IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2020/005
GY Civil Appeal No 57 of 2016

BETWEEN

AIR SERVICES LIMITED	**APPELLANTS**
RORAIMA AIRWAYS LIMITED	
FENIX AIRWAYS INC	
HINTERLAND AVIATION INC	
DOMESTIC AIRWAYS INC	
WINGS AVIATION LIMITED	
HOPKINSON MINING AND LOGISTICS INC	
NATIONAL AIR TRANSPORT ASSOCIATION INC	

AND

THE ATTORNEY GENERAL	**RESPONDENTS**
THE MINISTRY OF PUBLIC INFRASTRUCTURE	
THE GUYANA CIVIL AVIATION AUTHORITY	

Before the Honourable: **Mr Justice J Wit, JCCJ**
Mr Justice W Anderson, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr Devindra Kissoon and Ms Natasha Vieira for the Appellants

Mr Nigel Hawke and Ms Raeanna Clarke for the Respondents

Administrative law - Consultation– procedural fairness – whether the Minister had a duty to consult – whether consultation is a constitutional imperative in Guyana - extent of consultation necessary – whether duty was satisfied

On 9 May 2016, the Ogle International Airport was renamed as the Eugene F Correia International Airport. This name change was approved by the Minister of Public Infrastructure, as required by Article 24(1) of the Lease Agreement between the Government and Ogle Airport Incorporated (OAI) for the management, operation and development of the Airport. The Appellants did not agree with the name change and

contended that the Minister had a duty to consult with them before he proceeded with the renaming, as such a renaming would be harmful to them and their business interests. The Solicitor General conceded that the Minister owed a duty to consult with those who would be affected by his decision to rename the airport but submitted that this duty had been satisfied in this case.

Barrow JCCJ, in delivering the Judgment of the Court, found that the duty to consult in this case was in relation to the simple question of whether the proposed new name should be approved or not. He noted that the Appellants were able to discuss the name change, among other issues, at a meeting with the Minister on 18 November 2015, following which they also provided a brief to the Minister of all the issues discussed, including the name change. In that brief, the submission in relation to the renaming required nothing more than to 'Leave Ogle Airport name as it is'. There was nothing provided by the Appellants that suggested that the Minister would not have understood the nature and substance of their objection, and the Court found that the Minister took their concerns seriously enough that he commissioned a legal review of the Lease.

The Court thus held that there was no need for further consultations, as advanced by the Appellants. This was a case where the Appellants disagreed with the merits of the Minister's decision, for which the law gives no remedy. In a separate, concurring opinion, Jamadar JCCJ emphasised that the duty of the Minister to consult is rooted in the Constitution of Guyana, distinct from any procedural rights based on other legal sources.

Cases referred to

Attorney General and others v Joseph and Boyce [2006] CCJ 3 (AJ), (2006) 69 WIR 104; *Basdeo and St Hill v Guyana Sugar Corporation Ltd and the Attorney General* [2018] CCJ 24 (AJ), [2019] 1 LRC 120; *Belize International Services Limited v The Attorney General of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36; *Gairy v AG* [2001] UKPC 30, (1999) 59 WIR 174; *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2005] 4 LRC 86; *Lucas and Carillo v Chief Education Officer and others* [2015] CCJ 6 (AJ), (2015) 86 WIR 100, [2016] 1 LRC 384; *Madhewoo v The State of Mauritius* [2016] UKPC 30, [2017] 1 LRC 530; *Osborn v Parole Board; Booth v Parole Board; Re Reilly's application for Judicial Review (Northern Ireland)* [2013] UKSC 61, [2014] 1 All ER 369, [2014] AC 1115, [2013] 3 WLR 1020; *R (on the application of Machi) v Legal Services Commission* [2002] 1 WLR 983; *R (on the application of Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2015] 1 All ER 495; ; *R (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, 126 BMLR 134; *R v Brent London Borough Council ex p Gunning* [1985] 84 LGR 168; *R v Secretary of State for*

The Home Department, ex p Doody [1994] 1 AC 531, [1993] 3 All ER 92; *Re Hanoman (Carl)* (1999) 65 WIR 157; *United Policyholders Group and others v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 4 LRC 433.

Legislation referred to

Constitution of the Co-operative Republic of Guyana, Rev Ed 2011, Cap 1:01.

Other Sources referred to

Green A, 'Judicial Influence on the Duty to Consult and Accommodate*'* (2019) 56 (3) Osgoode Hall LJ 529; Promislow J, 'Irreconcilable?: The Duty to Consult and Administrative Decision Makers' (2013) 26 Can J Admin L & Prac 251; Robinson T, Bulkan A, and Saunders A, *Fundamentals of Caribbean Constitutional Law* (Sweet & Maxwell 2015).

