's recommendation of the applicant for appointment as one of Her Majesty's Counsel and/or the removal of his name from the Attorney-General's list diminishing or reducing or revoking the applicant's seniority at the Bar vis-à-vis lawyers (including two lawyers of lesser seniority at the Bar)actually appointed from among those named in the Attorney-General's list and from which the applicant's name was purged in the circumstances and the manner by which it occurred, is ultra vires the Act and an abuse of power that denies the applicant protection of the law and discriminates against him in contravention of Arts. 15 and 26 of the Constitution; further or alternatively.

(6) an order requiring the First and Second Respondents (or either of them) to disclose the Attorney-General's list as initially recommended to the Second Respondent on or about 19th August 2009, upon the requisite consultation with the designated persons that then Attorney-General Michael L.

Barnett would have had in accordance with sect. 15 of the Act; further or alternatively,

(7) an Order requiring the Third Defendant to disclose the list of names of counsel and attorneys of the Supreme Court they would have exchanged with the Attorney-General in the consultation process, with the recommendations of the Bar Council; further or alternatively,

(8) an order of exemplary damages; further or alternatively,

(9) an order requiring the recommendation of the applicant by the Attorney-General be dealt with in accordance with law.

(10) such orders, writs, or directions pursuant to Art. 28 of the Constitution as may to the Court seem appropriate for the purpose of enforcing or securing the enforcement of any right or freedom to the protection of which the Applicant is entitled.

(11) the applicant seeks expedited hearing of the substantive judicial review application (if leave to apply is granted) together with an Order abridging time for service of the Respondents' evidence to fourteen (14) days or such other period as the Court deems appropriate.

(12) The applicant seeks an oral hearing of the application for leave."

4. The Applicant also seeks costs and any other Order as may arise from the nature of the case. He sets out the grounds and legal matrix for the application; and his submissions on the law but due to their length I do not iterate them here. Reliefs 11 and 12 have fructified by the hearing of the Applicant's case.

The Dramatis Personae

5. The Applicant is a practicing counsel and attorney. He was called to The Bahamas Bar on 19 December 1980. He has been since that time a member in good standing of The Bahamas Bar Association and has acted in various

administrative capacities within that body. He has practiced as a general litigation counsel at all levels of the courts of The Bahamas and at the Privy Council for some twenty-eight years. From 1 August 1987 he practiced under the name ***"Maurice O. Glinton & Co."*** in Freeport, Grand Bahama. He is also a member of the Bar of England and Wales to which he was called on 18 November 1980.

6. The AG is the principal legal advisor to the Government of the Commonwealth of The Bahamas. He is a member of the Cabinet of The Bahamas established under Article 72 of the Constitution of the Commonwealth of The Bahamas (hereinafter referred to as ***"the Constitution"***). By virtue of section 15 of Legal Profession Act (Ch. 64) (hereinafter referred to as ***"the Act")*** he is responsible for receiving applications from those seeking to become QCs; making background checks on each applicant; and for forwarding his recommendations on to the Prime Minister.

7. The Prime Minister is appointed pursuant to Article 73 of the Constitution; and it is upon his advice that the Ministers comprising the Cabinet are appointed; and pursuant to Article 77, given their respective portfolios. The Prime Minister is required under section 15 of the Act to act once he has received a recommendation from the AG.

8. The Third Respondents are constituted by section 4 of the Act and their responsibilities are set out in section 5. They include:

"5. *(1) The Bar Council may make bye-laws for the direction, control and government of the Bar Association.*

(2) In addition to any other powers or duties conferred or imposed by this or any other Act, the Bar Council shall be responsible for-

(a) the maintenance of the honour and independence of the Bar and the defence of the Bar in its relations with the executive and the judiciary;"

Under section 15 of the Act the AG is obliged to consult with the President of the Bar Association in relation to an applicant before he makes a recommendation to the Prime Minister.

Preliminary Issues

9. Before the Court could hear the substantive issues raised in the Applicant's application it had first to dispose of certain preliminary objections raised by the Applicant in two Notices filed on 11 January 2010. They related to the Office of the Attorney-General appearing for the Second Respondent through Mr. Klein and other law officers' representation of the Prime Minister and the propriety and competency of Mrs. Deborah Fraser, the Director of legal Affairs, to swear to the facts contained in her affidavit filed on 5 January 2010 (hereinafter referred to as ***"the Fraser affidavit"***). There was also an application by the Respondents to set aside the leave granted by me but Mr. Klein was content to subsume this application in his main submissions so the Court could consider all of the issues at one time. In so doing he was guided by the Court in HMB

Holdings Ltd. v. Cabinet of Antigua and Barbuda [UKPC 37} (5 June 2007). I accept the guidance of Their Lordships.

10. Having heard Counsel I concluded that there was no impediment to any law officer of the Crown appearing for the Second Respondent nor was there anything improper about Mrs. Fraser's affidavit save that those portions of said affidavit purporting to set out opinions of law and hearsay should be expunged therefrom. In doing so I used the approach of of the English Court of Appeal in Re J [1960] 1 WLR 253, at p.257 and followed by Hall, J. in Perry G. Christie v. Hubert A. Ingraham, et. al., 2007/PUB//CON/00034. I held the view that there were portions of the affidavit which were useful to the fair resolution of the issues arising between the parties. We then proceeded to address the substantive issues raised by the Applicant.

11. As evidence of such usefulness, the Third Respondent was relieved of the need to participate in this action beyond 2 February 2010 because the Applicant was satisfied that the material he was provided with in the affidavit of Mrs. Fraser and that laid over to the Court and to him, adequately addressed his request for discovery of documents from the Bar Association. Thus, Mr. Evans was given leave to withdraw and did not take any further part in the proceedings. This meant also that the Court was relieved of the need to hear submissions in respect of reliefs 6 and 7.

12. I make reference to two of the documents exhibited to the Fraser affidavit, to wit, the recommendation of the AG to the Prime Minister and the advice tendered by the Prime Minister to the Governor-General. I do so because they demonstrate that the Applicant's name was forwarded to the Prime Minister by the AG in a letter dated 20 August 2009; and that his name was not included in the Minute Paper sent by the Secretary to the Cabinet to the Secretary to the Governor-General.

The Case

13. The long title to the Act states:

> ***"An Act to make provisions with respect to the practice of law by persons in The Bahamas, for the admission of persons to such practice, for the creation of a registered associate and legal executive, for the conduct and discipline of registered associates, legal executives and persons admitted to practice, and for matters incidental to or connected with the aforesaid matters."***

It was to replace the Bahamas Bar Act (Ch. 44) of the Statute Law of The Bahamas 1987 which had as its commencement date 1 June 1973. The Act introduced for the first time a statutory provision for the appointment of QCs in the form of section 15.

