

**IN THE CARIBBEAN COURT OF JUSTICE  
APPELLATE JURISDICTION**

**ON APPEAL FROM THE COURT OF APPEAL OF BELIZE**

**CCJ Appeal No BZCV2024/003  
BZ Civil Appeal Nos 12 and 13 of 2022**

**BETWEEN**

**CONTROLLER OF SUPPLIES  
MINISTER OF ECONOMIC DEVELOPMENT,  
PETROLEUM, INVESTMENT, TRADE AND  
COMMERCE  
ATTORNEY GENERAL**

**APPELLANTS**

**AND**

**GAS TOMZA LTD  
WESTERN GAS COMPANY LTD  
SOUTHERN CHOICE BUTANE LTD dba ZETA GAS  
BELIZE WESTERN ENERGY LTD**

**RESPONDENTS**

**Before:**  
**Mr Justice Anderson, President  
Mme Justice Rajnauth-Lee  
Mr Justice Barrow  
Mr Justice Jamadar  
Mme Justice Ononaiwu**

**Date of Judgment: 20 November 2025**

**Appearances**

Mr Edward Fitzgerald, KC, Ms Angeline Welsh, KC and Mr E Andrew Marshalleck, Jr, SC for the First and Second Appellants

Mr Eamon H Courtenay, SC, Ms Samantha Matute, Assistant Solicitor General and Ms Iliana N Swift for the Third Appellant

Mr Douglas Mendes, SC, Mr Godfrey P Smith, SC, Mr Luke Hamel-Smith and Mr Hector D Guerra for the Respondents

*Civil law — Constitutional law — Breach of fundamental rights — Protection from deprivation of property — Goodwill right to work — Freedom of association — Protection of the law — Equality of treatment under the law.*

*Civil law — Constitutional law — Protection from deprivation of property — Goodwill — Whether legislation effected acquisition of goodwill in business of distribution of liquefied petroleum gas.*

## **SUMMARY**

The appellants to the appeal and respondents to the cross-appeal are the Controller of Supplies; the Minister of Economic Development, Petroleum Investment, Trade and Commerce; and the Attorney General of Belize (hereinafter collectively referred to as ‘the Government’). The respondents to the appeal and appellants to the cross-appeal are Gas Tomza Ltd; Western Gas Company Ltd; Southern Choice Butane Ltd (dba Zeta Gas); and Belize Western Energy Ltd. (hereinafter collectively referred to as ‘the Gas Companies’).

Liquefied Petroleum Gas (‘LPG’) is widely used for a variety of purposes in Belize. It was sourced from the United States Gulf Coast to suppliers across Central America and then imported by land into Belize by each of the Gas Companies for distribution. Together, the Gas Companies controlled the importation of LPG into Belize for over 20 years.

The Government embarked on the National Liquefied Petroleum Gas Project (‘NLPG Project’) with the goals of ensuring the stability, quality, and affordability of the LPG supply, the creation of climate resilient infrastructure for LPG, the minimisation of smuggling of LPG, and the protection of the health and safety of the people of Belize. The National Gas Company (‘NGC’) was created to drive the NLPG Project. There was a Definitive Agreement between the Government and NGC which contemplated the importation of LPG wholly by sea and the construction of supporting infrastructure for importation, distribution and supply of LPG throughout Belize. Subsequently, the National Liquefied Petroleum Gas Project Act (‘the Original Act’) was enacted to give effect to the Definitive Agreement.

The Original Act introduced a regime whereby LPG would be exclusively imported by NGC into Belize by sea from the United States Gulf Coast, undergo quality assurance and other testing and stored at the NGC facility. The Act also exempted NGC from obligations relating to the payment of income and business taxes, sales taxes, customs and excise duties, stamp duties, environmental taxes, and others.

Following the passage of the legislation, the Gas Companies instituted a claim challenging its constitutionality. They argued that the monopoly conferred on the NGC, together with the various tax exemptions, caused them the loss of a substantial proportion of their customer base. They contended that the Original Act violated their rights to the enjoyment of property, to work, to freedom of association, and to protection under the law and equality of treatment, guaranteed by the Constitution. At the close of the trial, but before judgment was rendered, the Original Act was amended by the National Liquefied Petroleum Gas Project (Amendment) Act 2021 ('the Amended Act') making the importation of LPG by other companies possible. The Amended Act provided that to obtain a licence to import, companies would now be required to receive, store, and subject to testing their imported LPG at the NGC's terminal or an authorized import landing terminal with a minimum storage capacity of 1.5 million US gallons.

The Gas Companies claimed that the Amended Act continued the unconstitutionality of the Original Act, but they amended the particulars of their complaint. They complained that the amendment preserved the NGC's monopoly due to the unreasonable and/or unattainable requirements for importation of LPG and sought compensation for breach of their rights and vindictory damages. The parties agreed on the issues to be tried by the court. As regards the loss of property, the claim was that through the Amended Act, the Government had compulsorily acquired the goodwill of the Gas Companies without compensation and had imposed onerous and unreasonable conditions to engage in the business of importation of LPG.

The trial judge found that the Amended Act compulsorily acquired the Gas Companies' goodwill without compensation, but the other claims were dismissed. Specifically, it was

held that the conditions imposed by the Amended Act were a matter of executive policy and did not breach the Gas Companies' constitutional rights. The trial judge also found that the Amended Act removed the exclusivity clause, allowing other companies to apply for an import licence and to import gas through an authorised facility they built or through the NGC terminal. Therefore, it was not inconsistent with the right to work or freedom of association under the Constitution. Additionally, the Amended Act applied uniformly to all potential importers therefore it did not result in unequal and discriminatory treatment. The Gas Companies were awarded damages of a cumulative sum of BZD10,896,751.20 for the breach of the protection from deprivation of property under s 17 (1) of the Constitution but were not granted vindicatory damages. Each party was ordered to bear its own costs.

The Court of Appeal upheld the trial judge's finding that the Amended Act violated the Gas Companies' right to property by causing a loss of their goodwill which was acquired by NGC without provision for compensation. The Court of Appeal did not accept that the characterisation of legislation as 'regulatory' or part of executive policy automatically meant that there was no taking as it was possible that the 'regulation' could go too far and thus unlawfully interfere with the enjoyment of property. The court found that the legislation could not be excused by any of the exceptions in s 17(2) to the protection from deprivation of property under s 17(1). Applying the *de Freitas* proportionality test adopted by the Caribbean Court of Justice ('CCJ') in *Titan International Securities Inc v A-G*, the court held that there was no rational connection between the conditions imposed and goals in the public interest, as advanced by the Government.

The Court of Appeal also found that the Gas Companies' right to work was violated as an unjustifiable legislative fetter was placed upon their ability to engage in their business of choice, the importation of LPG, by requiring construction of a 1.5 million US gallons storage facility or passing imported LPG through the NGC terminal. In finding this constitutional breach, the Court of Appeal ordered the amendment of sch II to the Amended Act to delete the condition that requires each Authorized Import Facility to have a minimum storage capacity of 1.5 million US gallons.

As it relates to freedom of association, the Court of Appeal found that this right inures to collective groups with a common interest and properly excluded social and business relationships of a private nature, such as that between the Gas Companies and NGC. As for the right to equality, the Court of Appeal applied an ‘improper motive test’ and did not find a constitutional breach since the Gas Companies could not show that any difference in treatment was unfair because it was motivated by some improper purpose. The Gas Companies also argued that the Original Act was *void ab initio* and therefore any subsequent amendments were a nullity. However, the Court of Appeal was not persuaded by this argument.

The Court of Appeal found that the Gas Companies did not sufficiently plead and prove their case and remitted the assessment of damages to the High Court for the taking of further evidence. It affirmed the decision of the trial judge to not award vindictory damages. Each party was ordered to bear its own costs.

Both parties to the litigation appealed to the CCJ. At the hearing of the appeal, the Gas Companies abandoned the ground of the cross-appeal that the Original Act was *void ab initio* and that the amendments made thereto were a nullity. The remaining issues for the CCJ’s determination concerned the degree of judicial deference owed to the legislature in relation to legislation of a socio-economic nature, as well as whether the Amended Act contravened the Gas Companies’ rights to property, work, freedom of association and equality before the law. Depending upon its determination of these issues, the CCJ would determine whether the matter should be remitted to the High Court for assessment of damages and whether there should be an award of vindictory damages.

Anderson P delivered the lead judgment for the majority and first considered principles of judicial deference and the presumption of constitutionality. He affirmed that while the legislature should be afforded a generous margin of appreciation to shape socio-economic policy, courts must remain the ultimate guardians of constitutional rights. The presumption of constitutionality remains a core feature in deciding on the intensity of review of socio-

economic legislative policy as well as in the application of the *de Freitas* test for measuring proportionality.

Regarding the breach of the right to property, that property being goodwill, Anderson P accepted there could be an explicit or direct taking of property or a regulatory or indirect taking of property under s 17 of the Belize Constitution. He found that there had been no explicit or direct taking of goodwill and went on to consider whether the Amended Act was regulatory and had effected an indirect taking by being a substantial and disproportionate interference with the goodwill of the Gas Companies. On the facts of the case, he held that the Gas Companies failed to adequately plead or prove the existence and loss of goodwill in their businesses and hence that the claim that there had been a taking was bound to fail. In particular, the President determined that the Gas Companies' undoubted loss of market share could not wholly or necessarily be attributable to a loss of goodwill without provision of expert evidence which had not been forthcoming.

On the right to work, the majority found that the constitutional right to work guarantees the opportunity to engage in a trade or business and that this right may be extended to corporations. However, it was held that there was no breach of this right as the Gas Companies retained the ability to, and did in fact, continue to operate their LPG businesses. They had not been denied the opportunity to work, even if the conditions for importation had changed.

Pertaining to freedom of association, the majority agreed with the Court of Appeal that this right protects collective associations formed to pursue a common interest or objective which had a public element at its core. Freedom of association did not protect relationships solely of a private commercial nature, which were safeguarded by other constitutional protections. The requirement to use the NGC terminal did not amount to forced association in a constitutionally impermissible sense.

Further, the majority found no breach of the right to equality before the law. The Court reasoned that the NGC and the Gas Companies were not similarly situated as is required to

find a breach of this right, given the NGC's investment and role in the public-private partnership. In addition, the majority found that the differentiation in treatment was based on legitimate public policy objectives and was proportionate to the aims and effects of the legislation.

Since no constitutional breaches were found, the Court of Appeal's orders to amend the legislation and to remit the matter for assessment of damages, were quashed. The decision not to award vindictory damages was affirmed. There was no order as to costs, recognising the public importance of the issues raised and the reasonableness of the Gas Companies in pursuing the litigation.

In a concurring opinion, Barrow J focused on the issue of the loss of 'goodwill'. He found that the fact that the Gas Companies continued to operate their businesses contradicted their claim that the goodwill of their businesses was acquired or taken. It was also observed that the Gas Companies had no distinguishable importation business to which goodwill could attach.

As it related to the right to work, this issue was dwarfed by the previous finding that the legislation did not seize the customers of the Gas Companies. The opinion posited that the finding of a breach by the Court of Appeal reflected its failure to appreciate that the Gas Companies were actually in the business of re-selling and not importing. This involved a process of the LPG being trucked overland into Belize by the foreign suppliers of the Gas Companies, making importing and transporting ancillary to the distribution business of the companies. Additionally, the Gas Companies had the option of purchasing LPG from NGC for distribution, even if it was less profitable for them to do so.

As it relates to freedom of association and protection from unequal treatment, the judge agreed with the Court of Appeal in finding that there were no breaches of these rights. The Gas Companies had not begun to explore the option of building a terminal or importing through NGC's terminal or negotiating what concessions and treatment could have been available to them.

In another concurring opinion, Ononaiwu J focused on the claim by the Gas Companies that their right to equality under s 6(1) of the Constitution was breached. She found that the Gas Companies did not prove a *prima facie* infringement of this right. They did not substantiate their contention that the Amended Act prescribed conditions for importation that were unattainable by entities other than the NGC and thereby perpetuated the monopoly on importation that the Original Act had conferred on the NGC. The judge emphasised that the Amended Act did not prescribe that construction of an import facility with a minimum storage capacity of 1.5 million US gallons is a prerequisite for importation of LPG into Belize. Rather, receipt and storage of imported LPG at an authorized import facility that meets the minimum requirements, so that the product can undergo the requisite testing by or on behalf of the Government, is a condition for importation of LPG into the country. Even if it was not feasible for the respondents to construct such an import facility, they could still obtain an import licence once they complied with the tendering procedures and passed the imported gas through the NGC's terminal or an authorized import facility built by another entity, which meets the minimum requirements. The Gas Companies did not satisfactorily explain why importing LPG through the NGC's terminal was not feasible.

Ononaiwu J rejected the 'improper motivation' test adopted by the Court of Appeal for establishing a breach of s 6(1), which required a claimant to prove that any difference in treatment was motivated by an improper reason. Reading s 6(1) together with s 3 of the Constitution, she found that where a claimant had made a *prima facie* case that a law infringes the right to equality, the other party would bear the burden of demonstrating that the law can be justified in the public interest. She reasoned that in assessing whether the law could be so justified, it was appropriate for a court to give consideration not only to whether the difference in treatment is rationally connected to a legitimate objective but also the proportionality of the measure.

Jamadar J dissented. He found that the constitutional rights of the Gas Companies were breached relating to their right to property and their right to work. The judge examined the notion of the presumption of constitutionality and compared its usefulness as a burden of proof and a canon of construction in interpreting constitutional provisions. In socio-



economic policy making legislation or executive actions, the Court is, through the separation of powers, the final arbiter of whether constitutional standards have been met.

Further, he emphasised that in proving that a constitutional infringement has occurred there is a two-stage test to be applied: (i) a claimant must prove that *prima facie* their right has been, is being, or is likely to be infringed, and, once this has been established (ii) the burden shifts to the State to establish that the limitation on the right is, among other things, justified. The more substantial the interference, the greater the obligation on the State to provide a cogent justification and fulsome disclosure.

In examining whether the Gas Companies' rights were contravened under s 17 of the Constitution, the Judge considered that both lower courts concluded that the goodwill of the Gas Companies was lost because of the monopoly created by the Original Act and continued by the provisions of the Amended Act. The result of the Original Act was an immediate loss of business, customer base and goodwill. This amounted to a deprivation and/ or taking of property, due to the adverse effects of the interference.

Jamadar J opined that the State did not discharge the onus on it to satisfy the scrutiny of the justification test. In his opinion, there was no rational connection in requiring the Gas Companies to build multiple 1.5 million US gallons storage facilities, and no proven justification, especially with no guarantee that they would be granted an import licence. Further, he noted that the 'level the playing field' justification for the Amended Act failed, because of the difference in the requirements that the Gas Companies were subjected to, compared to the NGC. The conditions placed on the Gas Companies also impacted their ability to engage in work of their choosing since they could no longer import LPG. Also, in his view, it was unrealistic to determine that the importation of LPG was not a significant aspect of their enterprise that was adversely affected.

By agreeing with the Court of Appeal that there had been contraventions of ss 15 and 17 of the Constitution, the judge would have remitted the matter to the High Court for an assessment of damages. He reserved his position on the other issues in dispute.

In the result, having regard to the opinions expressed, the appeal was allowed, and the cross-appeal was dismissed. The Court made no order as to costs.

**Cases referred to:**

*A-G v Antigua Times Ltd* (1975) 21 WIR 560 (AG PC); *A-G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104; *A-G v Smith* (1984) 38 WIR 33 (BB HC); *A-G v Whiteman* (1991) 39 WIR 397 (TT CA); *A-G of Belize v Gabourel* [2024] CCJ 13 (AJ) BZ, BZ 2024 CCJ 5 (CARILAW), (26 June 2024); *A-G of Belize v Zuniga* [2014] CCJ 2 (AJ) (BZ), (2014) 84 WIR 101; *A-G of Guyana v Jones* [2024] CCJ 20 (AJ) GY; *A-G of The Gambia v Jobe* [1984] AC 689; *All U P Stamp Vendors Association v Union of India* (Allahabad India HC, 8 April 2021); *Aluminium Co of Canada Ltd v R* 55 OR (2d) 522, 29 DLR (4th) 583; *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB, BB 2024 CCJ 1 (CARILAW); *Arorangi Timberland Ltd v Minister of the Cook Islands National Superannuation Fund* [2017] 2 LRC 332; *Autronic AG v Switzerland* (1990) 12 EHRR 485; *Bar Association of Belize v A-G* [2017] CCJ 4 (AJ) (BZ), (2017) 91 WIR 123; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, (2020) 100 WIR 109; *Bisram v DPP* [2022] CCJ 7 AJ (GY), (2022) 101 WIR 370; *Boyce v R* [2004] UKPC 37, (2004) 64 WIR 37 (BB); *Browne v Griffith* [2013] CCJ 6 (AJ) (BB), (2013) 83 WIR 62; *Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co Ltd* (2000) 57 WIR 141 (DM PC); *Campbell v Narine* [2016] CCJ 7 (AJ) (GY), (2016) 88 WIR 319; *Campbell-Rodriguez v A-G* [2007] UKPC 65, [2008] 4 LRC 526 (JM); *Caribbean Consultants & Management Ltd v A-G* BZ 2015 CA 3 (CARILAW), (5 February 2015); *CGI Consumers' Guarantee Insurance Co Ltd v Stevenson* [2025] CCJ 11 (AJ) BB; *Chandler v The State (No 2)* [2022] UKPC 19, (2022) 101 WIR 520 (TT); *Chicago, B & Q R Co v City of Chicago* 166 US 226 (1897); *Collymore v A-G* (1967) 12 WIR 5 (TT CA); *Commissioners of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217; *Controller of Supplies v Gas Tomza Ltd* [2024] 5 LRC 109 (BZ CA); *Corp of Hamilton v A-G of Bermuda* [2025] UKPC 50 (BM); *de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing* (1998) 53 WIR 131 (AG PC); *Dhoray v A-G of Trinidad and Tobago* [2024] UKPC 28, [2024] 5 LRC 419 (TT); *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* [2010] 3 IR 251; *Edwards v A-G for Canada* [1930] AC 124; *Fort Street Tourism Village v A-G of Belize* (2008) 74 WIR 133 (BZ SC); *Gas Tomza v A-G* BZ 2022 SC 43 (CARILAW), (1 January 2022); *Gaskin v Minister of Natural Resources* [2024] CCJ 14 (AJ) GY, (2024) 105 WIR 385; *Ghana Lotto Operations Association v National Lottery Authority* [2009] 3 LRC 235; *Grape Bay Ltd v A-G* (1999) 57 WIR 62 (BM PC); *Harksen v Lane NO* [1998] 2 LRC 171; *Hoffmann v South African Airways* [2001] 2 LRC 277; *Hope v New Guyana Co Ltd* (1979) 26 WIR 233 (GY); *HTA Bowman Ltd v A-G* (BZ SC, 13 May 2010); *Irwin Toy Ltd v Quebec (A-G)* [1989] 1 SCR 927; *J McIntyre Machinery Ltd v Nicastro* 564 US 873 (2011); *Legal Tender Cases* 79 US 457 (1871); *Lilleyman v Inland Revenue Commissioners* (1964) 13 WIR 224 (GY SC); *Lorick v A-G* TT 2022 HC 211 (CARILAW), (16 September 2022); *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100; *Lucas v South Carolina Coastal Council* 505 US 1003 (1992); *Maccabee v Commissioner of Police* KN 2019 HC 26 (CARILAW), (3 May 2019);