JUDGMENT
of
The Honourable Justices Wit, Anderson, Barrow, Burgess and Jamadar

Delivered by
The Honourable Mr Justice Barrow

and

CONCURRING JUDGMENT
of
The Honourable Mr Justice Jamadar

on the 2nd day of March, 2021

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW, JCCJ

[1] This appeal considers whether, as a matter of legitimate expectation or procedural fairness, a Minister of government had a duty to consult the Appellants before he decided to proceed with a proposed action that the Appellants had urged him not to take because it would be harmful to them.

The relationships

[2] The decision of the Minister of Public Infrastructure ("the Minister") which the Appellants challenged was to approve the renaming of Ogle International Airport as the Eugene F Correia International Airport. The Guyana Civil Aviation Authority (GCAA) was made a party in the underlying proceedings so as to seek an order prohibiting it from implementing the decision to rename the

Airport. The Appellants are providers of commercial air transport services who operate from that airport, and a representative organization that they formed.

[3] The structure and history of the relationships between the parties supply the information necessary to understand how and why the dispute has arisen. That history begins with the Government's decision to reform the aviation sector, which included bringing Ogle Aerodrome, as it was then known, into compliance with international standards. The principals of, among others, Air Services Limited (ASL), Roraima Airways Limited (Roraima), and Trans Guyana Airways (TGA) satisfied the Government that they could develop and manage the airport under a Public Private Partnership and in the year 2000 they formed Ogle Airport Inc (OAI). ASL and Roraima are among the Appellants while TGA is not. TGA is a member of the Correia Group of Companies with whom the Appellants have badly fallen out over the way they operate in the running of OAI and at the airport.

[4] At the beginning, each company contributed equally to the share capital and each company provided one director on the original Board of OAI with Michael Correia Jr being named Chairman of the Board, which he remained up to the time proceedings commenced. The Appellants have expressed strong views as to how the Group has come to dominate the shareholding and control of OAI. ASL and Roraima remain shareholders, but no other Appellant is a shareholder, and the Appellants say that they have only two of the seven directors while the others are family members or associates of the Correias.

[5] On 30 October 2001, a lease was executed between OAI and the Government ("the Lease") for the management, operation and development of the airport by OAI, subject to the Minister's oversight. The Lease provided at Article 24(1) the procedure for the airport operator to apply for the Ministry's approval if it desired to change the name of the airport.

[6] The idea of changing the name originated with His Excellency, President Granger, who announced a proposal to rename Ogle International Airport as the Eugene Correia International Airport on 19 September 2015. Thereafter, on 14 October 2015, Michael Correia Jr, in his capacity as Chairman of OAI wrote the President stating that the Board of OAI had unanimously agreed to accept the

President's proposal to rename the airport and asking the President to formally agree to the renaming in collaboration with the Ministry of Public Infrastructure. The Court of Appeal regarded OAI's letter as the latter's adoption of the President's proposal for renaming and their presentation of the proposal to the Minister as their request for approval of a change of name, as per Article 24(1) of the Lease.

Opposition to renaming

[7] Less than two weeks after OAI's letter reporting unanimous board desire for the change of name, ASL wrote a letter dated 23 October 2015 to OAI stating that while it previously supported the name change, it was now withdrawing support after discussions among its directors and legal advisors. Similarly, Roraima wrote on 28 October 2015 and indicated it could not support the name change '[a]fter much reflection and consultation with other shareholders and stakeholders.' Thus, two of the members of OAI changed their minds about the change of name. Seven other operators at the airport also wrote to OAI opposing the change, making it nine out of the ten operators at the airport who opposed the renaming.

[8] The reasons for opposition, as stated by the Appellants in their contemporaneous communications, are not complex. ASL presented two considerations: there were other names associated with aviation more deserving of recognition and the proposed name change would give a huge advantage to ASL's competitors at the airport and would be counterproductive to ASL. Roraima submitted that the naming of an international airport was a matter of resounding national and international significance and required public debate and greater transparency than had attended the proposal. It also stated that 'against the backdrop of troubling corporate governance issues surrounding Ogle International Airport, and widespread stakeholder perception of dominance of the facility by the Correia Group's, Trans Guyana Airways, [it] strongly believe[s] that renaming the Airport as intended will provide an unfair and unjust competitive advantage to the Correia Group's operations at Ogle International Airport.' Hinterland Aviation argued that the renaming would give the Correia Group a greater competitive advantage over other operators. It accepted that the Correia Group

had contributed significantly to the growth of the airport but argued so had others and thus it would be appropriate to leave the name unchanged. Oxford Aviation thought the name change was an unfair decision because it was not made after consulting all aircraft operators. Hopkinson Mining contended that the renaming would scuttle and virtually sabotage the businesses of other operators; to name the airport after 'a fellow competitor' bordered on dictatorship and would ultimately confirm public perception that the Correia Group was the heavyweight and the other operators were second best. Wings Aviation wrote saying it was against the renaming. Jags Aviation stated that while they understood the reason for the renaming, there were many others who had contributed and who deserved consideration, so it was not in favour of the renaming at this time. Domestic Airways confined itself to stating that it did not support changing the name. Fenix Airways was similarly laconic.