14. I reproduce section 15 of the Act at the outset because it features prominently in this matter and will be referred to often in the course of my decision. Section 15 states:

> ***"15. (1) A counsel and attorney may apply to the Attorney General for appointment as one of Her Majesty's Counsel.***
>
> ***(2) The Attorney-General, after consultation with the Chief Justice, the President of the Bar Association and such other persons as the Attorney-General sees fit, may recommend to the Prime Minister the appointment of the applicant.***
>
> ***(3) Upon receipt of a recommendation from the Attorney-General the Prime Minister may advise the Governor-General to appoint the applicant as one of Her Majesty's Counsel.***
>
> ***(4) Every counsel and attorney who is immediately before the appointed day or who thereafter is appointed Queen's Counsel shall be a member of the Inner Bar and entitled to use the suffix Q.C. immediately after his respective family name."***

15. Although the Applicant has made complaint about the Second Respondent's acts I think he is willing to concede that as for his part, the Second Respondent has done most of what is required of him under section 15(2) of the Act. Even if he does not in fact make such a concession, I am satisfied that the Second Respondent has partially complied with the section inasmuch as he consulted with the Chief Justice and recommended the Applicant to the Prime Minister in a letter dated 20 August 2009.

16. The AG's letter to the Prime Minister addresses two of the reliefs sought by the Applicant, namely 1 and 4, because it demonstrates that the Applicant's name was included in the List sent to the Prime Minister. It should be noted however, that that aspect of the relief pertaining to the ***"rights and privileges of***

seniority" would not be addressed by the AG's letter. Nevertheless, for reasons which will become apparent later, the issue of seniority is non-justiciable.

17. I use the term ***"partially complied"*** because the correspondence disclosed in the course of this hearing between the AG and the then Chief Justice reveal that the Applicant's name was proposed by the Chief Justice to the AG as a person worthy of consideration for appointment as a QC; but the AG did not consult with the President of the Bar Association on the Applicant's appointment.

18. By letter dated 10 August 2009 the AG had written to the Chief Justice indicating the names of persons he proposed to recommend to the Prime Minister for appointment as a QC. That letter did not include the Applicant's name. By letter dated 12 August 2009 the Chief Justice replied to the AG in the terms following:

> ***"As for the other persons you may consider, I respectfully, suggest Mr. Maurice Glinton and ..."***

19. A letter identical to the one addressed to the Chief Justice dated 10 August 2009 written by the AG was sent to the President of the Bar Association who, on 11 August 2009 responded, concurring with the names listed and adding four other names. Neither the list of names nor those suggested by the President included the Applicant's name. The President concluded ***"I shall await your earliest advices."*** There is nothing to suggest the AG reverted to the President

with the Chief Justice's suggested name of the Applicant. This is an important point because in exercising the statutory power pursuant to section 15(2), i.e., making a recommendation, the AG is required to consult with the two persons named therein.

20. It is apparent therefore that there has been no consultation with the President of the Bar Association as envisaged by section 15 in respect to the Applicant:

> "***(2) The Attorney-General, after consultation with the Chief Justice, the President of the Bar Association and such other persons as the Attorney-General sees fit, may recommend ...".*** (Underlining is mine).

21. While the AG is free to consult with anyone at his discretion, he is obliged by the terms of section 15 to consult with the Chief Justice and the President of the Bar before making a recommendation to the Prime Minister in respect of an applicant. This is a pre-condition which must be observed. Further, the section speaks to consulting in respect to an ***"applicant"***. When the AG purported to consult with the Chief Justice and the President of the Bar Association, the Applicant was not then an ***"applicant"*** because he did not apply until 18 August 2009.

22. It should be noted also that the proposal of the AG contained in his letters to the Chief Justice and the President of the Bar preceded by a number of days any application having been made by any of the persons proposed. This is not the procedure set out in section 15. Counsel have the right to apply to an

Attorney-General for consideration for appointment as a QC if such Counsel consider they are possessed of the necessary qualifications and personal attributes to be so appointed; and it is only after receipt of an application does the Attorney-General consult and recommend. The triggering mechanism for the Attorney-General to act under section 15 is an application made to him by an applicant for appointment as QC. While the AG's proactive approach may not rise to a material irregularity, to my mind he ought not to do it and the Act should be followed scrupulously to avoid any misunderstandings.

23. I deprecate the approach of the AG because it is almost like pulling the wings off of flies for a person to be given the hope of an appointment by the invitation of the AG only to have such hope dashed because the AG's fair view of the applicant is not shared by the ultimate decision maker. Persons who consider they are qualified should apply when they deem themselves ready. That was the practice before the Act was promulgated and by section 15(1) such practice was intended to be preserved.

24. As it stands therefore, the AG has failed to consult with the President of the Bar Association in respect to the Applicant as required by the Act and ought not to have made his recommendation of the Applicant to the Prime Minister in the absence of such consultation. Inasmuch as there was non-compliance on the requirement to consult, no recommendation of the Applicant could properly be made by the AG to the Prime Minister: and the Prime Minister was not obliged, in the circumstances, to forward the Applicant's name on to the Governor-General.

If this application had been made on its own I have no doubt there could have been no sustainable challenge to the omission of the Applicant's name from the List received by the Governor-General.

25. This to my mind would have been sufficient to dispose of the Applicant's application altogether. However, two matters are of some moment here. First, the point was not argued before me and I may be wrong in the view I hold. Second, there is the case of Romauld James v. The Attorney General of Trinidad and Tobago [2010] UKPC 23 where an applicant was enabled by means of a flawed process which had benefited others to achieve the relief he sought because those others had received what the Government of Trinidad and Tobago sought to deny him. As observed by Lord Kerr at paragraph 22 of the judgment:

> ***"22. It is an interesting and – for reasons that will appear – relevant aspect of this case that the right which the appellant has asserted is not one which, absent the erroneous grant of the exemption to other officers, would have been available to him He has been treated unequally only because others have been treated better than he (and better than they ought to have been) due to an administrative error. If the rules had been properly applied to all, neither the appellant nor those to whom he has compared himself in order to demonstrate unequal treatment would have received the exemption."***

26. There were others on the List whose names had not been submitted for consideration by both the Chief Justice and the President of the Bar Association but who were recommended to the Governor-General and appointed as QCs.

The Applicant cannot be treated differently at this stage due to this apparent irregularity. Thus, I go on to consider the other matters raised by the parties.