*Maharaj v A-G of Trinidad and Tobago (No 2)* (1978) 30 WIR 310 (TT PC); *Malaysian Bar v Government of Malaysia* [1988] LRC (Const) 428; *Manitoba Fisheries Ltd v R* [1979] 1 SCR 101; *Marin v R* [2021] CCJ 6 (AJ) BZ, BZ 2021 CCJ 001 (CARILAW); *Matthew v The State* [2004] UKPC 33, (2004) 64 WIR 412 (TT); *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015) 87 WIR 178; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *Minister of Home Affairs v Fisher* (1979) 44 WIR 107 (BM PC); *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9, 2005 (1) SA 530 (CC); *MOL, Inc v Peoples Republic of Bangladesh* 736 F 2d 1326 (1984); *Mugler v Kansas* 123 US 623 (1887); *Mwellie v Ministry of Works, Transport and Communication* [1995] 4 LRC 184; *National Bank of Anguilla (Private Banking and Trust) Ltd (in administration) v Chief Minister of Anguilla* [2025] UKPC 14; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *Newfoundland (Treasury Board) v Newfoundland and Labrador Association of Public and Private Employees (NAPE)* [2004] 3 SCR 381; *Nicholson v Nicholson* [2024] CCJ 1 (AJ) BZ, BZ 2024 CCJ 1 (CARILAW); *Paponette v A-G of Trinidad and Tobago* [2010] UKPC 32, (2010) 78 WIR 474 (TT PC); *Penn Central Transportation Co v City of New York* 438 US 104 (1978); *Pennsylvania Coal Co v Mahon* 260 US 393 (1922); *Police Service Commission v Graham* TT 2010 CA 15 (CARILAW), (26 March 2010); *Prinsloo v Van der Linde* [1998] 1 LRC 173; *Prosser v A-G (Belize SC, 19 September 2006)*; *Public Service Employee Relations Act (Alta), Re* [1987] 1 SCR 313; *Quebec (A-G) v 9147-0732 Quebec Inc* [2020] 3 SCR 426; *R (Rotheram Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [2015] 3 All ER 1; *R v CIP Inc* [1992] 1 SCR 843; *R v Lewis* [2007] CCJ 3 (AJ) (BB), (2007) 70 WIR 75; *R v Oakes* [1986] 1 SCR 103; *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223; *Reflect-All 1025 CC v Member for Executive Council for Public Transport, Roads and Works* [2009] ZACC 24, 2009 (6) SA 391 (CC); *Reyes v R* [2002] UKPC 11, (2002) 60 WIR 42 (BZ); *Robinson v A-G of Jamaica* (JM SC, 12 April 2019); *Roodal v The State* [2003] UKPC 78, (2003) 64 WIR 270 (TT); *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v A-G of Trinidad and Tobago* (2009) 76 WIR 378 (TT PC); *Sears v Parole Board* [2022] CCJ 13 (AJ) BZ; *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* [1959] 1 SCR 279; *Société United Docks v Government of Mauritius* [1985] AC 585; *South African Diamond Producers Organisation v Minister of Minerals and Energy* [2017] ZACC 26, 2017 (6) SA 331 (CC); *Suraj v A-G of Trinidad and Tobago* [2022] UKPC 26, [2023] AC 337 (TT); *Suratt v A-G of Trinidad and Tobago* [2007] UKPC 55, (2007) 71 WIR 391 (TT); *Titan International Securities Inc v A-G* [2018] CCJ 28 (AJ) (BZ), (2019) 94 WIR 96; *Trinidad Cement Ltd v State of Trinidad and Tobago* [2019] CCJ 4 (OJ); *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79; *Webster v A-G of Trinidad and Tobago* [2015] UKPC 10, [2015] ICR 1048 (TT); *Whitfield v A-G* (1989) 44 WIR 1 (BS SC); *World Wide Minerals Ltd v Republic of Kazakhstan* 296 F 3d 1154 (2002).

#### **Legislation referred to:**

**Antigua and Barbuda** – Antigua and Barbuda Constitution Order 1981, CAP 23, Civil Service Act, CAP 87; **Belize** – Belize Constitution Act, CAP 4, Citrus (Processing and Production) Act, CAP 277, Land Acquisition (Public Purposes) Act, CAP 184, Mutual Legal Assistance and International Co-operation Act, CAP 103:04, National Liquefied

Petroleum Gas Project Act 2019, National Liquefied Petroleum Gas Project (Amendment) Act 2021, National Metrology (Liquefied Petroleum Gas) Regulations, Supplies Control Act, CAP 293; **Canada** – Canadian Charter of Rights and Freedoms; **Germany** – Basic Law of the Federal Republic of Germany 1949; **Guyana** – Summary Jurisdiction (Offences) Act, Cap 8:02; **India** – Constitution of India 1950; **Mauritius** – Constitution of the Republic of Mauritius 1996; **South Africa** – Constitution of the Republic of South Africa 1996, Diamonds Amendment Act 2005, Diamonds Second Amendment Act 2005; **The Bahamas** – Municipalities Reform Bill 2019; **Trinidad and Tobago** – Constitution of the Republic of Trinidad and Tobago Act, Chap 1:01; **United Kingdom** – Human Rights Act 1998, Tax Credits Act 2002; **United States of America** – US Const amend V, US Const amend XIV.

### **Treaties and International Materials referred to:**

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (adopted 10 December 1948, entered into force 3 September 1953) 213 UNTS 221; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

### **Other Sources referred to:**

Arimoro A, 'Public-Private Partnership and the Right to Property in Nigeria' (2019) 19 Afr Hum Rts LJ 763; Caribbean Court of Justice (Appellate Jurisdiction) Rules 2024; Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (Commonwealth Secretariat, 2006) < <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf> > accessed 16 September 2025; Cooper J, 'Applying Equality and Non-Discrimination Rights through the Human Rights Act 1998' in Gay Moon (ed), *Race Discrimination: Development and Using a New Legal Framework* (Hart Publishing 2000); Custos D and Reitz J, 'Public-Private Partnerships' (2010) 58 Am J Comp L 555; DeMerieux M, *Fundamental Rights in Commonwealth Caribbean Constitutions* (Faculty of Law, University of the West Indies 1992); MacDonnell V A, 'Theorizing About the Executive in the Modern State' (2023) 21 Int'l J Const L 356; McClean D, Abou-Nigm V R and Morris JHC, *The Conflict of Laws* (9th edn, Sweet & Maxwell 2016); Meighoo K and Jamadar P, *Democracy and Constitutional Reform in Trinidad and Tobago* (Ian Randle Publishers 2008); Mighty Spoiler, 'Magistrate Try Himself' (1958); Nwangwu G, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web' (2012) 7(4) Eur Procurement & Pub Private Partnership L Rev 268; Oliphant B J, 'Taking Purposes Seriously: The Purposeful Scope and Textual Bounds of Interpretation Under the Canadian Charter of Rights and Freedoms' (2015), 65 UTLJ 239; 'Parliament's Authority' (UK Parliament, 2 April 2016) < <https://www.parliament.uk/about/how/role/sovereignty/> > accessed 1 October 2025; Pongsiri N, 'Regulation and Public-Private Partnerships' (2002) 15(6) International Journal of Public Sector Management 487; Porter B, 'Inclusive Interpretations: Social and

Economic Rights and the Canadian Charter’ in Helena Alviar García, Karl Klare and Lucy Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2014); Robinson T, Bulkan A and Saunders A, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet & Maxwell 2021); Son S, ‘Legal Analysis on Public-Private Partnerships Regarding Model PPP Rules’ (Dankook University, Republic of Korea June 2012); Tocqueville A, *Democracy in America* 1835; Wheatle S and Campbell Y, ‘Constitutional Faith and Identity in the Caribbean: Tradition, Politics and the Creolisation of Caribbean Constitutional Law’ (2020) 58(3) *Commonwealth & Comparative Politics* 277; Williams E, *Capitalism and Slavery* (University of North Carolina Press 1944); Young A L, ‘Constitutional Entrenchment and Parliamentary Sovereignty’ (Institute For Government Bennett Institute of Public Policy Cambridge, March 2023) < <https://www.bennettschool.cam.ac.uk/publications/constitutional-entrenchment/> > accessed 11 October 2025.

## **JUDGMENT**

### **Reasons for Judgment:**

|                                                                |               |
|----------------------------------------------------------------|---------------|
| Anderson P (Rajnauth-Lee, Barrow and Ononaiwu JJ concurring)   | [1] – [129]   |
| Barrow J (Anderson P, Rajnauth-Lee and Ononaiwu JJ concurring) | [130] – [190] |
| Ononaiwu J (Anderson P, Rajnauth-Lee and Barrow JJ concurring) | [191] – [216] |

### **Dissenting:**

|           |               |
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| Jamadar J | [217] – [487] |
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| <b>Disposition and Order</b> | [129] |
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### **ANDERSON P:**

#### **Introduction**

- [1] This appeal concerns the constitutionality of legislation passed by the Parliament of Belize to create a new regulatory regime for the importation of Liquid Petroleum

Gas ('LPG') into that country. Enacted pursuant to a public-private partnership agreement, the legislation features as key components the construction and operation of a large LPG marine port storage facility regarded by the Government of Belize as necessary for energy security and stability, and the imposition of stringent pre-conditions to obtain a license on persons other than the owner of the port storage facility, to import LPG. Companies which had previously imported LPG over land from Central America sustained a drastic downturn in their businesses and considered that the legislation infringed upon their constitutional rights. Their primary claim is that the legislation effected a compulsory taking of their property contrary to the Constitution of Belize. This Court is also called upon to determine whether, contrary to the Constitution, the impugned legislation contravened the right to work, the right to freedom of association, and the right to equality before the law.

[2] The appellants are the Controller of Supplies (First appellant), a public officer under the Supplies Control Act<sup>1</sup> responsible for the oversight and control of the LPG industry in Belize; the Minister of Economic Development, Petroleum Investment, Trade and Commerce (Second appellant); and the Attorney General (Third appellant). Together they are collectively referred to as the 'appellants' or 'the Government' and they appeal against the decision of the Court of Appeal that the legislation effected a compulsory 'taking' or 'acquisition' of the respondents' property without provision for compensation and was therefore in violation of the protection of property right under s 17(1) of the Belize Constitution.<sup>2</sup> The appellants also appeal the decision of the court that the legislative conditions for importing LPG imposed unreasonable fetters on the respondents' right to work contrary to s 15(1) of the Constitution.

[3] The respondents are four LPG companies operating, or which operated in Belize at the material time: Gas Tomza Ltd (First respondent) operating since 2004; Western Gas Co Ltd (Second respondent), operating since 1990; Southern Choice Butane

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<sup>1</sup> CAP 293.

<sup>2</sup> Belize Constitution Act, CAP 4.

Ltd (also known as Zeta Gas) (Third respondent), which existed between 1994 and 2020;<sup>3</sup> and Belize Western Energy Ltd (Fourth respondent), operating since 1987. Collectively, they are referred to as the ‘respondents’ or the ‘LPG companies’. The respondents cross-appeal the decision of the Court of Appeal that the legislation had not breached their constitutional right to freedom of association under s 13(1); or their constitutional right to equality before the law under s 6(1) of the Constitution.

### **Factual Background**

- [4] LPG is a primary source of fuel widely used in Belize in various domestic, commercial, and industrial applications but is not produced in any significant quantities in the country and must therefore be imported. The source is the United States Gulf Coast (‘USGC’) where the fuel is acquired on the open market at the Mont Belvieu Index price. Prior to 2019, there was no marine terminal facility in Belize to which the LPG could be shipped, and it was therefore transported via the Pacific or Atlantic Oceans and the Caribbean Sea to marine terminal facilities in different Central American countries. The LPG companies would source LPG from these countries and truck it over land to Belize for distribution to wholesalers and retailers. Together the LPG companies controlled the bulk – over 90 per cent – of the imports of LPG into the country.
- [5] The landbound importation of LPG was subject to short-term import licences typically of 30–45 days only at a time, issued at the discretion of the Controller of Supplies, and to a regulated retail price fixed by the Controller of Supplies pursuant to the Suppliers Control Regulations. The appellants allege that on at least three occasions in 2000, 2007, and in 2011 the LPG companies threatened to and/or restricted the supply of LPG to Belizean consumers to secure an increase in the retail price. In 2011, responding to allegations that consumers were being charged for butane (one of the gases in LPG) not placed into their tanks, the Government of

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<sup>3</sup> Zeta Gas went out of business following the legislative and executive measures in issue in this case.

Belize enacted the National Metrology (Liquefied Petroleum Gas) Regulations requiring butane retailers to have authenticated scales on their delivery trucks and depots for butane distribution.

- [6] The Government, expressing concern about the stability and predictability of the supply and pricing of LPG, and about ensuring its quality, safety, and affordability, embarked on the National Liquefied Petroleum Gas Project ('NLPGP'). On 8 May 2017, the Government agreed a Memorandum of Understanding ('MOU') with Belize Natural Energy Ltd ('BNE') for the execution of the NLPGP using a special purpose vehicle called the National Gas Company ('NGC'). On 10 July 2018, the Government entered into a Definitive Agreement with the NGC as successor to the BNE, to develop the NLPGP through a public-private partnership ('PPP') which took the form of a 15-year Build-Own-Operate-Transfer ('BOOT') arrangement. The Definitive Agreement contemplated the development of national infrastructure for the importation of LPG entirely by sea and the provision of supporting national modern infrastructure (marine terminal, bulk depots, and distribution equipment) all dedicated to the bulk importation, supply and distribution of LPG throughout Belize. Of especial importance was that the marine terminal was to be constructed with a capacity of 1.5 million US gallons with facilities for receipt, storage, blending, testing and sale of LPG.
- [7] In the Definitive Agreement, the Government committed to providing an enabling framework in which NGC would implement the NLPGP. NGC was to bear all risk and management responsibility, as well as recoup its investment from revenues generated by the importation of LPG through the marine terminal. At the end of the 15-year BOOT period, all assets comprising the national infrastructure developed by the NLPGP were to be transferred fully to the Government. During those 15 years, the Government would hold 25 per cent of the shares and a seat on the Board of Directors of the NGC. Additionally, to facilitate the planned investment and high start-up costs incurred by NGC, it was agreed that the NGC would be exempt from



certain duties, taxes and imposts in the construction and operation of the required facilities.

- [8] Faithful to these agreements, the Government enacted the National Liquefied Petroleum Gas Project Act 2019 ('NLPGP Act') on 4 September 2019 to give effect to the PPP expressed in the Definitive Agreement. Crucially, the NLPGP Act conferred on the NGC the exclusive right to import wholesale LPG into Belize with effect from 1 May 2020 and implemented the agreed raft of fiscal and other incentives in favour of NGC. The NLPGP Act also introduced a regulated 'wholesale price' for LPG sold by NGC through application of the LPG Pricing Methodology.<sup>4</sup> The upshot of this was that the traditional importation of LPG hitherto engaged in by the respondents became concentrated in the NGC as the single monopoly for the importation of LPG. The respondents lost a substantial proportion of their customer base which turned to NGC as the sole entity permitted to import LPG.
- [9] On 16 November 2021, a year and a half after the NGC had begun operating as a monopoly, and after High Court proceedings had commenced challenging the constitutionality of the NLPGP Act, the National Liquefied Petroleum Gas Project (Amendment) Act 2021 ('NLPGP Amendment Act') was enacted. This permitted any person (including the LPG companies) to import LPG into Belize subject to certain conditions, including that: (1) they are licenced; (2) the statutory tendering procedures are adopted; (3) the LPG is received into the NGC's Terminal or into a new Authorized Import Landing Terminal which had a minimum storage capacity of 1.5 million US gallons and facilities for undertaking the same conformity assessment, quality assurance and other testing as the NGC Terminal. Ultimately, it is the question of the constitutionality of the NLPGP Amendment Act in the face of claims that it breached certain fundamental rights that were considered by the High Court, the Court of Appeal, and is to be finally decided by this Court.

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<sup>4</sup> The LPG Pricing Methodology is prescribed in the Schedule to the NLPGP Act 2019, (see s 10).

## **Litigation History**

### **High Court**

- [10] On 20 July 2020, the LPG companies sought relief against the Government for alleged breaches of their constitutional rights arising from the monopoly conferred on the NGC by the NLPGP Act. They claimed the monopoly violated their rights to the enjoyment of property, to work, freedom of association, and to equality before the law and equal protection of the law under the Constitution. Several months into the trial and after the close of evidence, the Government enacted the NLPGP Amendment Act which, as just seen, took away the NGC's importation monopoly and allowed the Gas Companies to import LPG into Belize provided certain requirements were met. However, the LPG companies argued that the amendment was 'colourable legislation' which imposed unreasonable and/or unattainable requirements, particularly as regards the construction of an import facility with a storage capacity of 1.5 million US gallons or alternatively passage of their imported LPG through the NGC's already constructed terminal. They alleged that these requirements in effect continued their exclusion from their importation business and perpetuated the violation of their constitutional rights. They maintained their claim for declarations and compensation in respect of the breach of their rights as well as for vindicatory damages.
- [11] For its part the Government denied that the legislation had infringed the LPG companies' constitutional rights and relied on the removal of the NGC's monopoly as well as public health, public safety, and adherence to international standards considerations as justification for the regulatory measures enacted. The Government contended that the new regulatory regime was applicable to all potential investors in the LPG industry and was in furtherance to the Government's socio-economic policy which was, in essence, a matter for the executive branch and in respect of which the court ought to be mindful of upholding the separation of powers.

- [12] By way of a further pre-trial memorandum dated 16 September 2022, the parties admitted that the Government had made amendments to the NLPGP Act, and they agreed on the statement of the five issues to be determined by the High Court. Each of these five issues was concerned with the NLPGP Amendment Act. These issues were whether the amendment: (i) imposed onerous and unreasonable conditions on the LPG companies for them to engage in the importation of LPG into Belize; (ii) was inconsistent with s 15 of the Constitution on the protection of the right to work by creating and facilitating a monopoly on LPG importation; (iii) was inconsistent with s 17 of the Constitution by compulsorily taking possession and/or acquiring goodwill of the LPG companies' import business without payment of compensation; (iv) was inconsistent with s 13 of the Constitution by hindering the right of freedom association of the LPG companies by requiring them to purchase LPG from the NGC or otherwise comply with onerous and unreasonable conditions; and (v) inconsistent with s 6 of the Constitution for subjecting the gas companies to unequal and discriminatory treatment under the law. The Memorandum was supplemented by legal contentions of the parties.
- [13] The trial judge, Arana CJ (Ag), found in favour of the Government on all but one issue, namely, she found that the LPG companies' constitutional right to property had indeed been infringed. Several important points from this judgment are worth bearing in mind. First, in coming to these conclusions, the trial judge found that the conditions imposed by the NLPGP Amendment Act, although onerous, did not amount to an automatic breach of constitutional rights. The question of the conditions to be imposed on a grant of a licence to import LPG was one of executive policy designed to regulate the way LPG was imported into Belize. The learned judge relied on *Hope v New Guyana Co Ltd*<sup>5</sup> to the effect that, '[e]very country in the world has and must exercise control over imports and exports in the public interest; that is part of executive policy, a sphere into which courts of law are not competent to enquire.'<sup>6</sup> The requirement to build a storage facility or use NGC's

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<sup>5</sup> (1979) 26 WIR 233 (GY).