The opposers represent

[9] On or around 11 November 2015, the nine opposers formed a corporation, The National Air Transport Association (NATA); seven of its members along with the corporation are Appellants in this matter. NATA wrote the President, on 17 November 2015, asking him to persuade Mr Correia to not proceed with the name change. The letter stated that NATA had no doubt that the President meant well when the suggestion was made for the name change 'but that you were unaware of the existing conditions at Ogle. However, as you will see from the attached letters to the OAI management from nine of the ten operators at Ogle, they all feel that the name change is unacceptable'. It is gathered that the reference to attached letters is to those summarised in the preceding paragraph.

[10] On the day after the date of that letter to the President, on 18 November 2015, NATA met with the Minister and his team to discuss 'the concerns arising out of the renaming of the Airport to that of the namesake of its competitor', as the Appellants described it in their original supporting affidavit. On the same day of the meeting, NATA submitted a written brief of the matters raised, described by the Appellants as containing 'a summary of the issues suffered by the airport operators at the hands of the Correia Group …, including a monopoly on fuel supply, the imposition of a 2.5 million dollar fuel license fee, provisions for fuel

insurance in the value of millions of US dollars, while the Correia Group of companies were exempted from these charges'. The written brief addressed the proposed renaming of the airport by making the contention that the proposed name would give the Correia Group of companies even more of a competitive advantage than presently existed. At the end of the brief a listing was made of thirteen matters that needed urgent resolution; the item that related to the renaming read simply 'Leave Ogle Airport name as it is'.

[11] In a letter dated 2 December 2015, the President responded to a letter from NATA to say he expected that the controversy regarding the change of name had been resolved and that he was aware the Minister had undertaken to ensure efficient administration of the airport. On 29 December 2015, the Minister wrote NATA advising that the process had been commenced to procure an independent legal review of the Lease. This review was intended to clarify the rights and obligations of the parties to the Lease (the Government and OAI) and form a basis for determining the way forward for the proper implementation of the Lease. The letter did not mention or refer to the name change.

[12] The next development was a letter of 21 March 2016 from NATA to the reviewer appointed by the Minister in which they advised him of their concerns and indicated their readiness to participate in the process. Then, on 4 April 2016, the Government announced that it had decided to proceed with the name change. On 13 April, NATA wrote to the Minister objecting to the decision stating that 'such a renaming will in effect legitimize the continuous gross abuse of dominance being carried out by the Chairman of OAI and head of the Correia Group of Companies.' Later that month formalities apparently were satisfied and the name change was officially announced.

Fairness

[13] The case for the Appellants is that based both on legitimate expectation and procedural fairness, the Minister had a duty to consult them and he failed to do so in the required manner. In oral argument, the Solicitor General rightly accepted that the Minister owed a duty to consult those who would be affected adversely by his decision but, he submitted, the Minister had fully satisfied the requirements of fairness in the circumstances of this case. The Solicitor

General's acceptance of the duty to consult means there is no need to review the Appellants' strained contention that the Minister created a legitimate expectation of consultation by making a promise to do so when he announced the creation of the Review Commission – an assertion which the Court of Appeal rejected as unfounded, since there was no such statement in the letter. As counsel for the Appellants was aware, from his quoting from *R (on the application of Machi) v Legal Services Commission*[1], 'The question is one of procedural fairness. It gains nothing by being cast in terms of legitimate expectation.' Accordingly, it was unnecessary for the Appellants to argue they had a legitimate expectation, based on a fancied promise in the Minister's letter or on an implied promise to be derived from the President's statement in his letter of 2 December 2015 that he expected the renaming controversy had been resolved.

[14] More productively, counsel for the Appellants relied on *R (on the application of Moseley) v Haringey London Borough Council*[2] to establish the existence at common law of the duty to consult, drawing upon the following statement of Lord Wilson JSC:

> [23] A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon CC, ex p Baker, R v Durham CC, ex p Curtis* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.

[1] [2002] 1 WLR 983 at [31].
[2] [2014] UKSC 56.