27. The Applicant submitted that the AG misconceived the authority of the First Respondent and the conclusiveness of his own when he invited the First Respondent to ***"consider advising the Governor General to appoint .."***. Has the AG abrogated his responsibility to appoint the Applicant a QC by suggesting to the Prime Minister he ***"consider advising"*** that the Applicant be appointed as a QC? My short answer is no. His invitation for the Prime Minister to ***"consider advising"*** in his letter dated 20 August 2009 was to my mind, not an abrogation of the AG's duty, nor the tendering of a legal opinion, but merely a call for the Prime Minister to act pursuant to section 15(3):

> ***"(3) Upon receipt of a recommendation from the Attorney-General the Prime Minister may advise the Governor-General to appoint the applicant as one of Her Majesty's Counsel."***

Also, as will appear later in this judgment, I do not consider the AG to be the effective decision maker.

28. The matter now resolves itself into an issue of whether the Prime Minister, upon receipt of the AG's recommendation of an applicant, has the discretion not to forward to the Governor-General the name of such applicant. However, before the Court can consider that issue it must of necessity determine the Respondents' contention that the Court cannot grant the reliefs sought by judicial review because of the non-justiciable nature of the grant of honours. They submit

that the appointment of persons as Queen's Counsel is an honour not unlike, e.g., a knighthood.

29. The main submission of the Respondents is that section 15 sets out a procedure but that section does not condescend to outlining the matters the Prime Minister must bear in mind when deliberating on the recommendation; and due to the absence of any statutory criteria an applicant must possess, there is no basis upon which a Court can adjudicate on a judicial review application. I have by the foregoing sentence sought to encapsulate the Respondents' position. I believe they have accepted the reviewability of decisions made by the Respondents in certain circumstances by the Court. In light of the English case Council for the Civil Service Union v Minister for Home Affairs, I certainly accept it.

30. The facts in the CCSU case are set out in paragraphs 2 and 3 of Lord Fraser's decision. They read:

> "***2. Since 1947, when GCHQ was established in its present form, all the staff employed there have been permitted, and indeed encouraged, to belong to national trade unions, and most of them did so. Six unions were represented at GCHQ. They were all members, though not the only members, of the Council of Civil Service Unions ("CCSU"), the first appellant. The second appellant is the secretary of CCSU. The other appellants are individuals who are employed at GCHQ and who were members of one or other of the unions represented there. A departmental Whitley Council was set up in 1947 and, until the events with which this appeal is concerned, there was a well-established practice of consultation between the official side and the trade union side about all important alterations in the terms and conditions of employment of the staff.***

3. On 25 January 1984 all that was abruptly changed. The Secretary of State for Foreign Affairs announced in the House of Commons that the Government had decided to introduce with immediate effect new conditions of service for staff at GCHQ, the effect of which was that they would no longer be permitted to belong to national trade unions but would be permitted to belong only to a departmental staff association approved by the director. The announcement came as a complete surprise to the trade unions and to the employees at GCHQ, as there had been no prior consultation with them. The principal question raised in this appeal is whether the instruction by which the decision received effect, and which was issued orally on 22 December 1983 by the respondent (who is also the Prime Minister), is valid and effective in accordance with article 4 of the Civil Service Order in Council 1982. The respondent maintains that it is. The appellants maintain that it is invalid because there was a procedural obligation on the respondent to act fairly by consulting the persons concerned before exercising her power under article 4 of the Order in Council, and she has failed to do so. Underlying that question, and logically preceding it, is the question whether the courts, and your Lordships' House in its judicial capacity, have power to review the instruction on the ground of a procedural irregularity, having regard particularly to the facts (a) that it was made in the exercise of a power conferred under the royal prerogative and not by statute, and (b) that it concerned national security."

31. His Lordship continued at paragraph 12 in setting out the primary objection to the Courts jurisdiction to enquire into the correctness or otherwise of the exercise of the prerogative power by the Minister:

"12. The Order in Council was not issued under powers conferred by any Act of Parliament. Like the previous Orders in Council on the same subject it was issued by the sovereign by virtue of her prerogative, but of course on the advice of the Government of the day. In these circumstances Mr. Alexander submitted that the instruction was not open to review by the courts because it was an emanation of the prerogative. This submission involves two propositions: (1) that prerogative powers are discretionary, that is to say that they may be exercised at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the

way in which they are exercised is not open to review by the courts: (2) that an instruction given in the exercise of a delegated power conferred by the sovereign under the prerogative enjoys the same immunity from review as if it were itself a direct exercise of prerogative power. Mr. Blom-Cooper contested both of these propositions, but the main weight of his argument was directed against the second."

32. The House held that executive action under a prerogative power was open to judicial review in the same manner as action under a statutory power, so that in appropriate circumstances a Minister might be under a duty to act fairly in relation to the exercise of the power. Further it was held that the Minister had acted unfairly in issuing the instruction in question because the staff had a reasonable expectation that they would be consulted before the instruction was issued and they had not been consulted.

33. The position in the CCSU case is to be contrasted with the earlier view of the courts on aspects of the Government prerogative. As Beadle CJ had earlier held in Dhlamini v Carter NO [1968] Rhodesian LR 136, 153:

"It is trite law that the exercise by the Government of a prerogative which includes a prerogative of mercy is entirely a matter for the Executive itself, and the courts have no jurisdiction whatsoever to inquire into the manner in which the prerogative power is exercised, always provided, of course, that the Government has the power."

34. I move now to consider whether the Second Respondent's decision to ***"expunge"*** the Applicant's name from the List is amenable to judicial review in the sense of being non-justiciable.

35. The ***"honours prerogative"*** reposes in the Sovereign as observed by Taschereau, J in Lenoir v Ritchie 1879 3 S.C R. 575:

> ***"It is trite to say that the Sovereign is the fountain of honors and dignities. "The Crown alone," says Chitty, "can create and confer dignities and honours The King is not only the fountain but the parent of them.", Chitty on prerogatives, 107. It must also be admitted that, in the exercise of that prerogative, the Crown has the right to appoint King's or Queen's Counsel, and to grant Letters of Precedence to members of the Bar. "To the Crown belongs also the prerogative of raising practitioners in the Courts of justice, to a superior eminence, by constituting them sergeants &c., &c., or by granting Letters Patent of precedence to such barristers as His Majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective Patents", Chitty on prerogatives, 118. And I may here add that these prerogative rights are rights inherent in the person of the Sovereign himself, which he alone, and without advice or consent, may exercise how and when he pleases."***

36. The conferment of honours in The Bahamas under section 15 submits Mr. Klein, rests in the Governor-General acting on the advice of the Prime Minister pursuant to Article 79 of the Constitution.