<sup>6</sup> *ibid* at 246.

facilities had legislatively been deemed necessary for public safety and international standards.

- [14] Secondly, rejecting the claim based on the right to work, the learned trial judge accepted that s 15 of the Belize Constitution granted an opportunity to earn a living rather than guaranteed employment or profit from any chosen business activity. The Government had the right to regulate industry and as there was no evidence of bad faith in the exercise of executive power, that power was immune from judicial interference.
- [15] Thirdly, refusing the claim for breach of the right to freedom of association, the judge held that the NLPGP Amendment Act provided options for the LPG companies to import LPG, namely, the building of their own facility or using the one belonging to NGC. She opined that while the option of creating a separate storage facility was not a financially viable option, storage of imported LPG in the NGC facility was a viable option and adverted to the public interest in protecting public health and safety as well as elevating importation to international standards.
- [16] Fourthly, denying the claim based on unequal and discriminatory treatment, the judge noted that the NLPGP Amendment Act removed the monopoly by introducing a licensing regime which allowed anyone who wished to be a participant in the business of LPG importation. The fiscal benefits which Parliament had granted to NGC were discretionary and well within the executive power of the Government. In support, she cited Baroness Hale in *Webster v Attorney General of Trinidad and Tobago*<sup>7</sup> to the effect that it was almost always possible to find some difference between people who have been treated differently, and that ‘discrimination’ entailed an unjustified difference in treatment. Justification was to be interrogated by asking two questions: ‘does the difference in treatment have a legitimate aim and are the means chosen both suitable to achieve

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<sup>7</sup> [2015] UKPC 10, [2015] ICR 1048 (TT).

that aim and a proportionate way of doing so?’<sup>8</sup> Evidently, the trial judge would have answered both questions in the affirmative on the facts of the case.

- [17] Fifthly, Arana CJ (Ag) found that there had been an infringement of the right to property under s 17 of the Constitution. She considered that the direct effect of the NLPGP Act as well as the NLPGP Amendment Act was that the NGC ‘abruptly seized the clients and customer base’<sup>9</sup> of the Gas Companies that they had established in Belize over thirty years without compensation, thereby violating their constitutional right to property. She considered the new regulatory regime for LPG importation ‘while completely legal, carries with it key similarities to the legal power of the acquisition of land for a public purpose by the government’,<sup>10</sup> namely, the requirement to pay compensation. The judge awarded damages to each of the LPG companies representing losses incurred because of losing customers and sales to NGC. These compensatory damages totalled BZD10,896,751.20. The trial judge refused to make an award of vindicatory damages. Each party was ordered to bear its own costs.

### **Court of Appeal**

- [18] Bulkan JA delivered the unanimous judgment of the Court of Appeal. He upheld the finding of Arana CJ (Ag) that the LPG companies’ right to property under s 17 of the Constitution was violated by the legislation in question by reason of the monopoly to import LPG into Belize conferred upon the NGC, and the subsequent onerous conditions imposed to undertake independent importation. Using similar reasoning, he further held that the s 15, right to work, had also been breached. The Court of Appeal agreed with the High Court that there had been no infringement of rights to freedom of association, or equality before the law. Although agreeing with the trial judge in most respects there were significant differences in the supporting reasoning and the eventual orders imposed.

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<sup>8</sup> *ibid* at [18].

<sup>9</sup> *Gas Tomza v A-G BZ* 2022 SC 43 (CARILAW), (1 January 2022) at 31.

<sup>10</sup> *ibid* at 33.

[19] Bulkan JA framed the central issue in dispute as ‘a familiar clash between individual entitlement and the public interest’<sup>11</sup> and emphasised the need to pay adequate attention to the specific textual provisions in balancing these competing interests. He acknowledged that the decision of this Court in *Titan International Securities Inc v Attorney General*,<sup>12</sup> which accepted the three-tiered test involving proportionality articulated in *de Freitas v Permanent Secretary of Agriculture, Fisheries, Lands and Housing*,<sup>13</sup> for assessing the constitutionality of legal measures was binding on the Court of Appeal of Belize. The judge considered that the *de Freitas* test ‘reflects a global trend that cuts across diverse constitutional frameworks’<sup>14</sup> and ‘represents the culmination of decades in the evolution of interpretation of limitation clauses in conventional Caribbean bills of rights’.<sup>15</sup> Against this background Bulkan JA considered that the traditional notion of the presumption of constitutionality had been discredited and was now only relevant as an interpretative tool to save a statute that was ambiguous or obscure, ie, to apply the meaning that was consistent with the Constitution on the basis that Parliament did not intend to violate the Constitution. He similarly rejected the notion of judicial deference to the executive or legislature based on concepts of the margin of appreciation or as a necessary requirement of the separation of powers principle, as illustrated in *Hope*<sup>16</sup> on which it will be remembered, the trial judge relied.

[20] Accordingly, the Court of Appeal’s finding that there had been a breach of s 17, property rights was premised on the rejection of the proposition that the Government’s characterisation of the legislation as ‘regulatory’ automatically meant that no taking had occurred. Even if a measure was regulatory, its effects could amount to a taking within s 17(1) and would then only be exempted from the obligation to provide compensation if it fell within one of the exceptions set out in s 17(2). Bulkan JA found that there had been a violation of s 17(1) and as the

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<sup>11</sup> *Controller of Supplies v Gas Tomza Ltd* [2024] 5 LRC 109 (BZ CA) at [15].

<sup>12</sup> [2018] CCJ 28 (AJ) (BZ), (2019) 94 WIR 96.

<sup>13</sup> (1998) 53 WIR 131 (AG PC).

<sup>14</sup> *Controller of Supplies* (n 11) at [24].

<sup>15</sup> *ibid.*

<sup>16</sup> *Hope* (n 5).

legislation did not facilitate any of the goals identified in s 17(2), compensation was payable. The Court also found that the right to work under s 15 had also been violated, as an unjustifiable legislative fetter was placed upon the ability of the LPG companies to engage in their business of choice of importing LPG. Applying the *de Freitas* proportionality test, the Court of Appeal pronounced that the conditions set by the legislative scheme of the construction of a 1.5 million US gallon storage facility or alternatively the passing of all imports through the NGC terminal were largely not required to achieve the legislative objectives and were therefore excessively burdensome.

- [21] The basis for finding that the right to freely associate had not been infringed was that the right enured to collective groups with a common interest and properly construed excluded social and business relationships of a private nature. Using the ‘improper motive test’ derived from South African constitutional jurisprudence, Bulkan JA held that the right to equality under the Constitution had not been violated because the LPG companies could not show that any difference in treatment was unfair because it was motivated by some improper reason.
- [22] The Court of Appeal considered that the LPG companies had not sufficiently pleaded or proven their case on quantum of damages and therefore quashed the award of damages and remitted this matter to the High Court for the taking of further evidence. The court ordered that sch II to the NLPGP Amendment Act be amended by the deletion of the condition requiring each Authorized Import Facility to have an installed storage capacity of no less than 1.5 million US gallons. It agreed with the trial judge that vindicatory damages were not to be awarded and that each party should bear its own costs.

### **Caribbean Court of Justice**

- [23] Both parties to the litigation were dissatisfied with the decision in the Court of Appeal and each appealed the findings adverse to them to this Court. The appellants cited five grounds of appeal, namely, that the Court of Appeal erred in (i) finding that the LPG companies’ right to property under s 17 of the Constitution had been

violated; (ii) finding that the Amendment Act violated the LPG companies' right to work under s 15 of the Constitution; (iii) ordering amendment of sch II by deleting the requirement that each Authorized Import Facility have an installed capacity of 1.5 million US gallons without this relief being sought and without prior consultation of the parties; (iv) ordering that the case be remitted to the High Court for an assessment of damages; and (v) ordering that each party bears its own costs. The respondents cross-appealed on four grounds, namely, that the Court of Appeal erred in (i) failing to declare the Original Act void and any subsequent amendments a nullity, (ii) holding that the LPG companies' right to freedom of association had not been breached; (iii) holding that the right to equal protection of the law was not breached by wrongly introducing a requirement for improper motive; and (iv) refusing to grant vindictory damages. At the hearing of the appeal, the respondents abandoned the first ground of the cross-appeal which thus forms no further part of this case. The remaining grounds of appeal and cross-appeal were amply supported by written submissions as well as forceful and erudite oral submissions at the hearing of the appeal to which reference will be made below as appropriate.

[24] The issues arise from the notice and grounds of appeal and the submissions are very much like those considered in the Court of Appeal and may be categorised similarly to the way they were considered there:

- i. Whether the Court of Appeal erred in determining the degree of judicial deference owed to the legislature in socio-economic policy-making? ('The Constitutional Review of Socio-Economic Policy-Making Point').
- ii. Whether the NLPGP Amendment Act contravened the respondents' property rights by effecting the taking or arbitrary deprivation of their property without compensation? ('The Right to Property Claim').
- iii. Whether the NLPGP Amendment Act effected a breach of the respondents' right to work by virtue of the conditions imposed for their importation of LPG ('The Right to Work Claim').



- iv. Whether the requirement in the NLPGP Amendment Act that the respondents store their imported LPG in the NGC terminal as a condition for importation hindered the respondents' right of freedom of association ('The Freedom of Association Claim').
- v. Whether the NLPGP Amendment Act subjected the respondents to unequal or discriminatory treatment ('The Equality Before the Law Claim').
- vi. Whether on the assumption that any of the breaches of the Constitution is established (a) the matter should be remitted to the High Court for assessment of damages and (b) there should be an award of vindictory damages ('Remedies').

### **Constitutional Review of Legislative Socio-Economic Policy-Making**

#### **(a) Judicial Deference**

[25] The Court of Appeal clearly held that, 'the government, in its executive and legislative roles, has the legal right to make decisions shaping socioeconomic and financial policy.'<sup>17</sup> Indeed, Bulkan JA stated that, '[t]here may well be an area of policy, involving complex financial or economic matters where the judiciary is institutionally incapable of second-guessing legislative decisions'.<sup>18</sup> However, he rejected the type of deference that required the judiciary to sit back passively and give the other arms of government unfettered discretion in deciding and enacting policy. He concluded:

Bearing these principles in mind, I cannot abandon the task at hand by mechanically upholding the challenged law as a manifestation of executive or legislative policy. Instead, in fulfilling this court's duty, I now turn to examine whether the impugned provisions violate any of the fundamental rights guaranteed by the constitution, as alleged by the LPG companies.<sup>19</sup>

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<sup>17</sup> *Controller of Supplies* (n 11) at [35].

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid* at [37].

- [26] Respectfully, these are eminently reasonable statements of the general approach to constitutional review of legislative socio-economic policy-making. There can be no question that in Caribbean constitutional democracies the court is and must remain the final arbiter of whether *any* law passes constitutional muster. It is well accepted that our Caribbean societies operate under constitutional supremacy and not parliamentary supremacy existent in the United Kingdom. In the case of Belize, s 68 of the Constitution grants the National Assembly immense law-making power to pass laws for ‘the peace, order and good government of Belize’ but this is immediately preceded by the recognition that this power is ‘[s]ubject to the provisions of this Constitution’. One of these limiting provisions is necessarily s 2(1) of the Constitution which with befitting dignity announces that, ‘[t]his Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void’. The courts decide whether ‘any other law’ crosses the red line into unconstitutionality.
- [27] The point may be made from another perspective. The judicial power of the State is invested in the courts, and this expressly includes the power to decide upon any question of the interpretation of the Constitution. As guardian of the Constitution, the court ensures attainment of the objectives of the preambular clause of the Constitution which recognises that men and institutions remain free only when freedom is founded upon the rule of law. In *Nervais v R*,<sup>20</sup> this Court asserted that ensuring that the laws are in conformity with the Constitution cannot be left to the legislature and the executive. That is the role of the judiciary, and it is the right of every person to depend on the judiciary to fulfil that role. As was stated recently by Sykes CJ in the Jamaican case of *Robinson v Attorney General of Jamaica*,<sup>21</sup> the judiciary must have the ‘final say’ on the interpretation and application of the Constitution.

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<sup>20</sup> [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178.

<sup>21</sup> (JM SC, 12 April 2019) at [167].

[28] However, the court is called upon to exercise its guardianship role against the backdrop of the plenary law-making power assigned to the legislature and in a variety of fields from civil and political rights to social and economic policy, among others. The separation of powers is the bulwark against tyranny precisely because it distributes specific public functions among the three branches of government. The court respects the decision-making power of the executive and of the democratically elected legislature, and this is especially so in relation to socio-economic issues concerned with the carrying out of the popular mandate. The court does not attempt to second-guess or micro-manage that decision-making and will only intervene where there is a clear infringement of the rights that the court is sworn to protect. This approach is described by such epithets as judicial restraint, judicial deference, presumption of constitutionality, and the margin of appreciation granted to the legislature. None of these descriptors should be taken to imply judicial subservience, an implication that would be clearly at odds with the judiciary having the final say.

[29] This Court has not yet had occasion to pronounce fully upon the appropriate attitude to the review of legislative socio-economic policy-making, although there were statements of passing relevance in *Attorney General of Belize v Zuniga*.<sup>22</sup> That case concerned the constitutionality of two Amendment Acts passed by the National Assembly of Belize to strengthen criminal contempt processes such as to deny or limit the ability of certain companies to enjoy financial concessions, assurances and inducements under an Accommodation Agreement. In deciding upon the constitutionality of the Acts, this Court affirmed that in the realm of policy, the Parliament was ‘not only best equipped, but it also has a specific remit to assess and legislate what it considers suitable for Belizean society.’<sup>23</sup> We continued:

This court would not go so far, however, as to endorse the blanket suggestion that a court may never be concerned with the propriety or expediency of an impugned law. It may be appropriate and even necessary to be so concerned where, for example, the purpose of the law is a relevant

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<sup>22</sup> [2014] CCJ 2 (AJ) (BZ), (2014) 84 WIR 101.

<sup>23</sup> *ibid* at [50].

issue in determining a breach of the separation of powers doctrine ... or a violation of a fundamental right.<sup>24</sup>

[30] The Privy Council has made more direct statements in *Grape Bay Ltd v Attorney General*<sup>25</sup> and relied upon the separation of powers to accept that Bermudians were in the best position to know what the public interest of Bermuda requires. The Board considered that the desirability of opening franchise restaurants was a pure question of policy, raising no issue of human rights or fundamental principle, was ‘entrusted to those Bermudians who constitute the legislative branch of government and not to the judges.’<sup>26</sup> That decision emphasised that members of the legislature ‘are not required to explain themselves to the judiciary or persuade them that their view of the public interest is the correct one.’<sup>27</sup> They accepted what had been said by Kempster JA in the Court of Appeal that ‘the legislature rather than the courts is in the best position to assess the requirements of the public interest and should be allowed a wide margin of appreciation.’<sup>28</sup>

[31] The recent decision of the United Kingdom Supreme Court in *R(SC) v Secretary of State for Work and Pensions*,<sup>29</sup> albeit delivered in a system under parliamentary supremacy, nonetheless expresses important principles worthy of reference. It reminds that a court should tread carefully before striking down legislation with socio-economic objectives. In considering whether the Tax Credits Act 2002 which limited benefits payable to two children was compatible with the European Convention on Human Rights as given effect by the Human Rights Act 1998, the court acknowledged that the Act affected more women than men and therefore gave rise to a presumption of discrimination on the grounds of sex contrary to the Convention. Nevertheless, the court upheld the Act noting that courts must: ‘... be

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<sup>24</sup> *ibid.*

<sup>25</sup> (1999) 57 WIR 62 (BM).

<sup>26</sup> *ibid* at 74.

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> [2021] UKSC 26, [2022] AC 223.

careful not to undermine Parliament's performance of its functions by requiring it, or encouraging it, to conform to a judicial model of rationality...'.<sup>30</sup>

[32] Specifically, the court stated that 'a low intensity of review was generally appropriate ... in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, [and] that the judgment of the executive or legislature would generally be respected unless it is manifestly without reasonable foundation.'<sup>31</sup> A flexible approach gave appropriate respect to the assessment of democratically accountable institutions. However, the intensity of the court's scrutiny would be influenced by a wide range of factors. The intensity of review will usually be high if the policy dictated a difference in treatment of a 'suspect' on the grounds of sex, race, origin, colour, religion or gender since this forms a special category intimately concerned with upholding human dignity and morality.

[33] The differential in review intensity is sometimes expressed in the rule that in social and economic policy legislation with macro-economic implications, the executive and the legislature should be afforded a generous margin of discretion (or appreciation): *R (Rotheram Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills*.<sup>32</sup> This was reflected in the Privy Council decision in *Arorangi Timberland Ltd v Minister of the Cook Islands National Superannuation Fund*<sup>33</sup> which found that the compulsory extraction of contributions from an employee's wages amounted to a constitutional 'deprivation' but also that the characteristics of the case were such that in assessing proportionality, the case was at the lower end of the intensity spectrum.<sup>34</sup>

[34] It may be worth noting that this Court also has accepted that there are differing levels of intensity of judicial review when exercising its original jurisdiction. This

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<sup>30</sup> *ibid* at [171].

<sup>31</sup> *ibid* at [158].

<sup>32</sup> [2015] 3 All ER 1 at [22]–[23] and [61]–[65].

<sup>33</sup> [2017] 2 LRC 332.

<sup>34</sup> *ibid* at [38] and [39].

was brought home most clearly in *Trinidad Cement Ltd v State of Trinidad and Tobago*<sup>35</sup> where it was held that the degree of judicial scrutiny depended on the nature of the decision being reviewed. A decision allowing a broad discretion to the decision-maker ‘needs to be distinguished from a review of others that allow for no or little discretion. In the latter type of cases the Court’s scrutiny must be more intrusive.’

**(b) Presumption of Constitutionality**

[35] Another reference point for constitutional review that is familiar to Caribbean jurisprudence is the presumption of constitutionality. This Court has repeatedly accepted and emphasised in appeals from Belize that the starting point for considering whether any law is consistent with the constitution is the presumption of constitutionality. In *Bar Association of Belize v Attorney General*<sup>36</sup> it was stated that: ‘At the outset when considering the constitutionality of a law, ... courts presume that the impugned law is valid and place the burden of establishing at least *prima facie* transgression on the party alleging breach.’<sup>37</sup> Building upon this precedent, this Court pronounced in *Titan International Securities*<sup>38</sup> that: ‘An Act passed by the National Assembly of Belize is presumed constitutional until a court of competent jurisdiction declares that it is inconsistent with the Constitution. Thus, the party alleging the breach has to prove that the law is unconstitutional, and the burden of proof is a significant one.’<sup>39</sup>

[36] *Titan International Securities* accepted the view of Baroness Hale in *Suratt v Attorney General of Trinidad and Tobago*<sup>40</sup> that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and that the burden on a party seeking to prove invalidity ‘is a heavy one.’ Elsewhere in the judgment she said that it was for Parliament in the first instance to strike the

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<sup>35</sup> [2019] CCJ 4 (OJ) at [36].