[15] In the *Application of Carl Hanoman,*[3] Bernard CJ (as she then was) made the observation:

> [9] However, modern trends indicate that the consultation process embraces more than just affording an opportunity to express views and receive advice. It involves meaningful participation and overall fairness, and although it inevitably involves the exercise of a discretion, inherent in that discretion is the obligation to act fairly and reasonably within the boundaries of the statute authorizing the exercise of the discretion …

[16] In *Moseley*, Lord Wilson's judgment went on to establish that what fairness required to be done depended greatly on the situation under consideration:

> **[24]** Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *Osborn v Parole Board, Booth v Parole Board, Re Reilly's application for Judicial Review (Northern Ireland)* [2013] UKSC 61, [2014] 1 All ER 369, [2014] AC 1115, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless, the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras [67] and [68] of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' (see [67]). Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' (see [68]). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for

[3] [1999] 65 WIR 157.

application to all the inhabitants of our Borough, should we make one in the terms which we here propose?

[17] In that case, because it was not a simple 'yes or no' decision, the authority posted a consultation document online and invited all residents to respond to it. Also, it delivered hard copies by hand to each of its 36,000 households entitled to the affected benefit, together with a covering letter signed by an official who presented his view as to the options that were available for consideration.

[18] A different manner of satisfying the requirements of fairness is seen in *R v Secretary of State for The Home Department, ex p Doody*[4] in which the House of Lords considered the rights of prisoners serving life sentences to participate in the process leading to the fixing of the date on which each might be released on licence. The court decided that the prisoner should be afforded the opportunity to submit in writing representations as to the period he should serve before the authority set the date. This case is often relied on as showing that fairness may be satisfied by allowing written representations without an oral hearing.

[19] A determination of what consultation was required in this case begins with recognizing that, in contrast to a case such as *Moseley*, the duty to consult was in relation to a simple question to be decided: "yes or no, should the proposed new name be approved?" This is not to be understood to mean that the simplicity of the decision being considered makes any less meaningful the need for genuine consultation; it means only that the nature and extent of the consultation required will be influenced by how simple or involved is the decision being considered.

Was the duty to consult satisfied?

[20] That short review follows the path of this Court in *Basdeo v Guyana Sugar Corporation Ltd*[5] and provides sufficient context to consider the submission of the Appellants that there was not the required consultation and the opposing submission of the Solicitor General that there was proper consultation. Counsel for the Appellants argued, without condescending to particulars, that the letters

[4] [1994] 1 AC 531, [1993] 3 All ER 92.
[5] [2018] CCJ 24 (AJ), [2019] 1 LRC 120 at [27] and [28].

and representations to the Minister were not sufficient to amount to meaningful consultation. However, a recapitulation of the course of events connected to the proposed renaming clearly reveals the important fact that there was consultation. It is fair to say that the meeting on18 November 2015 between the Minister along with his officials and the principals of the Appellants was the most direct and clearest form of consultation conceivable. The written brief following that meeting, prepared by the Appellants, places beyond dispute that the renaming proposal was discussed. It may be reasoned from the contents of the brief that there was nothing more to represent or discuss. As mentioned above[6], the list at the end of the brief of issues for urgent resolution, in dealing with the matter of renaming, required nothing more to be done than 'Leave Ogle Airport name as it is'. The Appellants in their brief (and presumably in their oral representations in the meeting with the Minister) asked for no action to be taken, no discussion to be held, no information to be given, no reason to be provided, no material to be submitted, no representations to be made, no further consultation to occur… nothing more.

[21] The conclusion that there was nothing more on which to consult is fully supported by looking at what the Appellants had to say in their letters making representations against the renaming. The nine letters between them stated only two reasons; one was that there were other deserving names to honour and the other was that the renaming would increase the competitive advantage that the Correia Group already enjoyed and legitimize the group's treatment of the Appellants. It is notable that only four of the nine letters mentioned the factor of competition as a reason for objecting to the name.

[22] The refrain of the Appellants' arguments has been that their fundamental concern was that by making the Correia brand name the name of the airport this would result in economic disaster for them because of the great competitive advantage it would give to the Correia Group; but the substance of the Appellants' representations and the facts to which they deposed do not bear this out as the reason for their opposing the name change. Their own material clearly reveals that the damage of which they complained was the oppressively anti-

[6] Para [10].

competitive way, they said, in which OAI and the Correia Group operated the airport. It must be taken to be a true expression of the reason for their objection, contained in the previously quoted letter of protest from NATA to the Minister after he announced the decision to rename, when they stated '… such a renaming will in effect legitimize the continuous gross abuse of dominance being carried out by the Chairman of OAI and head of the Correia Group of Companies.' The Minister would surely have understood the Appellants' objection to the renaming as peripheral to their great dissatisfaction with how the airport was being operated, which was a matter he took sufficiently seriously that he commissioned a legal review of how the airport was operating under the Lease.