37. Mr. Klein submitted that the dearth of criteria in section 15 precludes a court from ascertaining the basis upon which the decision to appoint a QC is made. Hence, a decision taken by the Executive is not amenable to judicial review; and for the reason set forth in Lord Roskill's decision in the CCSU case at page 418. A-C:

> ***"But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another."*** (Underlining is mine)

38. In commenting on the CCSU case in Reckley v Ministry of Public Safety and Immigration (No. 2) (1996) J.C.J. No. 3 (Quicklaw reference) Lord Goff of Chieveley said at paragraph 20:

> ***"That case recognised that the exercise of a prerogative power was not ipso facto immune from judicial review; but it certainly did not go so far as to suggest that every exercise of such a power was amenable to that jurisdiction. This was made plain in a number of passages from their Lordships' speeches in that case. To select just one example, Lord Scarman said (at page 407B):-***
>
> ***"... if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power."***
>
> ***See also Lord Diplock at pages 408-9, and Lord Roskill at page 418A-C."***

39. While I think those areas pronounced by Lord Roskill as being territory into which judicial review will not tread have been significantly diminished since 1985 due to later court decisions, I do not think the grant of honours has met that fate.

40. Black v Chretien, et. al. has been commended to the Court by Mr. Klein to demonstrate the approach taken by the Ontario Court of Appeal to a similar issue. Although that case is not binding on this Court, it is worth noting. The headnote reveals the facts and decision in the case; and are set out below:

> ***"The appellant, who was at the time a Canadian citizen, was nominated for appointment by the Queen as a peer. The nomination was accepted and recommended by the British Government. The Prime Minister of Canada intervened with the Queen to block the appellant's peerage, citing a contravention of Canadian law. He asserted that he had a right to block the appellant's nomination because of the Nickle Resolution, passed by the Canadian House of Commons in 1919, which requested the King to refrain from conferring titles on any of his Canadian subjects. The appellant's appointment as a peer was suspended or deferred. The appellant brought an action against the Prime Minister for abuse of power, misfeasance in public office and negligence. He also sued the Government of Canada for negligent misrepresentation. The Prime Minister and the Attorney General of Canada brought a motion to dismiss the claims (except for the claim of negligent misrepresentation against the Government) on two grounds: first, that the claims were not justifiable and therefore disclosed no reasonable cause of action; and, second, that the Superior Court had no jurisdiction to grant declaratory relief against the respondents because that jurisdiction lay exclusively with the Federal Court. The motions judge held that the Superior Court had jurisdiction to entertain the appellant's claims. He dismissed the claims, holding that what was involved was an exercise of the Crown prerogative, non-reviewable in court. The appellant appealed on the issue of justifiability. The respondents cross-appealed on the jurisdiction of the Superior Court to grant declaratory relief.***
>
> ***Held, the appeal and the cross-appeal should be dismissed.***

The Crown prerogative is the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown. It can be limited or displaced by statute. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in Canada.

Whether the Prime Minister exercised a prerogative power was a question of law. The court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute. The motions judge was entitled to consider the legal character of the appellant's allegations even though the appellant did not expressly plead that the Prime Minister exercised the Crown prerogative.

Crown prerogative powers are not required to be exercised exclusively by the Governor General. As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative.

Whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on the appellant's peerage or opposing the appellant's appointment, he was exercising the prerogative power of the Crown relating to honours. The honours prerogative is not limited to conferrals the Government of Canada or the Prime Minister might make. The honours prerogative also includes giving advice on, and even advising against, a foreign country's conferral of an honour on a Canadian citizen.

The controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter. The exercise of the prerogative will be justifiable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. The exercise of the honours prerogative is always beyond the review of the courts. No important individual interests are at stake. The appellant's rights were not affected. No Canadian citizen has a right to an honour, and no Canadian citizen can have a legitimate expectation of receiving an honour. In Canada, the doctrine of legitimate expectations informs the duty of procedural fairness; it gives no substantive rights. Even if the doctrine of legitimate

expectations could give substantive rights, neither the appellant nor any other Canadian citizen can claim a legitimate expectation of receiving an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on the appellant rested not with the Canadian Prime Minister but with the Queen.

Once the Prime Minister's exercise of the honours prerogative was found to be beyond review by the courts, how the Prime Minister exercised the prerogative was also beyond review. Even if the advice was wrong or careless or negligent, even if his motives were questionable, they could not be challenged by judicial review."

41. Black is distinguishable in my opinion from the present case because the honour to be bestowed in Black was a peerage, a strictly non-pecuniary designation, i.e., no monetary consideration attached to the conferment of such an honour. However, in the case of a QC, this has been recognized as an office, albeit one of limited scope: See the Canadian case of Attorney General for the Dominion of Canada v Attorney General for the Province of Ontario [1897] J.C.J. No. 2 and the Australian case of Bascomb v the Acting Administrator for the Northern Territories (1993) 119 ALR 557

42. Bascomb is important in another respect as it also illustrates the non-justiciability of the honours prerogative. The applicant in Bascomb had applied for and been refused the appointment as QC. It was a feature of the case that all accepted the applicant was qualified for appointment as QC. His application was

supported by the Chief Justice and the Attorney General. However, the Cabinet decided to advise that he not be appointed a QC.

43. Olney, J. referred to a number of authorities in the course of his judgment but ultimately, refused the relief sought by the applicant. He concluded at paragraph 74 (Quicklaw reference):

> ***"74. The various statutes and authorities to which reference has been made above lead to the following conclusions:***
>
> ***1. There has been established in the NT by valid Commonwealth legislation a system of responsible government broadly similar to the version of the Westminster system prevailing elsewhere in Australia. 2. Both by convention and by statute the Administrator as the representative of the Crown in the NT is obliged to exercise his powers and functions on the advice of the Executive Council. 3. The authority conferred upon the Administrator to make appointments pursuant to s 20 of the Legal Practitioners Act is in all essential respects equivalent to the Crown prerogative enjoyed by other representatives of the Crown in Australia to make similar appointments by letters patent. 4. An appointment as one of Her Majesty's Counsel for the NT is an appointment to an office and is not merely an honour. 5. The nature of the office to which the applicant sought appointment is such that the decision-making process may be influenced by a multitude of reasons which are not necessarily precise and which may not necessarily have any relevance to the personal merits of the applicant. 6. The decision-making process required to be undertaken in respect of an appointment pursuant to s 20 of the Legal Practitioners Act is similar in all relevant respects to the process of appointment to judicial office and is not susceptible to judicial review. 7. The decision of the Administrator to refuse to appoint the applicant as one of Her Majesty's Counsel for the NT is not justiciable. 8. The application should be dismissed."***

44. In the course of the decision in Bascomb, Olney, J referred to the opinion of Brennan J expressed in Macrae v Attorney-General for NSW (1987) 9 NSWLR 268 (at 33):

"Except where the power of appointment to a public office is governed by statute, the power must be at large if its exercise is to answer the purpose for which it is conferred, namely, to advance the interests of the public. If the power is conferred by statute but the statute prescribes no procedure for the making of appointments nor any criteria governing the exercise of the power, the power must be at large for the same reason. The Executive Government or other repository of the power is entrusted with authority to decide who is best fitted to fulfil the duties of the office. It is inconsistent with the public interest to postulate any preferential right to appointment in an individual. ... If it be said that unfettered executive discretion lays the way open to patronage or worse, the remedy must lie in the hands of the legislature which created, or which may prescribe the manner of exercise of, a power of appointment or which may call to account the Minister who advises on the exercise of the power. The remedy does not lie in an examination by the courts of appointments made by the Executive Government or an insistence on judicially-declared criteria affecting the exercise of the power. A fortiori, when the power is to appoint to a judicial office."