<sup>36</sup> [2017] CCJ 4 (AJ) (BZ), (2017) 91 WIR 123.

<sup>37</sup> *ibid* at [22].

<sup>38</sup> *Titan International Securities* (n 12).

<sup>39</sup> *ibid* at [35].

<sup>40</sup> [2007] UKPC 55, (2007) 71 WIR 391 (TT).

balance between individual rights and the general interest. For his part, Lord Clyde in *de Freitas*<sup>41</sup> did not consider that the presumption of constitutionality could be used to imply words and a whole meaning into legislation to save it. However, he also accepted that in the construction of statutory provisions which contravene human rights and freedoms there is a presumption of constitutionality and referenced the information and expertise in the drafting of legislation that was available to Parliament which was not available to the court. A recent decision of the Privy Council reaffirms this approach. In *Dhoray v Attorney General of Trinidad and Tobago*<sup>42</sup> the Board citing *Suratt*,<sup>43</sup> considered it ‘a strong thing’ to hold that legislation passed by a democratic Parliament is unconstitutional, and that the presumption of constitutionality is strong and there is a heavy burden on a party seeking to establish invalidity.

- [37] In concluding on the question of constitutional review of socio-economic policy-making, a key factor is worth bearing in mind. Core to the exercise of assigning the level of intensity of review or the weight of the presumption of constitutionality remains consideration of the text of the provisions in question. Even where the legislative objective is the attainment of social and economic policy objectives, the textual provision of the Constitution may require a high degree of scrutiny, as where, for example, a particular legal process is prescribed, or the constitutional wording leaves little room for discretion. In such circumstances, there simply must be compliance with the constitutional process, and any proportionality assessment test for constitutionality cannot excuse or redeem non-compliance.

**(c) A Broad Test for Constitutionality**

- [38] A widely referenced test for determining the constitutionality of legislation or other state action which affects fundamental rights and freedoms is that articulated by the Privy Council in *de Freitas*<sup>44</sup> (sometimes referred to as the *de Frietas*

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<sup>41</sup> *de Freitas* (n 13).

<sup>42</sup> [2024] UKPC 28, [2024] 5 LRC 419 (TT) at [57].

<sup>43</sup> *Suratt* (n 40).

<sup>44</sup> *de Freitas* (n 13).

proportionality test). In that case a constitutional claim was brought by a civil servant in Antigua and Barbuda who had participated in certain demonstrations against government corruption. Section 10(2)(a) of the Civil Service Act<sup>45</sup> prohibited civil servants from expressing any opinion in a public place on matters of national or international political controversy. The Board considered whether this provision violated ss 12 and 13 of that constitution<sup>46</sup> which protected the right of expression and assembly, expressing the view that any restrictions must be reasonably required for the proper performance of civil service functions and reasonably justified in a democratic society. Relying on jurisprudence from Canada, South Africa, and Zimbabwe, Lord Clyde stated that in determining whether a limitation was arbitrary or excessive, the Court should ask itself whether:

... (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>47</sup>

[39] The Board held that the challenged law failed because it had not struck a reasonable balance between the duty of civil servants to conduct their public functions and their freedom of expression, stating:

Their Lordships would be prepared to accept in principle that the first two of these criteria could be met in the case of civil servants once it is noticed that their special status, with its advantages and restraints, is recognised as proper in the administration of a free society. But the third criterion raises a question of proportionality ... Without some such refinement their lordships are not persuaded that the validity of the provision can be affirmed.<sup>48</sup>

[40] The three-pronged *de Freitas* proportionality test was accepted by this Court in *Titan International Securities*<sup>49</sup> as appropriate for determining whether s 18 of the Mutual Legal Assistance and International Co-operation Act<sup>50</sup> authorising a power

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<sup>45</sup> CAP 87 (AG).

<sup>46</sup> Antigua and Barbuda Constitution Order 1981, CAP 23.

<sup>47</sup> *de Freitas* (n 13) at 144.

<sup>48</sup> *ibid.*

<sup>49</sup> *Titan International Securities* (n 12).

<sup>50</sup> CAP 103:04 (BZ).



of search for the purpose of discovering evidence to support foreign criminal investigations breached the constitutional right in s 9 (protection from arbitrary search or entry) and s 14 (protection of right to privacy). This Court agreed that the test had been met in that case since within s 18 itself, there were important limitations and safeguards which made reasonable provision in the interest of public safety and order and was therefore not unconstitutional. However, it was held that Titan's constitutional rights against arbitrary or unlawful interference with its privacy had been breached because of the high-handed and oppressive way in which the search and seizure had been conducted.

[41] This Court has yet to develop its jurisprudence in relation to any specific test for constitutional review of socio-economic policy-making. Assuming applicability of the *de Freitas* proportionality test, it follows from what was said earlier that the three-pronged criteria must be applied with the appropriate level of review intensity. A case decided by the Privy Council placed judicial decision-making on social policy, '... very much at the lower end of the intensity of review spectrum'.<sup>51</sup> This is broadly in line with the caution expressed in the court below of second-guessing legislative policy involving complex financial or economic matters.<sup>52</sup>

### **The Right to Property Claim**

[42] The constitutional prohibition against unlawful taking of property is introduced by s 3 and is substantively contained in s 17 of the Belize Constitution.<sup>53</sup> Section 3 affirms the right of every person in Belize to the fundamental rights and freedoms of the individual subject to respect for the rights and freedoms of others and for the public interest. Section 3(d) specifies, as one of these fundamental rights and freedoms, the 'protection from arbitrary deprivation of property.' Section 17(1) elaborates on this right and states as follows:

- (1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any

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<sup>51</sup> *Arorangi* (n 33) at [41].

<sup>52</sup> *Controller of Supplies* (n 11) at [35].

<sup>53</sup> CAP 4.

description shall be compulsorily acquired except by or under a law that,

- (a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and
- (b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of,
  - (i) establishing his interest or right (if any);
  - (ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;
  - (iii) determining the amount of the compensation to which he may be entitled; and
  - (iv) enforcing his right to any such compensation.

Section 17(2) preserves the validity of any law providing for the taking possession of property or the acquisition of interest in property if the law falls into one of thirteen categories. It provides as follows:

- (2) Nothing in this section shall invalidate any law by reason only that it provides for the taking possession of any property or the acquisition of any interest in or right over property,
  - (a) in satisfaction of any tax, rate or due;
  - (b) by way of penalty for breach of the law or forfeiture in consequence of a breach of the law;
  - (c) by way of taking a sample for the purposes of any law;
  - (d) as an incident of any deposit required to be made with the Government of a reasonable number of copies of every book, magazine, newspaper or other printed work published in Belize;
  - (e) where the property consists of an animal, upon its being found trespassing or straying;

- (f) as an incident of a lease, tenancy, mortgage, charge, bill of sale or any other right or obligation arising under a contract;
- (g) by way of requiring persons carrying on business in Belize to deposit money with the Government or an agency of the Government for the purpose of controlling credit or investment in Belize;
- (h) by way of the vesting and administration of trust property, enemy property, the property of deceased persons, persons of unsound mind or persons adjudged or otherwise declared bankrupt or the property of companies or other societies (whether incorporated or not) in the course of being wound up;
- (i) in the execution of judgments or orders of courts;
- (j) in consequence of any law with respect to the limitation of actions;
- (k) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;
- (l) for the purpose of marketing property of that description in the common interests of the various persons otherwise entitled to dispose of that property; or
- (m) for so long only as may be necessary for the purpose of an examination, investigation, trial or enquiry or, in the case of land, the carrying out on the land,
  - (i) of work of soil conservation or the conservation of other natural resources; or
  - (ii) of agricultural development or improvement which the owner or occupier of the land has been required and has without reasonable and lawful excuse refused or failed to carry out.

The only category of s 17(2) that was argued to be of possible applicability in the present case was s 17(2)(a) which immunises a taking from being unconstitutional if it was ‘in satisfaction of any tax, rate or due.’ For reasons that shall appear, this judgment finds it unnecessary to pursue this line of enquiry.

[43] The courts below upheld the argument by the respondents that the goodwill in their businesses had been compulsorily taken possession of by the contested legislation.

It will be recalled that the NLPGP Act legislated for the NGC to be the sole importer of LPG into Belize. Section 5 of the NLPGP Amendment Act 2021 repealed this monopoly but imposed certain conditions to be met for importation by other persons. Sections 6A and 6B state as follows:

6A. Subject to supervision of the Controller of Supplies or other authorized officer of the Government, the Project Terminal and all Authorized Import Landing Terminals shall, at a minimum, at all times comply with the guidelines, codes, and standards applicable to storage capacity, construction, equipment installation, and operations as set out in Schedule II.

6B. No person shall import LPG into Belize unless that person holds an import licence issued by the Controller of Supplies under the authority vested in him under the Supplies Control (Import/Export) Regulations, provided that the Controller of Supplies shall not issue an import licence for LPG to any person, or allow the continued use of an import licence for LPG by any person, unless—

(a) such person—

(i) complies with the tendering procedure for the acquisition of the LPG to be imported into Belize as required by section 5A;

(ii) receives and stores LPG subject to the licence and subject to the same to conformity assessment, quality assurance and other requisite testing by or on behalf of the Government at the Project Terminal or at an Authorized Import Landing Terminal as required by section 6; and

(b) the Project terminal or Authorized Import Landing Terminal to which the LPG is destined meets and/or exceeds the Minimum Requirements as required by section 8.

Importantly, sch II to the NLPGP Amendment Act sets out the minimum requirements for an Authorized Import Landing Terminal which includes, among others, the condition that it has a storage capacity of no less than 1.5 million US gallons.

- [44] Both courts below found that the original monopoly and the nature of the conditions imposed by the amending legislation effected a taking of goodwill within the terms of s 17(1) of the Constitution. The High Court held that the commercial impact of the NLPGP Amendment Act was the destruction of the import business of the respondents which led to the loss of a substantial number of their customers to NGC ‘in the same manner as if the law had forced them to buy from NGC alone.’<sup>54</sup> The Court of Appeal agreed, finding that the LPG companies had abruptly lost their existing customer base that had been built up over the preceding three decades. The court held that the LPG companies suffered a loss of their property involving both goodwill and their business as a result of the legislative scheme which first conferred a monopoly on a competitor and then maintained it in a *de facto* manner by imposing unattainable conditions ‘for re-entry into the LPG market’.<sup>55</sup> As no compensation had been paid there was a violation of s 17(1). That court also found that the legislative regime did not facilitate any of the goals in s 17(2) and, even if it was for the broader ‘public interest’ goal, could not be justified by reference to ‘the governing proportionality test as laid down in *de Freitas* and similar cases’.<sup>56</sup>
- [45] This Court pays considerable deference to findings of fact by the courts below and has developed a body of jurisprudence regarding the circumstances in which it would overturn concurrent findings of fact. *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd*,<sup>57</sup> affirmed that the Court considered that it would only be willing to entertain arguments to overturn concurrent findings of fact in ‘exceptional’ cases where there has been some miscarriage of justice or violation of some principle of law or procedure. Consistent with the *Apsara* test, it is only viable to consider those arguments that allege that there was legal error in the concurrence of factual findings. In this regard, the central arguments advanced by the appellants were that the original and amendment LPG Acts did not encroach on property rights (1) because the legislation was regulatory in nature and therefore

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<sup>54</sup> *Gas Tomza* (n 9) at 29.

<sup>55</sup> *Controller of Supplies* (n 11) at [77].

<sup>56</sup> *ibid* at [76].

<sup>57</sup> [2024] CCJ 3 (AJ) BB, BB 2024 CCJ 1 (CARILAW).

did not effect an ‘acquisition’ or ‘taking’ within the meaning of s 17(1) of the Constitution, neither did it constitute an arbitrary deprivation of property under s 3(d) since if there was a deprivation of property it was not arbitrary; and (2) no property had been taken or acquired because (a) there was no goodwill in the importation of LPG and (b) the respondents had no expectation that they could continue to import LPG or that the LPG price would remain profitable.

[46] Two major issues arise for discussion:

- a. Whether the respondents possessed goodwill in their businesses; and
- b. Whether there was a ‘taking’ of any such goodwill contrary to s 17(1).

### **Respondents’ Possession of Goodwill in their Businesses**

[47] A hundred and twenty-five years ago, Lord Macnaghten discussed the nature of goodwill in *Commissioners of Inland Revenue v Muller & Co’s Margarine Ltd*<sup>58</sup> in the following well-known passage:

What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there.<sup>59</sup>

[48] This description has been accepted in a long line of cases including by Lord MacDermott LCJ in *Ulster Transport Authority v James Brown & Sons Ltd*<sup>60</sup> who

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<sup>58</sup> [1901] AC 217.

<sup>59</sup> *ibid* at 223–224.

<sup>60</sup> [1953] NI 79.

also considered that goodwill was used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue:

“Goodwill” is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense the word may connote much more than this. It is, as Lord Macnaghten observed in *Inland Revenue Commissioners v. Muller* ....., “the attractive force which brings in custom,” and it may reside, not only in trade connections, but in many other quarters, such as particular premises, long experience in some specialised sphere, or the good repute associated with a name or mark. It is something generated by effort that adds to the value of the business.<sup>61</sup>

[49] Goodwill is the intrinsic ability of a business to acquire and retain patronage by customers by dint of reputation and connection. Whilst immaterial and intangible, goodwill is calculable as part of the market value of the business. Further, there is now no dispute over the fact that goodwill is property. Nor is there great controversy that it may be the subject of constitutional protection against deprivation of property.<sup>62</sup>

[50] An important and very unsatisfactory feature of this litigation was that there was no pleading and little to no factual evidence that the respondents possessed goodwill in their businesses. The respondents relied on the evidence of Aureliano Cifuentes, Amira Gutierrez, Stivaly Andrade, and Ernesto Uh. These witnesses all deposed to the loss of profits in their respective businesses. Mr Uh also gave evidence regarding the closure of his business. Mr Cifuentes appears to have been the only witness who referenced goodwill in his affidavit as follows:

32. Furthermore, while the NGGL may not be able to commence selling into the domestic market right away, which they would have know[n] by their own market studies; the Claimants on the other hand would be excluded from importing LPG altogether and thus our business along with our goodwill, reputations and years of good name and clientele would be destroyed beyond measure. We cannot wait for our case to be heard to

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<sup>61</sup> *ibid* at 109.

<sup>62</sup> See *Manitoba Fisheries Ltd v R* [1979] 1 SCR 101; *Ulster Transport Authority* (n 60); *Société United Docks v Government of Mauritius* [1985] AC 585.

continue business, as we would never be able to return to our status quo of operation once closed for days much less months or years.<sup>63</sup>

- [51] Cross-examination was inconclusive and the matter of whether the LPG companies possessed goodwill appears to have been left to the court with the respondents relying on the affidavit evidence. In the 2022 further pre-trial memorandum, the parties agreed to place before the trial judge the critical issue of *Whether the Amended Act is inconsistent with section 17 of the Constitution of Belize as it compulsorily takes possession of and/or acquires the goodwill in the Claimants' LPG import business without compensation* (emphasis added). In answering this question, the trial judge found that the respondents possessed goodwill in their businesses, and this was upheld by the Court of Appeal.
- [52] The appellants argue that there was no goodwill in the importation of LPG and that even if there was, the respondents had no expectation that they could continue to import as a result of the pre-existing licensing regime or that the LPG price would remain profitable. The appellants further underscore that the government has the sovereign right to regulate imports into the country.
- [53] As far as these contentions are concerned, I accept that every country has and must exercise control over imports and exports in the public interest. *Hope*<sup>64</sup> remains good authority for that proposition. Subject to international treaties regulating international trade (which are not usually justiciable in national courts), the right to regulate imports and exports is an untrammelled sovereign prerogative: *MOL, Inc v Peoples Republic of Bangladesh*,<sup>65</sup> *World Wide Minerals Ltd v Republic of Kazakhstan*.<sup>66</sup> The respondents do not have a constitutional right to import LPG into Belize and they have not established a legitimate expectation of a right to such importation. They do have a right, however, to the fair exercise of the governmental power to authorise importation. Meaning that if the government decides to allow

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<sup>63</sup> Record of Appeal, 'Second Affidavit of Aureliano Rafael Bautista Cifuentes in Support of an Application for an Urgent Injunction' 175.

<sup>64</sup> *Hope* (n 5).

<sup>65</sup> 736 F 2d 1326 (9th Cir, 1984).

<sup>66</sup> 296 F 3d 1154 (DC Cir, 2002).



importation, it cannot choose to deny an import licence to an established importer arbitrarily, whimsically, or without reason.

- [54] It is an undeniable fact that over three decades the respondents had, by the time of the time of the passage of the legislation in issue, built up a strong customer base. It is not an unreasonable assumption that, in the words of Lord MacDermott LCJ in *Ulster Transport Authority*, they had developed ‘long experience in some specialised sphere’.<sup>67</sup> Their substantial customer base was intrinsically linked to their ability to import and distribute LPG. The courts below appear to have assumed that this customer base reflected goodwill which both inhered in the LPG companies’ importation of LPG and the corporate brand and commercial operations of the respondents. However, this is to assume that the customer base came to be because of the LPG companies’ power of attraction to bring customers home, or because of the good repute associated with a companies’ name or mark as opposed, for example, to the necessity of purchasing LPG from the gas companies.

#### **The ‘Taking’ of the Goodwill of the Respondents Under s 17(1)**

- [55] The appellants’ central argument is that even if the respondents possessed goodwill in their businesses the legislative regime in question was meant to regulate a sector in the economy and did not purport or intend to compulsorily take possession of any specific property or interest in property. General regulatory legislation such as this, it was argued, did not fall within s 17(1), although it was conceded, such a law could yet be unconstitutional as a deprivation of property under s 3(d). According to this perspective, for the legislative taking to come within the terms of s 17(1), the legislation must be intended for the purpose of taking with the normal result that title is usually passed from the property owner to the government who thereby compulsorily ‘acquires’ the property. Legislation is regulatory if it is of general application and regulates property in the public interest and its effect is not a taking within s 17(1) and is therefore not compensable.

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<sup>67</sup> *Ulster Transport* (n 60) at 109.

- [56] The appellants cited the cases of *Ulster Transport Authority*<sup>68</sup> and *Manitoba Fisheries Ltd*<sup>69</sup> as emphasising the role of legislative intent in distinguishing general regulatory laws from laws that directly appropriated property. These cases were said to represent an expressed, intentional and direct taking by law for which the framers had made provision for compensation. They contend that these features distinguish the present appeal where there was no legal prohibition of the respondents' carrying business as wholesalers and retailers of LPG.
- [57] It is widely accepted that there is a category of legislation for the express taking of property which immediately fails the s 17 test of constitutionality unless it satisfies the requirements of that section. Commonwealth constitutional law has long known legislation that expressly or by necessary intention purposefully acquires property for a public purpose, thereby coming under the requirement such as those of s 17(1) to provide adequate compensation, unless the legislative measure may be justified under provisions as those in s 17(2). The constitutional language of s 17(1) prohibiting property from being 'compulsorily taken possession of' or being 'compulsorily acquired' unless for a public purpose and without the law under which this is done making provision for reasonable compensation and access to the courts, is apt to describe laws which are intended for the purpose of compulsory taking and compulsory acquisition.
- [58] The quintessential case is the express compulsory acquisition of land. The Land Acquisition (Public Purposes) Act<sup>70</sup> provides the procedure for compulsory acquisition of land to include provision for determining compensation, access to the courts and for the vesting of the land in the Crown. As reported by noted constitutional scholar Margaret DeMerieux,<sup>71</sup> the most obvious connotation of 'compulsorily acquired' involves the passing of title<sup>72</sup> and she gives examples of

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<sup>68</sup> *ibid.*

<sup>69</sup> [1979] 1 SCR 101.