More consultation

[23] The Appellants resorted in oral submissions to arguing that they should have been allowed to make (further) representations to the Minister in a sit-down meeting in which they could have presented to him a study the Appellants had commissioned, as one gathers, and this would have showed the Minister how harmful to them the renaming would be in terms of competition. The Court of Appeal's dismissal of this material as unhelpful indicates how unpersuasive it was in relation to the renaming decision. But more fundamentally, the Appellants had been given a face-to-face meeting with the Minister with full opportunity to advocate and make representations and they have shown no justification for arguing they should have been given another meeting.

[24] Looking at the matter in the round, apart from legal principles, there is no reason for thinking that the Minister lacked a proper appreciation of the Appellants' views and arguments or that he did not take time to consider them, given he took more than six months before he finalized his decision. The Appellants wisely abandoned the plethora of claims they had made in the High Court attacking the Minister's decision on apparently every conceivable ground known to the law of judicial review. Ultimately, this was no more than a case of the Appellants disagreeing with the merits of the Minister's decision and it is settled that for this the law gives no remedy.[7]

[7] *Attorney General and others v Joseph and Boyce* [2006] CCJ 3 (AJ), (2006) 69 WIR 104 Joint Judgment of de la Bastide PCCJ and Saunders JCCJ [122].

CONCURRING JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ

Introduction

[25] I have read the opinion of Barrow JCCJ and agree with his core analysis and outcomes. I do not intend to repeat in detail the relevant facts as Barrow JCCJ has already set them out. I would however add the following summary comments primarily on the issue of consultation in the context of Guyanese constitutionalism, as I consider this an area of public law that is still in the formative stages of development in Caribbean legal contexts.

[26] Commendably the Solicitor General, before this Court, rightly accepted that the line Minister owed a duty to consult those who could be affected adversely by his decision to change the name of the airport. There can be no doubt that such a duty arose in the context of this case.

[27] The airport, historically known and named as the Ogle International Airport (OIA), was renamed as the Eugene F Correia International Airport. The idea for the name change sprung from a suggestion made by the President of Guyana, who, in September 2015, proposed renaming it as the Eugene Correia International Airport. In October 2015, as required by Article 24(1) of the Lease under which OIA was being run, Michael Correia, in his capacity as Chairman of the Board of the public-private venture company that the State had established to run the OIA (subject to the line Minister's overarching supervisory responsibility), formally indicated to the President and line Minister that the Board of OAI had agreed to accept the President's proposal to rename the airport. The Minister's approval of the name change was confirmed on 18 April 2016 and the name change was officially effected on 9 May 2016.

[28] Eugene Correia was related to Michael Correia, Chief Executive Officer of Trans Guyana Airways (TGA). The Appellants are all competitors of TGA, all operating out of OIA. They allege that five of the seven Board members were at the material time related to the Correias and/or affiliated with TGA.

[29] The Appellants have all objected to the name change. In common they have a singular underlying objection, which is ''the concerns arising out of the renaming of the Airport to that of the namesake of its competitor'[8]. And arising out of this, the consequential unfair commercial advantages that such a branding will create in favour of the Correia owned TGA. These concerns were also framed in the context of alleged historical and prior experiences by the Appellants of unfair and discriminatory practices and regulations introduced and applied by the Correia-led Board, that favoured TGA and disadvantaged competing service providers (including the Appellants) who operated out of OIA. In essence, the Appellants allege that their economic interests and investments, and in consequence the public interest, will be directly and adversely affected by the State's decision to effect the airport name change.

[30] OIA is a State owned and public airport. It provides support for both commercial and individual users. It is serviced by several providers, including the Appellants. The State has a duty in public law to ensure that it runs for the benefit and in the best interests of the public, and to do so fairly, and competitively. And to also do so within the framework of the socialist democracy that Guyana is. Articles 13, 14, 15, 16, and 17 of the Constitution are apposite. Consultation, when it arises, is a constitutional corollary of this public law duty. The Appellants are all relevant stakeholders in the operation of the airport, and thus have a legitimate interest in the name change, especially in the context of their concerns. They therefore have a right to consultation on this matter, and the State a concomitant duty to engage them in this process.