45. The following quote from Black (supra) encapsulates Mr. Glinton's response to the Respondents' argument that the honours prerogative remains intact under section 15. Mr. Glinton submits the prerogative has been displaced by statute hence it is amenable to the usual qualifications governing legislation that is to say, reasonableness and rationality, which may attract the Court's scrutiny via judicial review. The court in Black said:

"The Crown prerogative is the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown. It can be limited or displaced by statute. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in Canada."

46. Mr. Glinton referred to the conclusion of the authors Hogg and Monahan Liability of the Crown (3rd ed. 2000) that:

> ***"If the Prime Minister's actions had been taken pursuant to statute, there is no doubt but that they would have been regarded as subject to judicial review, since specific administrative decisions involving the application or interpretation of legal requirements are clearly justiciable."***

47. Has the prerogative been displaced by statute? Section 15 appears to have answered this question in the affirmative says Mr. Glinton because the Legislature could not have intended to lay down a rational procedure which an Attorney-General is to follow, that is, consult then recommend, only to do a "flip-flop" by allowing the Prime Minister an unfettered discretion to arbitrarily interfere in the process. He continues that even if Parliament intended such a result it would fall afoul of the ***"Wednesbury reasonableness"*** test.

48. Unquestionably Parliament can abate by statute all or any portions of the prerogative: R. v. Editor of ***"Daily Mail"***, Ex parte Farnsworth [1921] All E.R 476. In A.-G. v. De Keyser's Royal Hotel [1920] A.C. 479 Lord Swiffen, M.R. stated at page 538:

> ***"Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if***

the Crown could at its pleasure disregard them and fall back on prerogative?"

The view expressed by the Master of the Roll was repeated with approval by Lord Atkinson in A.-G. v. De Keyser's Royal Hotel (2).

49. Article 71 of the Constitution speaks to the Executive in The Bahamas when it says as follows:

> ***"71. (1) The executive authority of The Bahamas is vested in Her Majesty.***
>
> ***(2) Subject to the provisions of this Constitution, the executive authority of The Bahamas may be exercised on behalf of Her Majesty by the Governor-General, either directly or through officers subordinate to him."***

50. Article 79(1) and (3) provide:

> ***"79. (1) The Governor-General shall, in the exercise of his functions, act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where by this Constitution or any other law he is required to act in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, any person or authority other than the Cabinet ...***
>
> ***(3) Where the Governor-General is directed to exercise any function after consultation with any person or authority he shall not be obliged to exercise that function in accordance with the advice or recommendation of that person or authority."***

51. Pursuant to Article 79(1) the Governor-General is obliged to act in the exercise of his functions in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. It is evident that when the Prime Minister tenders his advice to the Governor-General under section

15(3) he is not a ***"Minister acting under the general authority of the Cabinet"***. Thus, where the Prime Minister advises the Governor-General under section 15(3), the exception contained in Article 79(1) is engaged pursuant to the phrase ***"any other law"***; and the Governor-General is not obliged to accept the advice of the Prime Minister.

52. I have so concluded because of the construction I place on certain Articles of the Constitution. Article 72 of the Constitution provides for a Cabinet and its constitution:

> ***"72. (1) There shall be a Cabinet for The Bahamas which shall have the general direction and control of the government of The Bahamas and shall be collectively responsible therefore to Parliament.***
>
> ***(2) The Cabinet shall consist of the Prime Minister and not less than eight other Ministers (of whom one shall be the Attorney-General), as may be appointed in accordance with the provisions of Article 73 of this Constitution."***

53. Ministers of Government are allocated portfolios demarking their respective spheres of authority within which they exercise ***"ministerial responsibility"***. An entry in Wikipedia states: ***"Ministerial responsibility or individual ministerial responsibility is a constitutional convention of governments using the Westminister System that a cabinet minister bears the ultimate responsibility for the actions of their ministry or department. Individual ministerial responsibility is not the same as cabinet collective responsibility, which states members of the cabinet must approve publicly of its collective decisions or resign"***. It should be noted that there are any

number of decisions taken by a minister or an officer in his ministry or department which do not require being placed before Cabinet.

54. The AG is allocated the Ministerial responsibility for certain legal matters of the country. However, he is not vested with any authority in relation to the Bar Association and its members other than the related head of legal education and relations with the Bar. When he acts in relation to matters within his portfolio he is ostensibly acting on the authority of the Cabinet given the convention of ***"collective responsibility"*** among those members comprising the Cabinet. Parliament has not seen fit to make the Attorney-General the Minister to advise the Governor-General under section 15 which it could quite easily have done. Instead, Parliament has interposed the person of the Prime Minister as the entity to provide the advice. It must be noted that the Prime Minister is not allocated any Ministerial responsibility for the legal profession or the conferment of honours under Article 77 of the Constitution; and but for section 15 of the Act he would have no responsibility pursuant to the Act either.

55. Parliament has sought to repose in the Prime Minister the ultimate discretion to advise on who should be made a QC and by omitting to provide any criteria for such appointment has left the decision to be made at large. This may have been a deliberate omission by Parliament to give effect to the traditional approach to appointments of QCs, to wit, they are affected in similar fashion by matters which need not be entirely personal to the aspirant to judicial office and may be unrelated to temperament, learning and character.

56. Article 52 of the Constitution sets out the limits of Parliament's authority to enact laws. It provides in part:

> ***"52. (1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of The Bahamas."***

Inasmuch as its acts are ***"subject to the provisions of this Constitution"*** Parliament is enjoined to remain within those limits of the provisions of the Constitution impinging upon their plenitude of powers.

57. I have already mentioned that Article 71 of the Constitution places the Executive authority in Her Majesty; and that authority is exercised on behalf of Her Majesty by the Governor-General ***"either directly or through officers subordinate to him"***. I construe the phrase "officers subordinate to him" as the Cabinet itself or Ministers comprising the Cabinet acting under the general authority of the Cabinet.

58. I have concluded already that the Prime Minister is not acting under the general authority of the Cabinet when he purports to act pursuant to section 15 of the Act and that would fall within the terms of acting pursuant to ***"any other law"***. In the circumstances of this case, the prerogative remains where it has always reposed to wit, in Her Majesty acting through Her representative, the Governor-General.