<sup>70</sup> CAP 184 (BZ).

<sup>71</sup> Margaret DeMerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (Faculty of Law, University of the West Indies 1992).

<sup>72</sup> *ibid* at 388.

several Caribbean jurisdictions which define ‘acquisition’ as implicating the passing of title of some kind.<sup>73</sup>

- [59] In the present case, the NLPGP Amendment Act did not specifically acquire the property of the respondents nor was there any passing of title. There was therefore no direct or express taking of the LPG companies’ property within the meaning of s 17(1). However, contrary to arguments of the Government, even regulatory legislation which does not target specific property and involve the passing of title may, in certain circumstances, amount to a de facto ‘taking’ within the meaning of s 17(1) that requires the payment of compensation, unless justifiable under s 17(2). Whether there is a de facto taking is a matter of degree of any infringement upon private property.
- [60] The discussion of the constitutional implications of ‘regulatory legislation’ that impinges upon private property traces its genesis to American jurisprudence where there is a basic division between two types of laws affecting private property. The first is that which directly takes property in the public interest and required the payment of just compensation pursuant to the Fifth Amendment, what may be referred to as ‘de jure’ or direct expropriatory laws. The second is that which exercises the general police power to regulate property to secure the public welfare, what may be regarded as regulatory laws, and which may amount to a ‘de facto’ or indirect taking.
- [61] For well over a century, it was thought the Fifth Amendment’s Taking Clause covered only ‘direct appropriation’ or ‘physical occupation’ by the government and that even where regulatory laws deprived an owner of most or all beneficial interest in property there was no possibility of compensation.<sup>74</sup> This perspective persisted until 1922. In *Pennsylvania Coal Co v Mahon*<sup>75</sup> Holmes J, delivering the judgment of the Court, over a robust dissent by Brandeis J, conceded that government

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<sup>73</sup> *ibid* at 388–389.

<sup>74</sup> *Mugler v Kansas* 123 US 623 (1887). *See also Legal Tender Cases* 79 US 457 (1871); *Chicago, B & Q R Co v City of Chicago* 166 US 226 (1897).

<sup>75</sup> 260 US 393 (1922).

‘hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.’<sup>76</sup> However, it was equally recognised that the protection against physical appropriations of private property could only be meaningfully enforced if the government’s power to redefine the range of protected property interests was constrained by constitutional limits. Holmes J stated that ‘[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’<sup>77</sup>

[62] This reasoning has been accepted in subsequent US Supreme Court (‘USSC’) decisions such as *Lucas v South Carolina Coastal Council*<sup>78</sup> and *Penn Central Transportation Co v City of New York*.<sup>79</sup> The case of *Penn Central Transportation* is particularly instructive in that it established a balancing test. The courts emphasise that the economic impact and investment-backed expectations are to compare what the property has lost through the challenged government action with what the owner retains. The court measures the economic loss caused by a challenged regulation; a concern is with the disproportionate imposition upon one or a few individuals of the costs of furthering development in the public interest.

[63] The American notion of ‘regulatory legislation’ gained a foothold in Commonwealth jurisprudence. As seen in *Grape Bay*,<sup>80</sup> the Privy Council outlined the fundamental principles governing governmental imposition on private property. Legislation acquiring private property must be for some public interest and should be borne by the public as a whole and therefore attracted compensation payable by the state to the affected property owner but general regulatory laws that impose restrictions on the use of private property in the public interest did not constitute a deprivation of that property. In support, it cited the American case of *Penn Central Transportation*<sup>81</sup> for the proposition stated by the USSC that a general law passed

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<sup>76</sup> *ibid* at 413.

<sup>77</sup> *ibid* at 415.

<sup>78</sup> 505 US 1003 (1992).

<sup>79</sup> 438 US 104 (1978) at 138. Rehnquist and Stevens JJ and Burger CJ dissented.

<sup>80</sup> *Grape Bay* (n 25).

<sup>81</sup> *Penn Central Transportation* (n 79).

in the public interest did not violate the Fifth Amendment prohibition on taking private property without compensation.

[64] *Campbell-Rodriguez v Attorney General*<sup>82</sup> is another Privy Council decision affirming the category of regulatory legislation. Citing with approval *Grape Bay* and the American decisions of *Mahon* and *Lucas*, the Board recognised that taking is not limited to direct expropriation but may encompass regulation of the use of land which adversely affected the owner to a sufficiently serious degree and considered that the cases on regulatory laws could provide useful guidance. General regulatory law not intended to compulsorily acquire property, but which nonetheless has an adverse effect on property which may even ‘linguistically’ be regarded as a taking is not compensable unless, to repeat the language of Holmes J, ‘it goes too far’ and, one could add, results in a de facto taking. Most recently, the Board accepted in *Corp of Hamilton v Attorney General of Bermuda*<sup>83</sup> that a Municipalities Reform Bill 2019 which would have substantially revised important aspects of the governance of the appellant corporation fell within the regulatory exception and was not to be treated as confiscatory.

[65] Three relatively recent cases suffice to illustrate the possibility of regulatory legislation. The first is *All U P Stamp Vendors Association v Union of India*<sup>84</sup> which challenged the constitutionality of Government rules that introduced an e-stamp regime that would severely impact an association of stamp vendors engaged in the occupation of distribution and sale of stamp paper in its physical form. Rejecting the argument by the association that the rules breached its constitutional right of guarantee to practise a profession and the right to livelihood under arts 19, 21 and 38 of the Constitution,<sup>85</sup> the High Court at Allahabad held that:

A business or a trade may become unprofitable or unviable on account of various factors such as the advent of technology, change in consumer preferences, entrance of new competitors, a policy shift of the

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<sup>82</sup> [2007] UKPC 65, [2008] 4 LRC 526 (JM).

<sup>83</sup> [2025] UKPC 50 (BM).

<sup>84</sup> (Allahabad India HC, 08 April 2021).

<sup>85</sup> Constitution of India 1950.

Government aimed at subserving larger public interest or security of revenue. But in the end, these are mere vagaries of trade which cannot be recognised as constituting the infringement of a fundamental right to carry on that trade or business. While hearing submissions advanced on behalf of the petitioners, it was more than evident that what the petitioners essentially seek to achieve is a perpetuation of the system of physical stamping and the continuation of a business model which is perceived to be threatened by the advent of e stamping. Articles 19, 21 or 38 of the Constitution cannot possibly be invoked for the aforesaid purpose.<sup>86</sup>

[66] The second is *South African Diamond Producers Organisation v Minister of Minerals and Energy*<sup>87</sup> which concerned the traditional practice of unpolished diamonds from local producers being offered on an anonymous tender basis to other South African licensed dealers for purchasing parcels of unpolished diamonds on offer. Non-licensed ‘experts’, often from abroad would attend on behalf of prospective foreign buyers and ‘assisted’ the licensed purchasers. The ultimate sale was concluded between the producer or licensed dealer and the South African licensed purchaser. Section 20A of the First and Second Diamond Amendment Acts 2005 abolished this practice and the South African Diamond Producers Organisation (‘SADPO’), whose members included diamond producers and diamond dealers, argued that s 20A offends against ss 22 and 25 of the Constitution<sup>88</sup> as it amounted to deprivation of property and the arbitrary restriction on their right to conduct their business in a manner they deemed fit. These claims were dismissed by the Constitutional Court of South Africa with the following observation:

[61] It cannot be that every time a government decision or regulation makes a particular business strategy unlawful, persons who preferred to conduct their business in accordance with that strategy have been deprived of property. As explicated above, a market is an inherently regulated space, and it cannot be that any alteration to the way in which market forces play out constitutes a deprivation of property. To the extent that the licences in issue are in fact property, the limitation imposed by section 20A is not

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<sup>86</sup> *ibid* at 22.

<sup>87</sup> [2017] ZACC 26, 2017 (6) SA 331 (CC).

<sup>88</sup> Constitution of the Republic of South Africa 1996.

substantial, as it does not have a legally relevant impact on the rights of the affected party.

[67] The third is *Reflect-All 1025 CC v Member for Executive Council for Public Transport, Roads and Works*.<sup>89</sup> This case concerns the constitutionality of legislation pertaining to the planning of provincial roads and the primary issue is whether the impugned provisions arbitrarily deprive owners of their property contrary to s 25(1) of the Constitution.<sup>90</sup> In holding that it did not, the court accepted that the state may regulate the use of private property to protect public welfare without such regulation amounting to arbitrary deprivation.

[68] For completeness it should be noted that the constitutions of some Commonwealth States, such as Belize, contain preambulatory provisions that provide a supplemental basis for scrutiny of regulatory legislation. Section 3(d) of the Belize Constitution which protects broadly against arbitrary deprivation of property, and s 17(1) forbidding compulsory taking or compulsory acquisition, are both enforceable under s 20. Conteh CJ in *Prosser v Attorney General*<sup>91</sup> considered that s 3(d) provides a broader right to protection from deprivation of property while s 17 is limited to compulsory acquisition. This was accepted by the Court of Appeal in *Caribbean Consultants & Management Ltd v Attorney General*<sup>92</sup> where Hafiz-Bertram JA (as she then was) found ‘that section 3(d) proscribes arbitrary deprivation of any property and should not be limited to compulsory takings or acquisitions under section 17(1).’<sup>93</sup> (These opinions followed similar views expressed by the Privy Council in *Société United Docks v Government of Mauritius*<sup>94</sup> in relation to equivalent provisions in the Mauritius Constitution).<sup>95</sup>

[69] These judicial pronouncements suggest that s 3(d) creates a separate cause of action from that in s 17(1). However, it should be noted that these cases did not examine

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<sup>89</sup> [2009] ZACC 24, 2009 (6) SA 391 (CC).

<sup>90</sup> Constitution of the Republic of South Africa 1996.

<sup>91</sup> (BZ SC, 19 September 2006).

<sup>92</sup> BZ 2015 CA 3 (CARILAW), (5 February 2015).

<sup>93</sup> *ibid* at [151].

<sup>94</sup> [1985] AC 585.

<sup>95</sup> Constitution of the Republic of Mauritius 1996.

the possibility that ‘regulatory legislation’ could amount to an indirect taking and thereby constitute arbitrary deprivation of property contrary to s 17(1). In other words, the work assigned to s 3(d) could be accomplished by s 17(1), more broadly interpreted. To the extent that these judicial pronouncements equated s 17(1) solely with express or direct acquisitions, s 3(d) provides a basis for adjudicating on regulatory takings. On the present understanding of the reach of s 17(1), there is no need or room to invoke the preambular s 3(d) as supporting a separate and distinct cause of action apart from s 17(1).

- [70] To conclude, regulatory legislation has now been widely accepted around the Commonwealth as the exercise of police powers distinct and different from laws directly appropriating property. To the well accepted objectives of the promotion of health and safety, planning control (or zoning), and environmental regulation, increasingly the relationship between regulatory laws and the operation of business enterprises has been stressed. In other words, regulatory regimes are now being used to define the space within which government may advance financial and economic initiatives without the necessity to compensate owners of property adversely affected thereby. Regulatory laws may have the effect of a ‘de facto’ or indirect taking within the terms of s 17(1) if the regulatory measure ‘goes too far’ and impinges substantively and disproportionately on private property of the claimant. Compensation will be payable unless the measure comes within one of the exceptions in s 17(2).

*Was the NLPGP Amendment Act Regulatory Legislation?*

- [71] The respondents argued that the NLPGP legislation was not regulatory. They submit that the clear intent of the impugned legislation was to take the property of the respondents as was openly stated in the Definitive Agreement in which the Government of Belize agreed to pass legislation in the National Assembly that would appoint NGC as the sole wholesale importer of LPG into Belize. They also say that the reasons put forward by the regulatory scheme were not connected to the actual requirements of the Act which suggested that the Government of Belize



wanted to make importation unfeasible for the respondents to the benefit of the NGC. In summary, the respondents submit that the NLPGP Amendment Act did not simply regulate the source or manner of importation, or the storage, safety, health and quality requirements of imported LPG but went further to prohibit everyone but the NGC from importing LPG, thereby facilitating the acquisition by the NGC of their goodwill.

### *Public Private Partnership*

- [72] The nature and objectives of the NLPGP Amendment Act cannot be properly considered separately from the concept of the PPP which inspired the passage of the legislation. PPPs emerged in the late 1990s and early 2000s to describe the contractual process by which government shifted much of the building, financing, maintenance and operating cost for public infrastructure to private contractors, who were allowed to recoup their costs through tolls or other user payments with eventual transfer of the infrastructure to the State, thus allowing government to use the market to accomplish its purposes and to relieve public budgets. A significant literature has emerged.<sup>96</sup> Augustine Arimoro documents several substantive advantages of PPPs.<sup>97</sup> Best practice suggests selection of PPP partners through a fair competitive bidding process in which the private sector is invited to submit proposals detailing plans which are subject to evaluation to ensure they are efficient and protect the public interest. Some countries have enacted framework legislation to govern the contractual agreements between the private sector and government.<sup>98</sup>
- [73] Like planning law and environmental assessments (which are also not mentioned in s 17(2) as exceptions to the compulsory taking property), PPPs properly regulated and operationalised, could become a new legal category of regulatory

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<sup>96</sup> See Nutavoot Pongsiri, 'Regulation and Public-Private Partnerships' (2002) 15(6) International Journal of Public Sector Management 487; Dominique Custos and John Reitz, 'Public-Private Partnerships' (2010) 58 American Journal of Comparative Law 555; Seungwoo Son, 'Legal Analysis on Public-Private Partnerships Regarding Model PPP Rules' (Dankook University, Republic of Korea June 2012); Augustine Arimoro, 'Public-Private Partnership and the Right to Property in Nigeria' (2019) 19 African Human Rights Law Journal 763.

<sup>97</sup> Augustine Arimoro 'Public-Private Partnership and the Right to Property in Nigeria' (2019) 19 African Human Rights Law Journal 763, 769.

<sup>98</sup> George Nwangwu, 'The Legal Framework for Public-Private Partnerships (PPPs) in Nigeria: Untangling the Complex Web' (2012) 7(4) European Procurement & Public Private Partnership Law Review 268.

legislation in the public interest. *Campbell-Rodriguez*<sup>99</sup> is an important precedent involving closure of a free public road in favour of a toll road which did not breach the constitutional right to property, although of course, land compulsorily acquired for the project would need to meet the conditions of s 17.

- [74] The evidence in this appeal in the Affidavit of Joseph Waight is that the Caribbean Development Bank has made the case for PPPs on the ground ‘that the Caribbean faces a challenge of having relatively large infrastructure deficits against a backdrop of limited fiscal space to respond.’<sup>100</sup> The World Bank and the Inter-American Development Bank have endorsed the PPP which ‘are now considered a preferred way for Governments to build and acquire infrastructure and increase economic development without having to incur debt at the expense of the taxpayers’.<sup>101</sup>

*Legislative Objective*

- [75] The broad purposes of the NLPGP Act are spelt out in the long title as:

AN ACT to comply with and give effect to certain undertakings and obligations of the Government of Belize, under and in connection with a public private partnership agreement for the establishment, operation and transfer of a liquefied petroleum gas terminal and related facilities in Belize for the proper rationalization of cost, supply and pricing and enhanced efficiency of the liquefied petroleum gas sector, to optimize quality control and in the overall interest of the public; to provide for certain exemptions from taxes and duties; and to provide for matters connected therewith or incidental thereto.

- [76] The NLPGP Amendment Act retained these objectives but introduced conditions by which non-NGC entities could engage in importation. They were burnished in the affidavit and oral evidence of Messrs Waight and Nicholson, witnesses for the Government, and summarised by the Government as (i) the securing and stabilisation of the LPG market in Belize, (ii) for health and safety reasons, (iii)

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<sup>99</sup> *Campbell-Rodriguez* (n 82).

<sup>100</sup> Record of Appeal ‘First Affidavit of Joseph Waight’ 2854.

<sup>101</sup> *ibid.*

creation of climate resilient infrastructure, (iv) quality assurance and (v) minimisation of smuggling risks.

- [77] There can be little doubt that these are important public policy objectives. The trial judge recognised that the Original and Amendment NLPGP Acts gave effect to a policy of the legislature that she considered it was fully empowered to formulate. The Court of Appeal also accepted that each of the five purposes was ‘undoubtedly in the public interest and would satisfy the police power exception insofar as they can be said to promote either public health, public safety and/or public order’.<sup>102</sup> The LPG companies themselves concede that, ‘A law which required all imports of LPG to be sourced from the USGC, be brought in by sea, be stored in an approved storage facility of a stipulated size, be subject to testing at that facility to ensure compliance with safety and health standards and quality stipulations, and be transported in a particular way, would plainly be a law designed to regulate the importation of LPG and, subject to rationality and proportionality considerations, would be unlikely to infringe any rights.’<sup>103</sup>
- [78] Without now attempting to determine issues of taking pursuant to s 17(1) or the s 17(2) exceptions, or of rationality and proportionality, it may be said that much of the objection to the NLPGP Amendment Act rests on the contention that it requires the construction of a 1.5 million US gallons facility or use of the existing NGC facility as alternative pre-conditions to importation of LPG. This objection was premised on the argument that such a large facility had already been constructed by the NGC so that another would lead to overcapacity, and on the contention that use of the NGC facility would place the Gas Companies in the invidious position of having to associate with their competitor.
- [79] In my view, acceptance that the NGC terminal was logically connected to the stated legislative objectives is important. It suggests, *prima facie*, good reasons for

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<sup>102</sup> *Controller of Supplies* (n 11) at [105].

<sup>103</sup> Respondents, ‘Respondents’ Response to 1st and 2nd Appellants Skeleton Argument dated 29 October 2024’, Submission in *Controller of Supplies v Gas Tomza Ltd*, BZCV2024/003, 29 November 2024, [8].

enactment of the legislation to secure the viability of the scheme for the construction of the NGC facility and the attendant national benefits that the facility affords. I bear in mind the lowered level of review intensity and the greater margin of appreciation accorded to the State in social and economic policy-making. In circumstances where the Original and Amendment NLPGP Acts were intended to regulate a significant sector of economic activity in the State and were passed pursuant to a PPP with the express objective of creating an important national asset, I consider the legislation to be in the nature of general regulatory law enacted in the public interest.

*Did the NLPGP Act go 'Too Far' and hence Effect a 'Taking' Under s 17(1)?*

- [80] In deciding on whether regulatory legislation 'goes too far' and thus effects a de facto or indirect taking, the main concern is the nature and degree of interference with private property: *Penn Central Transportation*;<sup>104</sup> *Grape Bay*.<sup>105</sup> Where that interference is substantial, it may amount to a compensable taking. Substantial interference normally disproportionately imposes on the property owner a burden which should be borne by the public generally. In this sense, the disproportionate imposition of the burden could be said to be arbitrary. Yacoob J aptly summarised the position in *Mkontwana v Nelson Mandela Metropolitan Municipality*<sup>106</sup> at [32] when he stated that:

Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.