A constitutional perspective

[31] Consultation in Caribbean public law has its deepest source in constitutional values. This is undoubtedly so in Guyana. Recognizing the constitutional nature of the duty is important in the Caribbean.[9] The Preamble to the Constitution sets as a core constitutional value and objective: '… a system of governance that

[8] Affidavit of Annette Arjoon dated 24 August 2020, in Support of Notice of Application, para 7(gg).
[9] See generally Andrew Green, 'Judicial Influence on the Duty to Consult and Accommodate' (2019) 56 (3) Osgoode Hall LJ 529 <https://digitalcommons.osgoode.yorku.ca/ohlj/vol56/iss3/2> accessed 25 February 2021; and, Janna Promislow 'Irreconcilable?: The Duty to Consult and Administrative Decision Makers' (2013) 26 Can J Admin L & Prac 251.

promotes concerted effort and broad-based participation in national decision-making in order to develop … a harmonious community based on democratic values, social justice, fundamental human rights, and the rule of law.'[10] Guyana is also a self-declared '… democratic sovereign state in the course of transition from capitalism to socialism …', self-identifying as '… the Co-operative Republic of Guyana.'[11]

[32] The supremacy clause in the Constitution creates an imperative to ensure that all laws (and governmental actions, including decisions) are consistent with the Constitution and Guyanese constitutionalism.[12] The courts are the guardians and constitutional auditors of this standard keeping.[13] The sovereignty clause in Guyana expressly vests constitutive power in 'the people' and constituted authority in 'democratic organs' of governance.[14]

[33] Indeed, in Chapter II of the Constitution (Principles and Bases of the Political, Economic and Social System), Article 13 mandates that 'the State is to establish an inclusionary democracy' and recognizes that this is achieved by 'the participation of citizens … in the management and decision-making processes of the State, with particular emphasis on those areas of decision-making that directly affect their well-being.' Consultation with those whose well-being is directly affected by decision making is thus a constitutional imperative. This Article constitutionally underpins the Appellants' case on the imperative for consultation.

[34] Remaining in Chapter II, this constitutional imperative for consultation in this case is reinforced by Article 16 of the Constitution, which speaks to the requirement for the State to 'foster the development of … relevant forms of cooperation … as are seen to be supportive of the goals of economic development' that the State intends to pursue. And, by Article 15, which mandates that: 'The State shall intervene to mitigate any deleterious effects of

[10] Preamble, Constitution of the Co-operative Republic of Guyana, Schedule to the Constitution of the Co-operative Republic of Guyana Act, Cap 1:01.
[11] Guyana Constitution (n 10), art 1.
[12] Guyana Constitution (n 10), art 8.
[13] *Belize International Services Limited v The Attorney General of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [305].
[14] Guyana Constitution (n 10), art 9.

competition on individuals or groups of individuals.' Again, these provisions support the Appellants' case, in so far as the OIA is intended to be operated as a vehicle for the economic development of the State; and in so far as the Appellants' allegations of unfair and discriminatory competition are credible. Which is to say, in these contexts the State has a constitutional duty to consult with all parties who may be adversely affected by the decision to effect the name change to the airport.

[35] Consultation in Guyana is thus not merely a common law principle, esteemed as that may be, but a constitutional imperative in furtherance of governance built on 'broad-based participation in national decision-making'. It is a necessity when context mandates it, that demands 'concerted effort'. The onus is on the State and Public Authorities to initiate its process and ensure that its requirements are satisfactorily met. It is in furtherance of the democratic socialist ideals to which Guyana aspires and is committed.

[36] What then is consultation? In the context of the democratic socialist constitutional values and imperative discussed above, it is a process that is fundamentally dialogical. The informed and active engagement of relevant stakeholders, as well as the transparent, open, and accessible flow of information is at its heart. This then is the first principle of Guyanese consultation; it is a dialogical process. In Guyanese constitutionalism, consultation is also rooted in an ideology of mutuality. It therefore requires sincere receptivity and genuine openness to correctly understand and appreciate other relevant views and suggestions. All such opinions are valued and to be considered. Mutuality is hence the second principle of Guyanese consultation.

[37] The requirement for broad-based participation in national decision making, can only be realized if all relevant stakeholders are meaningfully included in the dialogical process of consultation. No relevant stakeholder should be excluded from this process, if it is to meet the dictates of this principle. A third principle is consequently inclusivity. Further, where reasonably justified and possible ('appropriate') given the aims of the undertaking, the means being considered to achieve them, the available resources, and bearing in mind the pertinent opinions of others and relevant stakeholder interests, consultation requires the

making of best-interests and common-good changes, culminating ultimately in legitimate democratic socialist decisions. It involves a process of weighting and balancing interests. Accommodation, as the willingness of decision makers to change or modify decisions, is thus the fourth principle of Guyanese consultation.