59. If, as I have concluded the power to appoint QCs remains in the hands of Her Majesty, the Governor-General is the effective decision-maker and not the Prime Minister. The Governor-General may have regard to the advice of the Prime Minister, but he is not obliged to accept such advice. Pursuant to Article 79(4), ***"the question whether he has so exercised that function shall not be enquired into in any court."*** In the premises therefore the Applicant is entitled to have his application to be made a QC forwarded to the Governor-General by the Prime Minister.

60. As I may be mistaken in my view that the prerogative remains in the Governor-General and the Prime Minister is obliged to forward an applicant's name to the Governor-General for his consideration, I proceed to consider the position if, as contended for by Mr. Klein, the Prime Minister made the final decision under section 15.

61. In Sanatan Dharma Sabha of Trinidad and Tobago Inc., Satnaryan Marharaj, Islamic Relief Centre Ltd., Inshan Iahmael v. The Attorney General of Trinidad and Tobago [2009] UKPC 17 (Privy Council Appeal No. 53 of 2008) the Privy Council considered, inter alia, the grant of honours by the Executive, i.e., Cabinet, in Trinidad and Tobago. Their Lordships analysis of the issues which arose as a result of a complaint of religious discrimination by certain non-Christian members of the society makes for interesting reading on the use of Letters Patent as a form of lawmaking. What is apparent from this decision however, is that the Executive grants honours under the constitutional

arrangements in Trinidad and Tobago. Those arrangements are not dissimilar to our own constitutional provisions.

62. Their Lordships in Reckley (supra) concluded that the Minister advised the Governor-General and the Governor-General acted on that advice. Although that case related to the death penalty and the Advisory Committee it is material to the present application. Lord Goff alluded to the decision of Lord Diplock in the Privy Council in de Freitas v. Benny [1976] A.C. 239, at pages 247-8:

> ***""Except in so far as it may have been altered by the Constitution the legal nature of the exercise of the royal prerogative of mercy in Trinidad and Tobago remains the same as it was in England at common law. At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought might help him to make up his mind as to the advice that he would tender to the sovereign in the particular case."***

63. Reckley No. 2 was considered and distinguished in the Jamaican case of Neville Lewis, et. al. v. Attorney-General of Jamaica [2000] J.C.J. No. 32 (Quicklaw reference) where the Privy Council concluded judicial review of a

decision of the prerogative of mercy was available to a person under sentence of death. At paragraph 49 Lord Slynn of Hadley stated:

> ***"49 It is to their Lordships plain that the ultimate decision as to whether there should be commutation or pardon, the exercise of mercy, is for the Governor-General acting on the recommendations of the Jamaican Privy Council. The merits are not for the courts to review. It does not at all follow that the whole process is beyond review by the courts. Indeed it was accepted both by Lord Diplock in Abbott v. Attorney-General of Trinidad and Tobago [1979] 1 W.L.R. 1342, at p. 1346 and by Lord Goff of Chieveley in Reckley No. 2 at page 539C-E that there is a right to have a petition for mercy considered by the Advisory Committee. The same must be true of the Jamaican Privy Council. There could in their Lordships' view be no justification for excluding review by the courts if it could be shown that the Governor-General proposed to reject a petition without consulting the Jamaican Privy Council, that the Governor-General refused to require information recommended to be obtained by the Jamaican Privy Council or that the Governor-General having required the information to be obtained, the Privy Council indicated that it refused to look at it. The same would be the position if it could be shown that persons not qualified to sit on the Jamaican Privy Council or who were not members of the Jamaican Privy Council had purported to participate in one of the recommendations of the Jamaican Privy Council. "***

64. The Attorneys-General for Trinidad and Tobago and for The Bahamas intervened in the Lewis case due to the principles and issues under review and their applicability to their respective jurisdictions. What emerged from their collective representations is that the Court may look at the procedure adopted by the body exercising the discretion. Lord Slynn said at paragraph 67, ***"The***

procedures followed in the process of considering a man's petition are thus in their Lordships' view open to judicial review."

65. This continues to present a difficulty for the Applicant inasmuch as I can concern myself only with the procedure adopted in this case but not with the decision itself. Olney, J remarked in Bascomb (supra):

> ***5. The nature of the office to which the applicant sought appointment is such that the decision-making process may be influenced by a multitude of reasons which are not necessarily precise and which may not necessarily have any relevance to the personal merits of the applicant."***

66. It seems to me that the circumstances in Black are what obtain in The Bahamas pursuant to section 15, namely, there are no criteria governing the exercise of the power to appoint a QC. This is why, argues Mr. Klein, it is left to the Executive, ie, the Prime Minister, to determine "who is best fitted to fulfill the duties of the office. This may not be the best repository for the power. QCs are supposed to be the leaders of the Bar which Bar is expected to protect the rights of citizens in The Bahamas, when they are perceived to be threatened regardless of the source of the threat, viz, from another individual or the Government. As has been said elsewhere and often, an independent Bar is the surest bulwark against the tyranny of an overreaching government.

67. This Court is bound to give effect to the will of Parliament and it is usually left to Parliament to correct or not, what it has in fact done, Parliament is not permitted to overstep its constitutional bounds. That Governments generally determine who will be made a QC is beyond doubt and traces back to the seventeenth century. A thumbnail view of the history behind this observation may be found in Attorney-General for the Dominion of Canada v Attorney-General for Ontario (supra) at p. 253 per Lord Watson; and reiterated in an article by Mr. Justice P.W. Young in The Australian Law Journal Vol. 67 (1993) pp. 171-2.

68. Were I to decide the point of the Prime Minister's decision not to recommend the Applicant to the Governor-General I would say "***the Prime Minister's actions as communicating [The Bahamas'] policy on honours to the Queen, giving her advice on the appellant's [appointment] or opposing the appellant's appointment, he was exercising the prerogative power of the Crown relating to honours***". But can he decide not to send the Applicant's name to the Governor-General?

69. Mr. Glinton's position, as I understand it, is not directed to the exercise of the prerogative but to the decision not to have his name remain on the List when the Prime Minister sent it on to the Governor-General. I see this as a discrete issue inasmuch as it may be open to the Prime Minister to articulate his opposition to the Applicant's appointment as a QC when he forwards the List to the Governor-General; but he may not be at liberty to expunge the Applicant's name for consideration by the Governor-General.

70. It seems to me that the structure of section 15 expects the Prime Minister to transmit as a matter of course, the name of an applicant submitted by the AG to the Governor-General. The use of the word ***"may"*** is discretionary only in relation to the Prime Minister's recommendation, that is to say, he may advise the appointment be made or he may advise that it not be made. However, it does not lie within the power of the Prime Minister not to forward any advice to the Governor-General at all.