- [81] It is for the respondents to prove as a matter of fact that there was substantial and disproportionate interference or deprivation of property. Further, both the Privy

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<sup>104</sup> *Penn Central Transportation* (n 79).

<sup>105</sup> *Grape Bay* (n 25).

<sup>106</sup> [2004] ZACC 9, 2005 (1) SA 530 (CC).

Council in *Société United Docks*,<sup>107</sup> and this Court in *Titan* required that there must be demonstration of a causal link between the legislation or other state action and the loss of property. This remains so, and perhaps especially so in the case of the immaterial and intangible property of goodwill.

[82] It bears repeating that the entirety of the right to property claim is predicated upon the loss of goodwill. It is here that significant difficulty arises from the fact that the loss of goodwill was never established. The financial losses alleged to have flowed from the loss of goodwill were similarly neither pleaded nor properly proven. In this regard, Bulkan JA found five significant shortcomings in the evidence as justification for overturning the award of BZD10,896,751.20 made to the respondents by the trial judge and sought to remedy the problem by remitting the issue of damages to the High Court. Respectfully, remission could cure the question of quantification of damages but does not engage with the logically anterior question of whether the respondents had proved that they had been deprived of any specific property. In the absence of expert evidence, there could be no proof that their goodwill had been acquired, taken, or diminished or destroyed. In the absence of pleading and proving such loss, there could have been nothing more than judicial supposition and conjecture. This is somewhat foreshadowed in the observation by Bulkan JA that there was a ‘conceptual difficulty with the nature of the losses sustained’ and that there had been no demonstration of how the loss of wholesale customers to the NGC ‘translated into actual losses’.<sup>108</sup> In short, the respondents had not established that there was a deprivation of their goodwill and of how that deprivation translated into the losses they alleged.

[83] The appellants argue that as the respondents continue to operate their LPG business in respect of both wholesale and retail, their goodwill has not perished. This is an important point which goes back to the notion of the indivisibility of goodwill. In *Commissioners of Inland Revenue*,<sup>109</sup> Lord MacNaughten expressed the view that

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<sup>107</sup> *Société United Docks* (n 94).

<sup>108</sup> *Controller of Supplies* (n 11) at [154].

<sup>109</sup> *Commissioners of Inland Revenue* (n 58).

goodwill has no independent existence and cannot subsist by itself; it must be attached to a business: ‘Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again.’<sup>110</sup> However, a distinct part of a business and the goodwill attaching thereto may be sold or otherwise alienated (*Ulster Transport*). The continuity of the respondents in all of their business activities distinguishes this case from *Manitoba Fisheries* where the impact of the legislation obliterated the appellant’s entire business and hence its goodwill in the business. Similarly, in *Ulster Transport* the legislation resulted in the loss of a discrete portion of the respondents’ business (their furniture removal business) and the goodwill in that portion. This is not the position here.

[84] It is the case, that in *Société United Docks*<sup>111</sup> the Board held that there had been no ‘taking’ but found that if the legislation ‘had deprived the dock and stevedore companies of any goodwill, then the companies would have been entitled to compensation equal to the value lost’.<sup>112</sup> The difficulty with relying on this dictum is that there was no evidence presented in the present case of loss of goodwill. The respondents clearly suffered the loss of some of their wholesale customers. But that loss is not necessarily the loss of goodwill. Loss of market share can be attributed to numerous factors of which loss of goodwill is but one. Another could be the ability of erstwhile customers to obtain the product at better prices from the NGC. This would not have resulted in any loss of goodwill on the part of the respondents. The decision to purchase the product from another source, namely NGC, could have been based entirely on financial grounds, without any loss of regard for the respondents or their brand. For it to be established that loss of market share had damaged the respondents’ goodwill (brand or reputation), expert evidence would have been needed and this evidence was simply not produced.

[85] The Judicial Committee of the Privy Council recently delivered its decision in *Corp of Hamilton*<sup>113</sup> which addresses issues that overlap with some of those in this

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<sup>110</sup> *ibid* at 224.

<sup>111</sup> *Société United Docks* (n 94).

<sup>112</sup> *ibid* at 604.

<sup>113</sup> *Corp of Hamilton* (n 83).

appeal. Two of the Board's pronouncements bear brief mention in the present context. First, it was said that the introductory, preambular s 1 of the Bermuda Constitution is generally not directly or separately enforceable<sup>114</sup> and second, that there is a distinction between an express taking and a regulatory or constructive taking. The latter may be unconstitutional if it surpasses a certain threshold of serious interference with private property.<sup>115</sup>

[86] These findings support what has already been said in this judgment. Primarily (i) that the claim of the Gas Companies that there is an arbitrary deprivation of property is properly before this Court by virtue of s 17(1) of the Belize Constitution and that there need not be a separate claim lodged under the preambular s 3(d); and (ii) that regulatory restrictions introduced by the executive or legislature may go too far so as to amount to a taking or acquisition which adversely affects the owner to a sufficiently serious degree.

[87] As discussed by the Board in *Corp of Hamilton*, 'regulatory taking' is based on the accepted premise that regulatory activity in the public interest does not necessarily constitute an unconstitutional taking even though there may be an adverse economic effect on private property ownership. The circumstances and evidence in the case before the court will be determinative as to whether the regulatory legislation has surpassed the threshold to amount to a taking. The Board preferred the terminology of 'adverse effects to a sufficiently serious degree' whereas this judgment defines the threshold in terms of substantial and disproportionate interference. There is not a great deal of difference between these two standards. In either case, as aforementioned, the LPG companies have not sufficiently proved that any interference with their property by the Amended Act amounted to a taking of their goodwill as prohibited by s 17 of the Constitution. Simply put, the respondents have not discharged the evidential burden required to get their claim for breach of their property right off the ground.

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<sup>114</sup> *ibid* at [89].

<sup>115</sup> *ibid* at [193], [194].

## **The Right to Work Claim**

- [88] Section 15 of the Belize Constitution provides for the content and scope of the right to work. The general right is conferred in s 15(1) which states that ‘No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise.’ Subsection (2) then allows, as a condition for embarking on work, the requirement of payment of professional trade or business licences fees or similar charges or possession of appropriate licences or qualifications. Subsection (3) immunises laws making reasonable provision required in the public interest of defence, safety, order, or morality; for protecting the rights and freedoms of others; and imposing restrictions on the right to work of non-Belizean citizens.
- [89] The appellants contend that the Court of Appeal erred in finding that there had been a breach of the right to work as that right did not extend to corporate entities. Alternatively, they argued that there had been no breach as the respondents continue to work in their core business of resale of LPG, which was the basis on which they had been licensed to import LPG. Thus, the two issues of (1) application of the right to work to corporate entities and (2) denial of an opportunity to work, arise in relation to the right to work claim.

### **Does the Right to Work Apply to Corporate Entities?**

- [90] It has been firmly established since *Attorney General v Antigua Times Ltd*<sup>116</sup> that corporate entities may enjoy constitutional rights. Drawing upon Commonwealth and American authorities, Lord Fraser had regard to the important place in the economic life of society occupied by corporate bodies and considered it natural for the modern Constitution of Antigua and Barbuda of 1967, dealing with rights to property, to use the word ‘person’ to include corporations. He pointed out that constitutional reference to “‘race, place of origin, political opinions, colour, creed

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<sup>116</sup> (1975) 21 WIR 560 (AG PC).



or sex” indicates that the section was referring primarily to human or natural persons, *but there is nothing to exclude artificial persons so far as they are capable of enjoying the fundamental rights and freedoms.*<sup>117</sup> Immediately thereafter, he accepted that the nature and extent of the rights and freedoms protected must depend upon actual provisions of the sections protecting those rights and freedoms and that some sections clearly cannot apply to corporations but that others can and do.

[91] From the days of the *Antigua Times* case, it has been difficult to identify specific rights enjoyed by corporations. The fertility of the legal mind is such that corporations can be analogised as capable of having or discharging most of the functions and attributes of human beings, although the analogy sometimes has a sense of strain and artificiality.<sup>118</sup> It is now widely accepted that the actual corporate rights enjoyed under the constitution are largely a function of the relevant constitutional text.

[92] The Canadian Supreme Court case of *Irwin Toy Ltd v Attorney General (Quebec)*<sup>119</sup> considered s 7 of the Canadian Charter of Rights and Freedoms which provides that, ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.’ In deciding that a corporation could not avail itself of the protection offered by s 7, the court noted that it was difficult to conceive of a corporation being deprived of its ‘life, liberty or security of the person’ and that it would be nonsensical to speak of a corporation being put in jail. Nor would s 7 protect against some sort of ‘economic liberty’ because a striking feature of the section was its inclusion of ‘security of the person’ as opposed to ‘property’ adopted in the classic liberal formulation, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived ‘of life,

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<sup>117</sup> *ibid* at 569 (emphasis added).

<sup>118</sup> See eg, the suggestion that, ‘A corporation is not born (though it is incorporated); it cannot marry (though it can be amalgamated with or taken over by another corporation); it cannot have children (though it can have subsidiaries); it does not die (though it can be dissolved or wound up)’; David McClean, Veronica Ruiz Abou-Nigm and JHC Morris, *The Conflict of Laws* (9th edn, Sweet & Maxwell 2016) para 3-029.

<sup>119</sup> [1989] 1 SCR 927.

liberty or property, without due process of law’. Even so, the court refused to hold that no right with an economic component could fall within ‘security of the person’ since to ‘exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.’<sup>120</sup>

[93] *Irvin Toy* was accepted and applied by the Canadian Supreme Court in *Attorney General of Quebec v 9147-0732 Quebec Inc*<sup>121</sup> which held that an analysis of the text of s 12 of the Canadian Charter of Rights and Freedoms protecting against cruel and unusual treatment or punishment did not apply to corporations. This was because corporations lie beyond s 12’s protective scope: ‘Simply put, the text “cruel and unusual” denotes protection only human beings can enjoy’. The court stated:

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[7] To claim protection under the *Charter*, a corporation — indeed, any claimant — must establish that “it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision”: *R. v. CIP Inc.*, [1992] 1 S.C.R. 843, at p. 852. In order to make that determination, the court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, “by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*” ...

[8] This Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision.  
...

[9] This is so because constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed in general terms, the words used remain “the most primal constraint on judicial review” and form “the outer bounds of a purposive inquiry”: B. J. Oliphant, “Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian

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<sup>120</sup> *ibid* at [96].

<sup>121</sup> [2020] 3 SCR 426.

<sup>122</sup> *ibid* at 442–443.

Charter of Rights and Freedoms” (2015), 65 *U.T.L.J.* 239, at p. 243. The Constitution is not “an empty vessel to be filled with whatever meaning we might wish from time to time”: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*Re PSERA*”), at p. 394; *Caron*, at para. 36. Significantly, in *Caron*, the Court reiterated this latter passage and reasserted “the primacy of the written text para. 36; see also para. 37.

[94] There is at least one judgment asserting that a corporation has the right to privacy and the right to communicate: *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources*.<sup>123</sup> However, no academic or judicial authority was cited to us on the precise question of whether a corporation has a constitutional right to work. Such a right might have been assumed in *Ghana Lotto Operations Assn v National Lottery Authority*,<sup>124</sup> but the court there considered that any such right could not be an entitlement to engage in a gambling business since, ‘it would be unreasonable to construe a right to work as including’ an unregulated right to enter the regulated business of gambling.

[95] It is clearly part of modern economic life that corporations play a critical role in undertaking and being responsible for the performance of tasks in the economy. Individuals often incorporate to carry on work whether as sole traders or as small private companies who remain worthy of the constitutional protection of the right to work. The appellants are correct to point out that the basis for identifying persons enjoying the right to work is the first phase in s 15(1), prohibiting the denial of any person ‘the opportunity to gain his living by work which he freely chooses or accepts’ and that the categories which follow are merely illustrations of the areas in which the prohibition applies. The concept of freely choosing or accepting work does appear apt to describe human beings. It is also true that only individuals can truly pursue a ‘profession’ or occupation’. However, I would not go so far as to say that the right to work must be taken to refer exclusively to human beings. A purposive interpretation of the constitutional provision could allow the decision-making agencies in corporations to choose or accept work, and to do so by

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<sup>123</sup> [2010] 3 IR 251.

<sup>124</sup> [2009] 3 LRC 235, 236.

‘engaging in a trade or business.’ There is nothing in the wording of the Belize Constitution that would prevent such a conclusion and therefore which would necessarily exclude a legal entity from maintaining a constitutional right to work claim.

### **Were the LPG Companies Denied the Opportunity to Engage in the Business of their Choice?**

[96] The Constitution guarantees the opportunity to work, not the outcome of having that opportunity. This point was reinforced in *Fort Street Tourism Village v Attorney General of Belize*<sup>125</sup> where the construction of walls on a boardwalk prevented direct access by passengers coming off cruise ships to the businesses located on the other side of the boardwalk which was claimed to have infringed on those businesses’ right to work. The Court of Appeal of Belize held unanimously that there had been no violation of the claimants’ right to work in s 15. Mottley P stated that, ‘In order for s 15(1) to be breached in so far as a denial of the opportunity to work was concerned, legislation or some statutory instrument would have to provide that the claimants are not entitled to engagement in any business or in a particular type of business’.<sup>126</sup> Morrison JA found that the right under s 15 meant that the government should not, whether by legislation or administrative measure place ‘an unjustifiable fetter’ on the citizen’s right to choose a trade or profession.<sup>127</sup>

[97] This Court approved and adopted the *Fort Street* approach in *Lucas v Chief Education Officer*<sup>128</sup> where it was stated at [48]:

The right to work is an important socio-economic right that has found expression in the 1966 Human Rights covenants adopted by the United Nations. However, the scope of that right must vary from country to country dependent on a State’s economic well-being. Thus the Belize Court of

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<sup>125</sup> (2008) 74 WIR 133 (BZ).

<sup>126</sup> *ibid* at [47].

<sup>127</sup> *ibid* at [137].

<sup>128</sup> [2015] CCJ 6 (AJ) (BZ), (2015) 86 WIR 100.

Appeal has properly concluded that the right to work is not a guarantee of employment but merely an opportunity to earn a living. No legislative or administrative fetter may be place on that right.

[98] In the context of corporations, the further point may be made that the guaranteed right is an opportunity to engage in a trade or business. It does not proffer nor hold out a guarantee of a profit in that trade or business, a point made with clarity in *All U P Stamp Vendors Association*.<sup>129</sup>

[99] On the facts of the present appeal, the respondents cannot get a claim under s 15 off the ground for the simple reason that the impugned legislation does not deny them the opportunity to engage in their core business of distributing and retailing LPG in Belize. Not only do they retain that right, but the undisputed evidence is that they continue to supply LPG to their customers in Belize. There remains the opportunity of full participation in the importation and wholesaling of LPG either by building the authorized terminal with a 1.5 million US gallons storage capacity or passing their imports through the NGC terminal. The first option has attracted criticism by the respondents mainly on the ground that the construction of the facility would be too costly and would lead to overcapacity. The second option has also been criticised mainly based on its requirement of the respondents' doing business with their competitor. As discussed earlier, this requirement is not so onerous or unreasonable as to be unlawful. Nor, in the present context, could it be said that the provision does not represent a genuine opportunity to participate in the importation and trade of LPG. There is no evidence that the respondents had sought to take up this option provided in the legislation and were rebuffed or met with such unreasonable or unjustifiable conditions as to render the opportunity meaningless.

### **The Freedom of Association Claim**

[100] The right to freedom of association is contained in s 13 of the Belize Constitution.<sup>130</sup> Following the usual pattern, sub-s (1) provides for the general right and sub-s (2) lists exceptions to the right. The section reads as follows:

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<sup>129</sup> *All U P Stamp Vendors Association* (n 84).

<sup>130</sup> CAP 4.

13.-(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests or to form or belong to political parties or other political associations.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes reasonable provision,

- (a) that is required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is required for the purpose of protecting the rights or freedoms of other persons;
- (c) that imposes restrictions on officers in the public service that are required for the proper performance of their functions; or
- (d) that is required to prohibit any association the membership of which is restricted on grounds of race or colour.

[101] The Court of Appeal found that the respondents' right to freedom of association had not been violated by the NLPGP Amendment Act for two main reasons. First, the right was based on the notion of the collective, so that while individuals may invoke the right, 'the relationship or subject-matter must involve a group or collective'.<sup>131</sup> This meant that purely social gatherings or one-on-one relationships of a private business nature did not come within the scope of the right. Second, 'the *raison d'être* of the association or group in question is that of promoting some common interest or objective' which had a 'public' element at its core, such as concerns for workers' rights, humanitarian assistance, entertainment, governance and so on.<sup>132</sup> Even if the amended conditions forced the LPG companies to 'associate' with the NGC to obtain a licence to import, this would be a commercial relationship of a wholly private nature and there was no common public objective in that relationship.

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<sup>131</sup> *Controller of Supplies* (n 11) at [121].

<sup>132</sup> *ibid* at [122].

[102] The respondents argued that the Court of Appeal erred in that there is nothing in s 13 that limits freedom of association to those who associate in a collective to promote common interest and urged a broad interpretation of s 13(1) based upon the accepted principle that fundamental rights and freedoms must be interpreted generously and liberally in favour of the individual, citing: *Minister of Home Affairs v Fisher*,<sup>133</sup> *Reyes v R*,<sup>134</sup> *Marin v R*.<sup>135</sup> They relied upon the judgment Williams J in *Attorney General v Smith*<sup>136</sup> in which he said:

But it would seem to me that in a society of free men and women freedom of association must guarantee the individual as well the right to choose with whom he wishes to have social, business and other relationships. A man or a woman must be free to choose his or her spouse, his or her friends, his or her business partner, his or her employer or employee. And, conversely, he or she must be entitled to reject social, business and other relationships which they do not wish and to object to such relationships being forced on them against their will. Freedom of association must have significance to individuals as well as to groups.<sup>137</sup>

[103] The general freedom of the individual to associate with groups and for the groups to take action to promote their interests is a necessary feature of every democratic society and tends to reflect a public law perspective. The foundational art 20 of the Universal Declaration of Human Rights 1948 ('UNDHR') affirms the right of everyone to freedom of peaceful assembly and association. The European Convention on Human Rights ('ECHR'), which as Bulkan JA pointed out was one of the precursors of Commonwealth Caribbean Bills of Rights, including Belize's, similarly provides in art 11 for freedom of assembly and association, including the right to form trade unions, subject to certain restrictions that are in accordance with law and 'necessary in a democratic society.' The case law arising from art 11 has been largely concerned with proscriptions of political parties, prohibitions on trade unions, and bans on parades featuring sexual orientation.

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<sup>133</sup> (1979) 44 WIR 107 (BM PC).

<sup>134</sup> [2002] UKPC 11, (2002) 60 WIR 42 (BZ) at [23].

<sup>135</sup> [2021] CCJ 6 (AJ) BZ, BZ 2021 CCJ 001 (CARILAW) at [31]–[32].

<sup>136</sup> (1984) 38 WIR 33 (BB HC).