[38] These four foundational principles can lead to some guidelines, not by any means prescriptive, but ones that provide basic pointers for both application and assessment. Thus, in summary, consultation is an inclusive, accommodating, mutually dialogical process which meaningfully involves all relevant stakeholders. Article 13 of the Constitution suggests that the requirement for consultation is *prima facie* triggered whenever 'areas of decision-making … directly affect (the) well-being' of citizens and relevant stakeholders. Thus it would appear that for consultation to be triggered: a) the State must have actual or constructive knowledge of or can reasonably foresee potential stakeholders' interests and rights, b) the intended actions or conduct of the State must have the realistic potential to impact and directly affect these stakeholders well-being, interests, and rights whether positively or negatively, and/or c) the intended actions or conduct can reasonably have a potential adverse effect on some or all of these stakeholders. The standard of review in relation to whether the duty to consult has been triggered is 'correctness'. It is a purely objective standard.

[39] Of course, consultation from a constitutional perspective must also be in alignment with human rights values and rule of law requirements. Thus, consultation must also be carried out in accordance with the rule of law good faith principle.[15] A principle which in the context of consultation encompasses a willingness to share all relevant information, genuinely engage in the process, give real consideration of relevant stakeholders' views and concerns, and to reasonably change and modify initial positions. The principle in the context of consultation also includes values such as transparency, openness, clarity, inclusivity, accountability, and timeliness in relation to both the process and relevant stakeholders. Good faith dealings are a cornerstone of good governance. It thus supports public trust and confidence.

[15] *BISL v AG* (n 13) [342]–[343]; See also Green (n 9) 533.

[40] Human rights values that are pertinent include, the principles of respect, equality, non-discrimination, and fundamental fairness. Grounding consultation in these principles represents a rights-based approach to development and upholds the principles of Guyanese constitutionalism outlined above. In particular, the principle that in Guyana, people have a right to be consulted when context demands it.

[41] However, human rights are not absolute.[16] This engages the principles of proportionality, and reasonableness. There is no single prescriptive form or process for constitutionally due consultation. Consultation must be tailored to meet the needs of context, which includes the nature of the project, the relevant stakeholders, and the potential benefits and burdens – impacts. Put more colloquially, in consultation, 'one size does not fit all'. Thus, the doctrines of proportionality and reasonableness, as public administrative law principles, intersect with the constitutional (and common law) principle of fairness, and allows for nuanced and varying degrees and forms of consultation depending on context.

[42] The duty is thus variable and context dependent. It shifts along a spectrum from limited to extensive consultation.[17] Context may dictate that the consultation process may be limited to: simply notice of a decision and opportunities to state concerns; or full and frank disclosure and information sharing, and the receipt and consideration of opinions and concerns; or it may necessitate a systematic, thorough, intricate, and involved process of engagement with relevant stakeholders, from conceptualization to completion; or some other permutation. The strength of interests, rights, and claims, as well as the seriousness and potential adverse effects (impact) on the well-being of relevant stakeholders (a spectrum analysis), impacts the content of the duty to consult. As well, such a spectrum analysis influences whether accommodation is appropriate.

[43] Constitutionally and contextually, the interrogation in this case may be framed ideologically as whether the process was a sufficiently inclusive,

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[16] *Lucas and Carillo v Chief Education Officer and others* [2015] CCJ 6 (AJ), (2015) 86 WIR 100, [2016] 1 LRC 384 at [48]; *Madhewoo v The State of Mauritius* [2016] UKPC 30, [2017] 1 LRC 530 at [21]

[17] See Green (n 9) 534.

accommodating, mutually dialogical process which meaningfully involved all relevant stakeholders, filtered through human rights and rule of law lenses. Context will determine the degree of consultation required. The appropriate standard of review that courts will apply in relation to the process of consultation is still evolving but recognizes that a certain measure of deference is to be paid to decision makers, especially in relation to the degree of policy involved. Generally, a standard of 'reasonableness' is appropriate in relation to the degree and process of consultation required: 'What is required is not perfection, but reasonableness.'[18] Whenever consultation is triggered, a decision maker ought not to take any determinative actions unless and until the duty is fulfilled. Where there is inadequate consultation, the impugned decision may be quashed.

[44] For the purposes of this opinion, the point I really hope to make is that the duty to consult is a constitutionally derived State obligation and is distinct from procedural rights based on other constitutional or administrative law requirements. As such, engaging the duty to consult through this lens is both important and necessary. The Constitution is, after all, supreme.[19]

The common law approach

[45] In the context of the common law duty to consult, the approach is grounded in the principle of fairness. In my opinion a constitutional lens enlightens the common law approaches to consultation. It does so emphatically at the intersection of the approaches on the point of fairness, which may be considered a fulcrum point. Moreover, and as Lord Bingham has explained: 'In interpreting and applying the Constitution … the traditional rules of the common-law must so far as necessary yield.'[20] Indeed, the common law, though inherited, is capable of its own dynamic evolution and growth in response to both societal needs and changes, as well as constitutional imperatives.[21] It is a thing of beauty

[18] *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73, [2005] 4 LRC 86 at [62]; Green (n 9) 537; Irreconcilable? (n 9).
[19] Irreconcilable? (n 9).
[20] *Gairy v AG* [2001] UKPC 30, (1999) 59 WIR 174 at [19].
[21] See generally Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (Sweet & Maxwell 2015), [3-013]-[3-016].

to behold, this didactic interplay between constitutionalism and the common law!