71. It is in the act of expunging his name from the List that the question raised by the Applicant becomes of some moment, to wit, what has occurred between the AG's due diligence and recommendation to the Prime Minister which has made the Applicant less suitable to be appointed QC than those others on the List? The Applicant seeks, therefore, to be treated the same as the others named in the List unless there is something which sets him apart from them. In other words like should be treated as like. I would hold that such like treatment can only relate to the right of an applicant to have his application reviewed by the Prime Minister and forwarded to the Governor-General with the Prime Minister's advice.

72. The difficulty for the Applicant with the view I hold lies in the Prime Minister not being required to express the reasons for his decision to not recommend an applicant for appointment as a QC; and the nebulous criteria for one to be so appointed. Thus, I would agree with the dicta of Olney, J in Bascomb, that "***the decision-making process may be influenced by a***

multitude of reasons which are not necessarily precise and which may not necessarily have any relevance to the personal merits of the applicant."

73. Also, it seems to me that the subject matter, i.e., appointment as a QC, is not amenable to the judicial review process notwithstanding the view expressed that the appointment as a QC is an appointment to an office. This situation is different from those encountered by the courts in those cases involving ***"licensing"*** issues, e.g., Central Broadcasting Services Ltd., et. al. v. Attorney General of Trinidad and Tobago [2006]1 WLR 2891 which related to the constitutionally protected right of freedom of expression and the clearly demonstrated unjustified discrimination against the appellant in favour of another applicant. See also Benjamin v. Minister of Information and Broadcasting [2001] 1 WLR 1040 and Observer Publications Ltd. v. Matthews 58 WIR 188 (PC).

74. I am satisfied that the decision I have arrived at on the issue of justiciability in regards to the honours prerogative is determinative of the Applicant's case. However, I wish to comment on the issues of legitimate expectation and unequal treatment under the Constitution because they were raised by the Applicant.

Legitimate Expectation

75. Although the Applicant was induced by the then Attorney-General to apply for appointment as a QC which would have given him cause to believe his application when made would ultimately be successful, such an expectation

could only have been reasonably held if the Attorney-General was the decision maker. The structure of section 15 does not support the proposition that the decision to make the appointment lies in him. This position is to be contrasted to that obtaining in Bascomb (supra) where the statute specifically placed the power to appoint QCs in the hands of the Administrator albeit acting on the advice of the Cabinet when regard is had to other legislation, viz, section 34 of the Interpretation Act (NT).

76. Olney, J. observed at paragraph 73 in Bascomb (supra):

> ***73 An appointment as Queen's Counsel has the potential to enable the appointee to enhance his earning capacity. But there is nothing in the traditions and practise of the legal profession to give rise to an expectation that by either eminence or seniority in the profession a practitioner will necessarily progress to a stage where he or she becomes entitled to expect those benefits. The appointment of Queen's Counsel has by tradition been within the province of the executive government. Examples abound of barristers who, for one reason or another, have been overlooked for appointment or whose appointments have been delayed.***

77. One could mount an argument that inasmuch as it is left to the Attorney-General to do the due diligence in checking on the suitability of an applicant; the position the Attorney-General holds as the leader of the Bar in the Order of Precedence; and that he is entitled to consult with anyone he deems appropriate – and I would think that could include the Prime Minister and members of the Cabinet – his judgment should be given more weight in the scheme of the Act

and is a strong indicator that the Legislature intended him to be the effective decision maker under section 15.

78. As a part of his submissions, Mr Glinton explained his position on how his legitimate expectation arose when he said, "The idea of the legitimate expectation being put forward in the context of what the evidence is, is in relation to the names that were given the applicant by the then Attorney General at the applicant's request, and it is in respect of those persons all of this should be clear from the affidavit as well as the notice that that is sought." He went on to make the concession that but for the fact of the invitation, but for the fact that that invitation was accepted, the applicant being just a participant in that exercise could have no expectation of maintaining seniority to anyone who was appointed. It arises purely in the context of the list that was read from by the Attorney General at the request of the applicant so that the applicant wanted to be reassured that with respect to those persons named, all things being equal, that seniority would be retained.

79. I must revert to my position that the Attorney-General is not the ultimate decision maker on appointments as QCs, thus his reassurances to the Applicant as to the retention of his seniority counts for naught. Such statements of comfort can be no more than a placebo because the Attorney-General in recommending a person for appointment as a QC does so only on the hope that his choice will meet with the approval of the Executive.

80. Unfortunately for the Applicant, says Counsel for the First and Second Respondents, the Attorney-General has not been designated the person to confer the title of QC under section 15. He is only called on to make a recommendation and therefore, no legitimate expectation to be made a QC may reasonably be held by a person recommended, even when invited to apply by the Attorney-General, that such person will be duly appointed. As Nelson, JA observed in the Application of Vashti Sampson, et. al., Civil Appeal No. 96 of 2003 (TT): ***"It is trite law that a decision-maker cannot properly create a legitimate expectation that is beyond its statutory powers or is in breach of the law"***.

81. That section 15 has been a source of contention and confusion since its promulgation is evidenced by the correspondence between the then President of the Bar Association, Mr. Peter Maynard and the then Attorney-General, Mr. Carl Bethel exhibited to the affidavit of the Applicant filed on 22 December 2009. Both express differing views on who should make the recommendation for appointment as a QC. Nevertheless, such legitimate expectation as the Applicant could have held could only be that his application would be considered by the authorities; and no more.

Discrimination

82. The Applicant's fifth relief relates to discrimination contrary to Articles 15 and 26 of the Constitution. Article 15 provides:

"15. Whereas every person in The Bahamas is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely —

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the foresaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

83. Article 26 provides"

"26. (1) Subject to the provisions of paragraphs (4), (5) and (9) of this Article, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of paragraphs (6), (9) and (10) of this Article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this Article, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions

to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Paragraph (1) of this Article shall not apply to any law so far as that law makes provision — (a) for the appropriation of revenues or other funds of The Bahamas or for the imposition of taxation (including the levying of fees for the grant of licences); or

(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement or residence within, The Bahamas of persons who are not citizens of The Bahamas; or

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; or

(d) whereby persons of any such description as is mentioned in paragraph (3) of this Article may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society; or

(e) for authorising the granting of licences or certificates permitting the conduct of a lottery, the keeping of a gaming house or the carrying on of gambling in any of its forms subject to conditions which impose upon persons who are citizens of The Bahamas disabilities or restrictions to which other persons are not made subject.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of paragraph (1) of this Article to the extent that it makes provision with respect to standards or qualifications (not being a standard or qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for service as a public officer or as a member of a disciplined force or for the service of a

local government authority or a body corporate established by law for public purposes.

(6) Paragraph (2) of this Article shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in paragraph (4) or (5) of this Article.