<sup>137</sup> *ibid* at 46.

[104] The first major pronouncement upon the scope of the right to associate was given by Wooding CJ in the seminal case of *Collymore v Attorney General*.<sup>138</sup> The learned Chief Justice stated that:

... freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country.<sup>139</sup>

[105] This very much accords with the notion of individuals associating as groups to pursue public objectives and has been taken as representing the nature and scope of freedom to associate. No authority has been produced to demonstrate that this represents a narrow interpretation of the text either as originally drafted or as nuanced by widespread judicial decision-making. *HTA Bowman Ltd v Attorney General*,<sup>140</sup> on which the respondents rely was not concerned with private business relationships but rather with compulsion of a group of citrus growers to join an association. In that case, the combined effect of ss 7 and 16 of the Citrus (Processing and Production) Act was to prohibit processors from purchasing or accepting delivery of citrus from any producer who did not have a licence, which licence could only be obtained from the association.

[106] In the circumstances, I consider that Bulkan JA was essentially correct in coming to the view that:

... Williams J in *AG v Smith* erred in his interpretation of this right as including the freedom of individuals to choose with whom they wish to have social and business relationships, such as spouses, business partners and employees. That was not only an unsupportable extension of the right, but a distortion – if not trivialisation – of its purpose. Freedom of association evolved to confer protection upon collectives to pursue their common (or

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<sup>138</sup> (1967) 12 WIR 5 (TT CA).

<sup>139</sup> *ibid* at 15.

<sup>140</sup> (BZ SC, 13 May 2010).



‘public’) goals, including goals of an economic nature such as higher wages. However, it does not cover personal relationships such as those existing within marriage, as confirmed in a recent Caribbean case, or, I would add, those existing in business and commerce. This does not mean that such relationships are devoid of protection, as bills of rights contain other rights that may be relevant such as, for example, protection of the family or protection of the opportunity to work. However, it is clear that freedom of association does not confer protection on the private relationships between individuals. (footnote omitted)<sup>141</sup>

[107] It follows that the claim by the respondents fail both the key requirements of the right to freedom of association. They were individual companies pursuing their individual businesses and not an association pursuing a collective purpose and the purpose pursued by them was commercial and not one serving a public interest function. For these reasons the claim under this head must fail.

### **The Equality Before the Law Claim**

[108] Sections 6 and 16 of the Belize Constitution concern the right to equality and the related right of protection from discrimination. Section 6(1) provides a general guarantee of equality in the following words: ‘All persons are equal before the law and are entitled without any discrimination to equal protection of the law.’ Subsections (2) to (12) then provides in exacting detail for due process to be accorded to every person charged with a criminal offence. Section 16(1) provides that ‘Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect’ and sub-s (2) provides that ‘Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person or authority.’ Critically, sub-s (3) defines ‘discriminatory’ as differentiation attributable to sex, race, place of origin, political opinion, colour or creed.

[109] Evidently, ss 6 and 16 concern fundamental notions of equality and non-discrimination. Equality is the cornerstone of the philosophical foundations of

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<sup>141</sup> *Controller of Supplies* (n 11) at [123].

human rights and intimately connected to the concepts of justice and the rule of law. Non-discrimination overlaps with equality and is probably best understood as a means of achieving equality.<sup>142</sup> Unfair discrimination means treating people differently in a way that impairs their fundamental dignity as human beings. The UNDHR and the ECHR, which were among the inspirations for the Belize Bill of Rights, each contain relevant provisions. In the language of the art 7 of UNDHR 1948: ‘All are equal before the law and are entitled without any discrimination to equal protection of the law.’<sup>143</sup> Article 14 of the ECHR provides that the rights secured by the Convention shall be enjoyed ‘without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’<sup>144</sup>

[110] At its core, equality means that law must treat individuals in like circumstances, alike, and individuals in unlike circumstances, differently. Outside of these categories, differentiation will only pass constitutional muster if it clearly promotes a legitimate purpose, has a rational connection with the purpose of the law, and does not have a disproportionate or unjustifiable adverse effect on the claimant. In words used in *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar*,<sup>145</sup> the different classification must be based on intelligible criteria and that the criteria ‘must have a rational relation to the object sought to be achieved by the statute in question’.

[111] Section 16 is concerned with securing non-discriminatory treatment of persons and hence protecting the dignity of human beings, a moral concern at the heart of our constitutional order. This is evident from the definition of ‘discriminatory’ in s 16(3) as prohibiting differentiation attributable to sex, race, place of origin, political opinion, colour or creed. There is a close resemblance of s 16 and art 14 of the ECHR and no authority was presented to the Court as showing art 14 being applied

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<sup>142</sup> See Jonathan Cooper, ‘Applying Equality and Non-Discrimination Rights through the Human Rights Act 1998’ in Gay Moon (ed), *Race Discrimination: Development and Using a New Legal Framework* (Hart Publishing 2000).

<sup>143</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) art 7.

<sup>144</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (adopted 10 December 1948, entered into force 3 September 1953) 213 UNTS 221 art 14.

<sup>145</sup> [1959] 1 SCR 279 at 296–297.

to corporations. Section 15 of the Canadian Charter of Rights and Freedoms which is similarly concerned to protect equality before and under the law without discrimination based on the prohibited grounds has consistently been interpreted applicable to human beings and not to corporations. For example, in *Aluminium Co of Canada Ltd v R*<sup>146</sup> Montgomery J stated that '[i]n my view, s. 15 is restricted to the protection of individuals and does not apply to corporate entities. It is a part of the Charter that protects the dignity and worth of human beings against governmental intrusion that would make distinction between individuals based upon human attributes and characteristics.'<sup>147</sup>

[112] The respondents were therefore entirely correct to concede that s 16 is not applicable to this appeal since the discrimination they claim was not attributable to any of the six specified grounds prohibited by s 16(3) and to base their claim for breach of their right to equality on s 6(1) alone. Their case is that they have not been afforded equality before the law or protection of the law under the NLPGP Act and the NLPGP Amendment Act by dint of the preferential treatment which has been bestowed on the NGC.

[113] Both parties appear to assume that s 6(1) guaranteeing the general right to equality before the law applies to legal entities such as the respondents. This even though s 6(2) to (12) are exclusively concerned with due process to be accorded to every person charged with a criminal offence. The due process includes safeguards such as the right not to have the trial conducted in his absence unless necessitated because of how the accused conducts himself, the right against being compelled to give evidence, or provisions on regulating the discipline of persons held in detention. In *Fort Street Tourism Village*<sup>148</sup> Conteh CJ held that s 6(1) was a procedural guarantee, that is, a guarantee of due process to everyone, a view accepted by the Court of Appeal in that case. Article 7 of the UNDHR 1948, which is worded similarly to s 6(1), applies to non-governmental organisations, and art

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<sup>146</sup> 55 OR (2d) 522, 29 DLR (4th) 583.

<sup>147</sup> *ibid* at [38].

<sup>148</sup> *Fort Street Tourism Village* (n 125).

19(3) of the Basic Law of the Federal Republic of Germany 1949, accepted in Caribbean jurisprudence in *Webster*,<sup>149</sup> calls for application of fundamental rights ‘to ... legal persons to the extent that their nature permits.’ In *J McIntyre Machinery Ltd v Nicastrro*<sup>150</sup> the US Supreme Court decided that a company was entitled to rights under the Due Process Clause of the Fourteenth Amendment.<sup>151</sup> Even as regards s 6(2) to (12), a company may enjoy such due process rights as its nature permits.

[114] The respondents take issue with the test introduced in the Court of Appeal that breach of s 6(1) required ‘improper motivation’ and argue that in any event, there was improper motivation because the purpose of the Act was to take the goodwill in their respective businesses while conferring and maintaining a monopoly in favour of the NGC. Much ink was spilt in the Court of Appeal and by the respondents in positing the appropriate test for determining whether a breach of the right to equality had occurred. The Court of Appeal rejected the applicability of the proportionality test applied by Baroness Hale in *Webster*<sup>152</sup> when determining the meaning of the right of the individual to equality of treatment under s 4(d) of the Trinidad and Tobago Constitution.<sup>153</sup> Bulkan JA considered the *Webster test* to be inapplicable since the basic presumption that all differential legislative classifications are treated as impermissible unless justified by reference to proportionality would render s 16 otiose. Not having found appropriate guidance from fellow Caribbean Constitutions, Bulkan JA sought assistance from s 9(1) of South African Constitution, which in broad similarity to s 6(1) of the Belize Constitution, provides that ‘Everyone is equal before the law and has the right to equal protection and benefit of the law’.<sup>154</sup> In analysing the application of this right, Bulkan JA identified motivation or reason for the differentiation as a key component and developed the ‘improper motivation’ test which he applied to the

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<sup>149</sup> *Webster* (n 7).

<sup>150</sup> 564 US 873 (2011).

<sup>151</sup> United States Constitution amend XIV § 1.

<sup>152</sup> *Webster* (n 7).

<sup>153</sup> Constitution of the Republic of Trinidad and Tobago Act, Chap 1:01.

<sup>154</sup> Constitution of the Republic of South Africa 1996.

present appeal. As there was no proof of improper motivation behind the challenged legislation the claim under s 6(1) failed.

[115] Whilst useful to bear in mind any potential for overlap between ss 6 and 16, it is not necessary to decide the test applicable to s 16 for present purposes. The respondents rely solely on the general guarantee of equality before the law in s 6(1) and urge the proportionality test adopted by *Webster* in the interpretation of s 4(d) of the Constitution of Trinidad and Tobago. Section 4(b) also contains an equality before the law provision which is also worth quoting. Section 4(b) and (d) provides as follows:

4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

...  
(b) the right of the individual to equality before the law and protection of the law;

...  
(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions.

[116] In *Webster* the issue was whether, by virtue of s 4(d) of the Constitution, present and former special reserve police officers ('SRPs') were entitled to equal treatment with regular police officers ('RPOs'). A Cabinet decision of 2000 absorbed SRPs who had been continuously employed on a full-time basis for at least two years into the regular police service subject to special criteria for absorption. Those SRPs who could not or would not meet those criteria would be terminated with a 'separation package'. The essential appeal involved the allegation that SRPs were denied equal treatment with RPOs during their years of service as SRPs, but the Board rejected the appeals largely on evidential grounds. In delivering the judgment of the Board, Lady Hale noted that the claim was originally brought under both s 4(b) and (d) but that the former claim was not pursued before the Board where the appellants relied

exclusively on the s 4(d) claim. Emphasising that there was ‘a clear distinction between the two’ Lady Hale stated that the case was concerned with whether the actual treatment of these officers by the public authority in charge of them is a violation of s 4(d) and explicitly formulated the test for s 4(d) as suggesting that, ‘... the difference in treatment must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.’<sup>155</sup>

[117] Section 6(1) of the Belize Constitution embodies the general entitlement to equality before the law and equal protection of the law in wording closer to s 4(b) of the Trinidad and Tobago Constitution than s 4(d) of that Constitution, dealing with the right to equality of treatment from public authority. There are two reasons for holding that the respondents have not established a breach of s 6(1). First, it is well accepted in the jurisprudence that the right to equality before the law does not mean the same protection or treatment for everyone. The underlying principle of equality is not the uniformity of treatment to all in all respects but rather to give persons who are similarly situated the same treatment, and different treatment to persons who are differently situated. Like should be treated alike and different should attract differential treatment. The initial burden is on the claimant to show both ‘likeness’ and ‘differential treatment’: *Webster* citing with approval Jamadar J (as he then was) in *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v Attorney General of Trinidad and Tobago*.<sup>156</sup>

[118] The respondents have not shown any relevant ‘differential treatment’ in this case. The original NLPGP Act conferred the exclusive legal right to import LPG and granted certain tax exemptions on the NGC. But none of the respondents made the substantial investment which the NGC made, nor did they meet the requirement for Authorized Import Landing Facilities prescribed in sch II to the NLPGP Amendment Act. As the appellants argue, NGC was in a class of one and had no comparator in the LPG sector in Belize, and therefore the respondent cannot claim

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<sup>155</sup> *Webster* (n 7) at [24].

<sup>156</sup> (2009) 76 WIR 378 (TT PC) at 421–428.

to be like the NGC and demand that like companies be treated alike. This does not change by reformulating the argument to say that the NLPGP Amendment Act treats differently circumstanced entities the same. If it can be said that the NGC and the LPG companies are situated differently, the reason for the differential is precisely the difference in participation in the Definitive Agreement concluded pursuant to the PPP. Nothing prevented the LPG companies from seeking to reach a similar accommodation with the Government as did the NGC.

[119] Second, for the reasons already explored, the purpose of the NLPGP Amendment Act was undoubtedly the legitimate objective of modernising and reforming the LPG sector in Belize. Reduction of supply and price volatility, improved safety by introducing standards for storage and dispensing facilities, ensuring quality and furthering the Government's policy of promoting public-private partnerships in major infrastructural investments are clearly in the public interest. To the extent that the law created different categories of potential LPG importers, ie, (i) the NGC and (ii) the respondents who had passed their imports through the NGC facility and pay a transparently calculated user fee to support the establishment and operation of the facility, the differentiation appears to be rationally connected to the objectives specified in the legislation. As discussed earlier in relation to the 'Right to Property Claim', (see particularly [75] to [82]), there was 'good reason' for the differentiation, and the effects were not disproportionate to the legislative objectives.

### **Remedies**

[120] The Court of Appeal found that there had been a violation of the constitutional rights to work under s 15 and to protection of property under s 17 of the Constitution. It ordered two primary remedies. First, the severance of the first condition specified in sch II to the NLPGP Amendment Act, namely, that each Authorized Import Facility is required to have a minimum installed storage capacity of no less than one and a half million (1.5 million) US gallons. Second, that the

issue of the financial loss sustained be remitted to the High Court for an assessment of damages to be conducted.

[121] In view of my finding that there was no breach of the constitutional provisions in issue, the remedies ordered fall away. An award of vindictory damages is not appropriate in the absence of constitutional breach. This leaves only the issue of costs to be determined.

### **Costs**

[122] In both courts below, each party was ordered to bear its own costs. This order was appealed in both the appeal and the cross-appeal with the parties seeking to be awarded costs in this Court and the courts below respectively.

[123] In *Titan International Securities Inc*, it was held that it was not appropriate for this Court to interfere with the exercise of a judge's discretion as it relates to costs, unless we are satisfied that the exercise of the discretion was plainly wrong.<sup>157</sup> We have no evidence that the courts below were plainly wrong in ordering that each party bears its own costs and no submissions were raised to persuade the Court to interfere with such orders.

[124] As regards costs in this Court, at the case management stage in this matter, the parties had indicated through their filed Case Management Checklists that there was agreement on the value of the appeal at USD29,125,000 and that costs be awarded in accordance with sch 2 to the Caribbean Court of Justice (Appellate Jurisdictions) Rules 2024 ('the Rules') in the event of a full success on appeal and cross-appeal but that such total costs be appropriately adjusted to reflect any partial success only of the appeal or cross-appeal in favour of any party.

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<sup>157</sup> *Titan International Securities* (n 12) at [61].



[125] Generally, the successful party is entitled to costs. However, the Court may take into account other considerations in assessing liability as to costs. These considerations are aptly outlined in r 17.4(3) of the Rules:

In deciding who should be liable to pay costs, the Court shall have regard to all the circumstances and in particular the Court shall have regard to –

- (a) the conduct of the parties both before and during the proceedings;
- (b) whether a party has succeeded on particular issues, even if that party has not been wholly successful in the appeal or proceedings;
- (c) any offer to settle made by a party drawn to the Court’s attention;
- (d) whether it was reasonable for a party
  - (i) to pursue a ground of appeal;
  - (ii) to raise a particular issue;
- (e) the manner in which a party has pursued –
  - (i) the appeal;
  - (ii) a ground of appeal;
  - (iii) a particular issue;
- (f) whether an appellant who has succeeded in their appeal, exaggerated their claim.

[126] As regards these factors, the consideration in r 17.4(3)(d) as to the reasonableness of the conduct of the party appears most relevant. As it relates to the costs in the appeal and the cross-appeal before this Court, in *Gaskin v Minister of Natural Resources*,<sup>158</sup> it was acknowledged that private citizens should be encouraged to pursue litigation to affirm their constitutional rights.<sup>159</sup> This encouragement stands in relation to actions that are not deemed frivolous, vexatious or unmeritorious.

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<sup>158</sup> [2024] CCJ 14 (AJ) GY, (2024) 105 WIR 385.

<sup>159</sup> *ibid* at [93], [135]–[136], [165]–[166].

[127] The protection of one's constitutional rights and the ability to institute claims is of great public interest. The LPG companies, though ultimately unsuccessful before this Court, sought to challenge legislation which, to them, adversely affected their constitutional rights. This claim and the important constitutional issues raised were novel to this Court and reasonable for the LPG companies to pursue in protection of their rights enshrined in the Constitution of Belize. Their business structures would inevitably be required to be adjusted in compliance with the current statutory framework. The arguments submitted to this Court could not reasonably be labelled frivolous, vexatious or entirely unmeritorious. As such, the LPG companies did not act unreasonably to ask the Court to pronounce on the constitutionality of the legislation and both sides acted reasonably in pursuing their appeals up to the apex Court due to the public importance attached to the circumstances of this case.

[128] This Court's general approach has been to make no order as to costs in constitutional appeals when the person challenging the actions of the State is unsuccessful based on the public importance. This approach does not necessarily hold where the State is found to have acted unconstitutionally, as costs may be awarded to the successful party in latter cases.<sup>160</sup> In the circumstances, and consistent with the Court's approach, there shall be no order as to costs.

### **Disposition**

[129] For the reasons above, I conclude that the appeal should be allowed and the cross-appeal dismissed, with no order as to costs.

### **BARROW J:**

[130] This appeal and cross-appeal concern the divisibility of the goodwill of the business that each respondent separately conducted and whether there was an

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<sup>160</sup> See *A-G of Guyana v Jones* [2024] CCJ 20 (AJ) GY at [29]; *A-G of Belize v Gabourel* [2024] CCJ 13 (AJ) BZ, BZ 2024 CCJ 5 (CARILAW), (26 June 2024); *Sears v Parole Board* [2022] CCJ 13 (AJ) BZ; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, (2020) 100 WIR 109.

unconstitutional taking or deprivation of a portion of it. The courts below found there had been a taking by the legislation that created a new regime for the importation and sale of liquefied petroleum gas ('LPG') in Belize.

### **Product and Parties**

[131] LPG is widely used for a variety of purposes and has a high demand in Belize since it is used for cooking in 83 per cent of homes. It is sourced from the US Gulf Coast ('USGC'). Historically, there was no direct marine terminal facility in Belize to receive the product; instead, LPG was shipped to terminals in Honduras, Guatemala, and El Salvador and then trucked into Belize from across the border with Guatemala.