[46] The Privy Council, in 2016, recognized that the court may go beyond the 'Wednesbury grounds' of reasonableness, requiring that consultation be given unless there is an overriding reason to resile from it, which reason will be judged in accordance with what fairness requires. [22] And earlier, in *Doody v Secretary of State for the Home Department*[23] the House of Lords conceptualised what fairness requires saying, *inter alia*, that 'it will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to procuring its modification, or both'[24].

[47] This Court has explained its take on this approach in *Basdeo v Guyana Sugar Corporation Ltd*.[25]. The Court found that the common law duty to consult was relevant in interpreting the meaning and extent of the requirement that a party be consulted prior to a final decision being taken. The Court referenced the basic principles set out in *R v Brent London Borough Council ex p Gunning*[26] as being the criteria to determine whether there was sufficient consultation, those principles being:

(i) Consultation when the proposals are still at a formative stage.

(ii) Adequate information on which to respond.

(iii) Adequate time in which to respond.

(iv) Conscientious consideration by an authority to the consultation.

[48] In ***Basdeo***, the Court recognized the *Gunning* principles as being widely accepted and applied and highlighted that the process of consultation embraces more than just affording an opportunity to express views and receive advice.

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[22] *United Policyholders Group and others v Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] 4 LRC 433, at [90].
[23] *Doody* (n 4).
[24] *Doody* (n 4) 106.
[25] *Basdeo* (n 5) [27]–[28].
[26] [1985] 84 LGR 168.

The Court opined that '[i]t involves meaningful participation and overall fairness'.[27] Thus, the views of relevant stakeholders, including those actually and potentially affected, ought to be taken into consideration even though these opinions may ultimately not be accepted or acted on.

[49] Indeed, in 2014, in *R (on the application of Moseley) v Haringey London Borough Council*[28], the UK Supreme Court also endorsed the G*unning* criteria, saying that 'it is hard to see how any of [the] four suggested requirements could be rejected or indeed improved'[29], and accepted the England and Wales Court of Appeal statement that it was 'a prescription for fairness'[30]. The UKSC added two general points from the authorities[31]:

(a) The degree of specificity with which the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting, meaning that persons who are more aware of the nature of the proposed activity may not require as much detail to be able to respond satisfactorily; and

(b) The demands of fairness may be higher when the proposed activity deprives someone of an existing benefit or advantage than when the person is simply an applicant for future benefit.

[50] The opinion of Barrow JCCJ has sufficiently outlined the contours of the common law principle and its application in this case. I agree with the application to the facts in this matter.

Conclusion

[51] Based on the facts as stated by Barrow JCCJ, and in the context of the name-change decision, it is reasonable and proportionate to conclude that the process engaged in this matter was a sufficiently inclusive, accommodating, mutually dialogical process which meaningfully involved all relevant stakeholders, and

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[27] *Basdeo* (n 5) [28].
[28] *Moseley* (n 2).
[29] *Moseley* (n 2),[25].
[30] *R (on the application of Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, 126 BMLR 134 at [9].
[31] *Moseley* (n 2) [26]–[28].

in particular the Appellants. On a contextual spectrum analysis, a more limited process of consultation was reasonable.

[52] The Appellants were aware of the decision and had more than ample opportunities to articulate and communicate their concerns, which they did orally and in writing. Concerns which were received, considered, and acted upon when the line Minister commissioned a formal review into the operations of the airport based on the Appellants' complaints.

[53] There is also nothing that suggests that the good faith principle was undermined, or that the core applicable human rights values that underpin consultation in this matter were breached. The same reasoning can be said to apply by analogy, in relation to the common law duties of fairness and consultation in this case. This is not to say that what transpired was by any means ideal or perfect. However, it is to say that it was at least sufficient. For the discerning, the value of viewing this matter of consultation through a constitutional perspective will, I suggest respectfully, be obvious.

Order of the Court

[54] The Court orders that:

(a) The appeal is dismissed.

(b) Costs are awarded to the Respondent to be taxed if not agreed.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess

/s/ P Jamadar

The Hon Mr Justice P Jamadar