(7) Subject to the provisions of subparagraph (4)(e) and of paragraph (9) of this Article, no person shall be treated in a discriminatory manner in respect of access to any of the following places to which the general public have access, namely, shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort.

(8) Subject to the provisions of this Article no person shall be treated in a discriminatory manner—

(a) in respect of any conveyance or lease or agreement for, or in consideration of, or collateral to, a conveyance or lease of any freehold or leasehold hereditaments which have been offered for sale or lease to the general public;

(b) in respect of any covenant or provisions in any conveyance or lease or agreement for, or in consideration of, or collateral to, a conveyance or lease restricting by discriminatory provisions the transfer, ownership, use or occupation of any freehold or leasehold hereditaments which have been offered for sale or lease to the general public.

(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision whereby persons of any such description as is mentioned in paragraph (3) of this Article may be subjected to any restriction on the rights and freedoms guaranteed by Articles 21, 22, 23, 24 and 25 of this Constitution, being such a restriction as is authorised by Article 21(2)(a), 22(5), 23(2), 24(2) or 25(2)(a) or (e), as the case may be.

(10) Nothing in paragraph (2) of this Article shall affect any discretion relating to the institution, conduct or

discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law."

84. Insofar as Article 26 is concerned I fail to see how section 15 of the Act discriminates against the Applicant. Neither am I able to discern the discrimination said to have been practiced upon him by the Respondents. I would adopt the submission of Mr. Klein that allegations of discrimination must be properly pleaded and particularized. The Applicant makes bare assertions that the lawyers appointed as QCs were, unlike him, ***"partners in larger white controlled or established law firms"*** and were primarily supporters of the Free National Movement, the party of the Prime Minister and the AG. More must be provided to establish these allegations, e.g., the numbers and composition of lawyers that make up these ***"larger white controlled firms"*** and how are they known to be supporters of the FNM. I do not recall it anywhere stated what the Applicant's political leanings are or if they are known to anyone else.

85. I hold the view that there is no general right to equality under Article 26 as there may be acceptable derogations from equal treatment to all persons. This was observed by Their Lordships in Matadeen v Pointu [1998] J.C.J. No. 10 (Quicklaw reference) where at paragraph 20 Lord Hoffmann said ***" 20 It by no means follows, however, that the rights which are constitutionally protected and subject to judicial review include a general justiciable principle of equality."*** Difference in treatment is not necessarily discrimination.

86. In Attorney General of Antigua and Barbuda v. Lake [1998] J.C.J. No. 48 the appellant claimed he had been discriminated against. The Privy Council found there were facts which had been set out in the appellant's affidavit which supported such an inference. At paragraph 31 of Lord Hutton's judgment he stated:

> ***"On the facts alleged by Dr. Lake, in the Primary Election for St. John's Rural North in mid 1993 the candidate supported by Dr. Lake defeated the candidate supported by the Prime Minister, and shortly thereafter, when they met, the Prime Minister told Dr. Lake that he would deal with him. Their Lordships consider that the fact that in an election Dr. Lake supported a candidate who successfully opposed another candidate supported by the Prime Minister is sufficient to raise the issue that the treatment of Dr. Lake in respect of his position as Medical Superintendent of Holberton Hospital constituted discrimination attributable to his political opinions or affiliations."***

87. The Applicant has failed to disclose the basis upon which the discrimination alleged is said to have manifested itself. What he has done instead is to leave it to be inferred because of the fact that he was not made a QC while others, two of whom were his juniors, were appointed as QCs.

88. On the matter of unequal treatment, this may be given short shift because to seek to compare the qualities, attributes and talents of persons whose names appear on the List is to engage in a subjective exercise where suitability lies in the eyes of a particular beholder. An applicant could have little cause for complaint if his sole application was refused but that of another practitioner made

at the same time but the subject of a separate recommendation, was granted. So too it seems to me that notwithstanding the Applicant's name appears on a list with a number of other persons, his application is to be looked at on its own. Each name is a separate recommendation made by the Attorney-General and it is unproductive to seek to compare the qualities of one to that of another. Given the esoteric and undefined nature of the qualifications for appointment as QC it is impossible to ascertain what factors or qualities have caused one person to be made a QC and another not to be made a QC. This is precisely why the courts have held the appointment of QCs to be non-justiciable.

89. In view of my decision that the Applicant's name was required to be forwarded by the Prime Minister to the Governor-General whether he was the ultimate decision maker or the Governor-General was; and the non-justifiability of the decision to appoint QCs, I do not venture into consideration of the constitutional infringements alleged by the Applicant beyond the references thereto I have already made.

90. I have stated that each application is a separate freestanding application notwithstanding that in this case there was a list of some thirteen names sent to the Prime Minister by the AG. This means that it was within the purview of the Prime Minister to send the names of the aspirants collectively or separately; and in no particular order in terms of dates of call to the Bar. The Applicant seeks declarations which would cause his name to be restored to the List but that would not be the appropriate relief in this case. I do grant relief (9) and I order that ***the***

recommendation of the applicant by the Attorney-General be dealt with in accordance with law", viz. pursuant to section 15(3) of the Act the Applicant's application must be transmitted to the Governor-General by the Prime Minister.

91. In the premises therefore I do not make the declarations sought at 1, 2, 3 and 5; nor do I make the orders sought at 4, 6, 7,8 and 10 in the Applicant's reliefs.

92. I do not make an order for exemplary damages because there were no grounds advanced by the Applicant to warrant the grant of damages which are meant to indicate a court's disapproval of a flagrant and egregious disregard of a person's rights. Romould James (supra) is instructive on the issue of damages.

93. I would only wish to add this observation: inasmuch as an applicant seeks the grant of an ***"office"*** when he applies to become a QC, it is incumbent on the Executive to communicate in writing to such applicant whether or not his application has been successful. Common courtesy would dictate such a course. Bascomb (supra) provides an example of this at paragraph 35.

94. I have perused all of the authorities referred to by the parties and while I may not have mentioned them in this judgment, they have assisted in informing my view of the issues in this case. I am obliged for the industry of the Applicant and Counsel for the Respondents as they have made my task infinitely more tolerable.

95. Also, I am grateful for the patience the parties demonstrated in accommodating the Court's calendar by agreeing to early starts for hearings and numerous adjournments when the matter was overtaken by other fixtures. I offer also my apology for the time it has taken me to deliver this judgment and would proffer by way of a partial excuse the issues raised by the parties caused me to make a number of revisions to my judgment.

96. I will hear the parties on the matter of costs although my initial reaction is not to make any order for costs in view of the novelty of the issue raised in this case and its utility in the advancement of our local jurisprudence.

Dated this 14th day of September, 2010.

Isaacs, Sr. J.

Having heard Counsel on the issue of costs each party is to bear his own costs.

Dated this 15th day of September, 2010.

Isaacs, Sr. J.