[132] The respondents, originally the claimants, also referred to as 'the Gas Companies' and 'the Companies', are Gas Tomza Ltd, Western Gas Company Ltd, Southern Choice Butane Ltd (dba Zeta Gas) and Belize Western Energy. Together, the Gas Companies controlled the import of LPG into Belize for over 20 years. Each of the Companies sourced LPG from established suppliers in the neighbouring Central American countries and the evidence of the Controller of Supplies was that the Companies were all subsidiaries of larger companies within South and Central America, dominated by the Zaragoza family of Mexico, which controlled the LPG market in Belize and Central America. Gas Tomza was said to be the namesake of Tomas Zaragoza, and Zeta Gas and Tropigas were said to be associated with Miguel and Eduardo Zaragosa. Various intermediary owners in Guatemala and Mexico were identified.<sup>161</sup>

[133] The appellants are, firstly, the Controller of Supplies, a public officer under the Supplies Control Act,<sup>162</sup> responsible for the oversight and control of the pricing aspect of the LPG industry in Belize. The second appellant is the Minister of Economic Development, Petroleum Investment, Trade and Commerce who has

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<sup>161</sup> Record of Appeal, 'First Affidavit of Lennox Nicholson' 3611.

<sup>162</sup> CAP 293.

responsibility for the LPG industry. The third appellant is the Attorney General of Belize ('A-G') who is the legal representative of the State. The appellants are also sometimes referred to as 'the Government' or ('GOB').

### **The Legislation**

[134] For stated policy reasons, the Government entered into a Public Private Partnership ('PPP') agreement, pursuant to which, it embarked on the National Liquefied Petroleum Gas Project (the 'NLPG Project' or the 'Project'). A PPP was described as a business arrangement to meet the challenge of having large infrastructure deficits against a background of limited fiscal space to respond. It combines public and private sector skills and resources while sharing risks and responsibilities. The Project provided for engagement of the National Gas Company Ltd ('NGC'), the PPP partner, as the development vehicle. A Definitive Agreement dated 10 July 2018 between the Government and NGC was made to govern the importation of LPG, which was to be wholly by sea, and the construction of supporting infrastructure for importation, distribution and supply of LPG throughout Belize. In pursuance of this design, the National Liquefied Petroleum Gas Project Act<sup>163</sup> ('the Original Act') was enacted on 4 September 2019 which introduced a new regulatory regime for the LPG industry. By this regime all LPG would be purchased in a tender process from abroad, imported into Belize directly by sea from USGC, and received, tested and stored at a marine terminal at the Port of Big Creek and thereafter stored at bulk depots at specified parts of the country for wholesale distribution.

[135] The long title of the Original Act identified its objects as including the establishment, operation and transfer of an LPG terminal and related facilities, the proper rationalisation of cost, supply and pricing and enhanced efficiency of the LPG sector, optimising quality control and the overall interest of the public. Other significant public interest objectives were stated but for present purposes, those

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<sup>163</sup> Act 12 of 2019.

stated in the Original Act are sufficient for drawing attention to the pricing and financial dimension of the new regime as a primary focus of the policy and which attracted surprisingly little consideration.

[136] Section 5 of the Original Act provided for the NGC to be the sole importer of LPG. The creation of this monopoly provided a clear target for the respondents who contended that such a structure stifled competition to the detriment of consumers and caused financial loss to the respondents, for which they should be compensated and, accordingly, the respondents brought a claim in the High Court. Before the claim was heard, the National Assembly passed the National Liquefied Petroleum Gas Project (Amendment) Act 2021<sup>164</sup> ('the Amended Act') which added ss 6A and 6B. These provided, in essence, for the elimination of the NGC monopoly by permitting other persons to be authorised to build landing terminals. The amendments also provided for other persons to be permitted to import and use the Big Creek terminal.

[137] The respondents scoffed that it was illusory to permit the building of a rival landing terminal and facilities, as this was an impossibility for them because the cost would have been in the region of USD60 million. The Court of Appeal regarded this intended relaxation of the monopoly as unrealistic and decided it did not save the legislation.<sup>165</sup> As regards to the amendment now providing for the respondents to be able to use the landing terminal at Big Creek to resume importing, while the trial judge did not dismiss this option, Bulkan JA did so,<sup>166</sup> ultimately describing it as 'unpalatable'.<sup>167</sup> That description prompted very experienced leading counsel for GOB to confess that for him this was a new standard by which to consider the constitutionality of legislation. Again, the Court of Appeal decided that the amendment did not rescue the legislation from unconstitutionality. In the result, the Court of Appeal upheld the High Court decision that the legislation violated the

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<sup>164</sup> Act 44 of 2021.

<sup>165</sup> *Controller of Supplies* (n 11) at [74].

<sup>166</sup> *ibid.*

<sup>167</sup> *ibid* at [163].

constitutional rights of the respondents to property and expanded on it by finding that, as well, the legislation also violated the respondents' right to work.

### **The Previous Situation**

[138] Mr Joseph Waight, the Financial Secretary, was the key witness for the GOB because he presented the official Government position, identifying the information and viewpoints upon which the GOB acted.<sup>168</sup> Where his evidence conflicts with evidence from the respondents there is no need for choosing between them as reliance on GOB's version is solely to provide the bases upon which GOB acted and the detailed accuracy of that information is not presently significant.

[139] Mr Waight was not challenged when he described in cross-examination how the industry previously operated, when the respondents were importers and brought in 90 per cent of the total supply of LPG for the local market. The respondents were always both wholesalers and retailers. Of the total amount imported, the records revealed that the respondents would sell 45 per cent to wholesale customers, who were also wholesale and retail distributors in competition with the respondents. These competitors would sell to sub-distributors as well as to their own retail customers. Of the 55 per cent balance of LPG imported, the respondents would sell some to other wholesale customers or distributors and some to the respondents' own retail customers.

[140] The respondents could have freely determined the wholesale price they charged to wholesale customers because the wholesale price was not fixed by law. However, the retail price was fixed by law. Therefore, the markup and margin of profit that the competitors were able to charge was the difference between the wholesale price they had to pay and the fixed retail price. At this time, besides the competing wholesalers there were other dealers who also purchased wholesale from the respondents. Some of these dealers were affiliated with the respondents. To them,

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<sup>168</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 26 July 2021) 4385, 4627.

the respondents sold at a more favourable wholesale price, enabling them to enjoy a greater differential between the wholesale price at which they purchased and the fixed retail price. Thus, a more generous markup and profit margin to a select cohort. GOB regarded this differentiation in pricing as price manipulation. This price manipulation is a factor to bear in mind when consideration is given below to goodwill, because the practice would hardly have earned for the respondents the goodwill of the competing wholesalers.

### **The New Regime**

[141] As expressed in the first affidavit of Mr Waight,<sup>169</sup> a major objective of the new regime was to eliminate the opportunity to manipulate and control prices. The design of the public private partnership was to exclude incentive for profit manipulation by investors, by having repayment of debt and return on investment set by the Original Act and by benchmarking return on investment to the Belize market. NGC's prices, applicable and uniform throughout Belize, were fixed by the pricing methodology prescribed in the legislation and controlled by the Belize Bureau of Standards. As Mr Waight saw it, prices to the public were therefore transparent because they were not subject to transfer pricing as they had been when the respondents, their regional parent companies, and their local affiliated companies could have shifted profits, losses and costs between themselves to control and dominate the supply, price and sale of LPG. This was described as an oligopoly.

[142] Mr Waight saw the new regime as marking the establishment of a supply system whereby all industry players, inclusive of the respondents, now had access to LPG on an equal basis across the country.<sup>170</sup> This levelled the downstream playing field in this essential services market and created an environment in which there could be true competition in the retail sale and distribution of LPG in Belize. It was an

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<sup>169</sup> Record of Appeal, 'First Affidavit of Joseph Waight' 2860.

<sup>170</sup> *ibid* 2863.

important element in this arrangement that NGC's role was restricted to importation and bulk supply, and it was not involved in the downstream distribution and retail of LPG.

[143] On Mr Waight's view, the respondents were free to carry on their business of LPG distribution and retail in Belize, only now they had to purchase their supply from NGC and not source supply directly from their parent companies. He said the parent companies could continue to supply Belize, but they now had to do so through an open and fair competitive tender process. This harks to the fact that NGC itself was obliged to do exactly as described, when it purchased LPG, consistent with the fact that a pillar of the new regime was that the facility was built to be owned ultimately by the State and, until transferred, was to be operated under strict government control. The Project made NGC the 'Developer' and required it to comply with very specific regulations set by law on a range of matters, including quality, pricing, and operations.

[144] There was abundant material that demonstrated GOB's intention to operate a new regime based on transparency, fairness and the national interest. One example of the detailed regulation that was legislated to govern the industry is the wholesale price setting exercise that was required to be conducted by the Belize Bureau of Standards and the Developer. On the receipt by the Developer of each bulk delivery of LPG, the wholesale price at which LPG would be sold to the Belizean public would be set by reference to prescribed considerations and not, as might have been expected, solely according to how much a private distributor thought they could get away with; reg 2 in the Schedule to the Original Act. Another random example, of detailed operational control, was art 13.1.15 of the Definitive Agreement which mandated the Developer to '[e]nsure that business is conducted with local buyers on a non- discriminatory basis and that no interested local buyer is unreasonably denied business with the Developer.'<sup>171</sup>

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<sup>171</sup> Record of Appeal, 'Second Affidavit of Giacomo Sanchez' 3873, 3886.



## **The Claim Against Taking**

[145] The Gas Companies succeeded on their claim that, by having been barred from importing, they lost a substantial proportion of their consumer base which was acquired by the NGC being the sole entity permitted to import LPG. The companies had challenged the constitutionality of the Act claiming that the monopoly conferred on the NGC, together with the various tax exemptions, violated their rights to the enjoyment of property, to work, to their freedom of association, to protection under the law and to equality of treatment guaranteed under the Constitution. They claimed compensation for breach of their rights as alleged and vindicatory damages.

[146] The Court of Appeal upheld the decision of the trial judge that the Gas Companies' right to property under s 17 of the Constitution was violated by the legislation by reason of the monopoly to import LPG into Belize which it conferred upon the NGC and subsequently maintained. Section 17<sup>172</sup> states:

17.-(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that,

(a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of,

...

(ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;

(iii) determining the amount of the compensation to which he may be entitled; and

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<sup>172</sup> Belize Constitution Act (n 2) s 17.

(iv) enforcing his right to any such compensation.

[147] The courts decided that the monopoly resulted in the compulsory possession of the goodwill in the claimants' LPG import business by the NGC without compensation. The trial judge was quoted for her finding that:

... there can be no doubt that the direct effect of the Original as well as the Amended Act is that the NGC abruptly seized the clients and customer base of all five of these Claimant companies that they had established in Belize over the past thirty years, without compensation, thereby violating the Claimants' constitutional right to property.<sup>173</sup>

Therefore, the Court of Appeal confirmed, compensation had to be paid, since the Gas Companies' customers were all acquired by NGC, the sole importer licensed to import.

[148] Bulkan JA considered the argument of GOB that none of the consequences of the legislation amounted to a taking as the effect of the legislation was merely to divert the erstwhile customers of the Gas Companies to NGC. The judge found this was 'a very narrow view of the right, which covers not just "takings" and "acquisitions" in s 17(1) but also "deprivation", which is expressly protected against in s 3.'<sup>174</sup> He found it was 'not true to describe what happened as the claimants simply being deprived of their customers, because the customers they lost were immediately acquired by the NGC'.<sup>175</sup> He regarded the case of *Ulster Transport Authority*<sup>176</sup> as showing that statutory diversion of customers from one company to another amounts to an acquisition.

[149] The judge made this decision after tracing the monopoly that was created and maintained by the legislation. His Lordship concluded at [77]:

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<sup>173</sup> *Gas Tomza* (n 9) at [13].

<sup>174</sup> *Controller of Supplies* (n 11) at [72].

<sup>175</sup> *ibid.*

<sup>176</sup> *Ulster Transport* (n 60) at 112 (Lord MacDermott LCJ).

Accordingly, the claimants suffered a loss of their property involving both goodwill and their business as an ongoing concern as a result of the legislative scheme which first conferred a monopoly on a competitor and then maintained it in a de facto manner by imposing unattainable conditions for re-entry into the LPG market. These measures were not to facilitate any of the goals identified in s 17(2), and even if were for the more generic ‘public interest’ goal, were too excessive and disproportionate for the losses suffered by the claimants. This was accordingly a ‘taking’ or ‘acquisition’ for which compensation was required, and in the absence of any such provision in the enabling legislative measures, the claimants sustained a violation of their right to property under s 17(1) of the Constitution and the learned trial judge did not err in so finding. I therefore find no merit in GOB’s appeal against this finding.<sup>177</sup>

Five grounds of appeal were filed by GOB and these addressed some refined constitutional issues, such as the constitutionality of limiting measures, the compensability of regulatory measures and the nature of a taking rather than a regulating, the right to work and more. The grounds addressed, as well, alleged errors in the findings made in the courts below as well as the remedies ordered.

### **Existence of Import Businesses**

[150] Clarity of exposition may be served best by considering first the appeal by the Attorney General which was monolithic. It addressed itself to what it presented as the primary issue in these proceedings, namely the finding that there was a breach of s 17. The A-G contended that the legislation did not deprive the respondents of their goodwill as importers because they did not have businesses as importers. That issue is fundamental because the claim for compensation was for taking the goodwill of the respondents’ LPG Import Business (capitalisation provided by the respondents). As seen above, in both courts the decision was that the effect of the legislation was to acquire the goodwill in the companies’ LPG import businesses.<sup>178</sup>

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<sup>177</sup> *Controller of Supplies* (n 11) at [77].

<sup>178</sup> See *Gas Tomza* (n 9) at [11]. This is the specific question that the trial judge considered and decided in favour of the companies. As mentioned, *Controller of Supplies* (n 11) at [77], the Court of Appeal endorsed this finding.

[151] It may be observed that in the High Court the judgment dealt with the companies being importers of LPG by stating only the commonly accepted fact that they carried on their businesses as wholesalers and retailers by themselves importing the product.<sup>179</sup> The evidence that the court discussed indicated the companies were importers only to obtain LPG for the purpose of selling it to wholesale and retail customers. There was no reference to evidence of a business of the respondents as importers as distinct from their businesses as wholesalers and retailers – or distributors. There was no evidence of there ever having been income from supposed customers of the alleged Import Business. The evidence of loss the respondents suffered to their LPG Import Business was only the loss of wholesale customers. Because the NGC did not sell as retailers the respondents could not claim any loss to the retail side of their businesses. Loss of wholesale customers was their only loss, and they tied their claim to it.

### **Submissions on the Facts**

#### **Submissions of GOB**

[152] The heart of the case for the Attorney General was that there was no evidence that any goodwill of the respondents passed to NGC. The A-G argued it was a false narrative that the companies operated multiple businesses because each respondent adduced a single Trade Licence for their single business. It was submitted that each Licence accurately described each business as ‘**Retail - Fuel Dealers LPG.**’ There was no evidence of trade licenses for ‘import businesses’ or ‘multiple businesses.’ It was a fiction that the respondents operated separate retail businesses and import businesses, and the reality was expressed in the licence. The stubborn fact, the A-G submitted, was that each of the respondents’ retail business continued to operate.

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<sup>179</sup> *Gas Tomza* (n 9) at [11].

[153] References were made to the cases of *Manitoba Fisheries*<sup>180</sup> and *Ulster*<sup>181</sup> to demonstrate the situation where in each of those cases the purpose and effect of the legislation was to obliterate the companies' entire business or to destroy the companies' businesses (*Manitoba*). As was stated in *Ulster*, the company lost completely certain portions of their business and the goodwill which existed in respect of that portion.

[154] The contrast was drawn with the instant case where, it was argued, the impact of the Amended Act is on the importation of LPG and it does not prohibit or restrict the companies from offering their business to their customers. The fundamental point, it was stated, was that in both *Manitoba* and *Ulster* it was the express intent of the legislature, as provided in the relevant Acts, to acquire property. In *Manitoba*, the legislation provided a scheme to acquire the property and to compensate property owners. It was because the province of Manitoba refused to pay compensation that there was litigation. In *Ulster* the legislation prohibited the respondents from continuing to carry on their business of furniture removal for reward and provided that only the Authority was permitted to engage in that business. This was held to be both a taking away and a taking over of the respondent's business.<sup>182</sup>

[155] In the present case, the A-G notes that the respondents contend that their property, being goodwill, was taken by the NGC or in any event, they were deprived of it because they have lost their customers and goodwill, and the right to manage and control their own affairs should they import through the NGC's LPG terminal. In response to that, the A-G argued that the companies continued to carry on their businesses, and the goodwill continues to attach.

[156] The A-G submitted that while the companies now assert deprivation of property, namely goodwill, the record reflects that the case that the Gas Companies

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<sup>180</sup> *Manitoba Fisheries* (n 69).

<sup>181</sup> *Ulster Transport* (n 60).

<sup>182</sup> *ibid* at 112.

marshalled before the trial judge was for loss of profits. They failed to prove the existence of the companies' goodwill, that such goodwill was taken and that it was received by the NGC.

[157] Attention was drawn to the pleadings to note that while the respondents pleaded that their s 17 rights had been infringed, because they had been deprived of their property, there was no pleading specifying that the property was goodwill. The issue of goodwill was raised for the first time in the pre-trial memorandum. The submission continued that evidence with respect to loss of goodwill was absent. It was stated that the relevant witnesses all deposed to the loss of profits in their respective businesses and in addition one witness gave evidence regarding the closure of his business.

[158] Only one witness, it was submitted, mentioned in his witness statement that there was loss of goodwill and the relevant passage was reproduced. It is safe to interject that the passage was pure argument and not fact<sup>183</sup> and in cross-examination the witness offered no information that substantiated the assertion of goodwill.<sup>184</sup> In summary, it was submitted there was no evidence that advanced the case for the existence of goodwill.

### **Submissions of the Gas Companies**

[159] The respondents acknowledged that their customers who wanted to patronise their LPG business could still do business with them. The nub of their case, however, as presented in their written submission, was that given that they, the respondents, were now required to purchase LPG from NGC, then in order to make any profit the respondents would naturally have to put a markup on the LPG they, in turn, sold to their customers. But, the respondents submitted, it would not make sense for the respondents' erstwhile customers to purchase at a hypothetical higher, marked up price, from the respondents when the said customers could just as well purchase

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<sup>183</sup> Record of Appeal, 'Second Affidavit of Aureliano Rafael Bautista Cifuentes in support of an Application for an Urgent Injunction' 175.

<sup>184</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, September 2022) 4385, 4509.

from the NGC at the same price the respondents were required to pay to NGC. This, said the respondents, is what resulted in the respondents losing their customers in droves to the NGC, as the evidence established.

[160] The respondents submitted that, as evidenced by this staggering loss of wholesale customers which the respondents have suffered, clearly many of the respondents' former customers in fact do want the services of an '*LPG Import Business*', as opposed to an '*LPG Retail Business*', and therefore started doing business with NGC (emphasis added).

[161] The submissions continued that:

Applying the principles of *Manitoba Fisheries* and *Ulster Transport* to the present case, it is clear that the NGC has acquired the Respondents' goodwill in their LPG Import Businesses – with the obliteration of their LPG Import Businesses, the Respondents have lost all their associated goodwill.<sup>185</sup>

The Respondents then asked, 'And whither has the goodwill gone?'. The respondents' answer to their question is that it went to:

... the only entity which is practically capable of running an LPG Import Business under the NLP legislation. Therefore, the NGC must get what the respondents must lose -- namely the goodwill in their LPG Importing Businesses.<sup>186</sup>

[162] The respondents particularise their loss by referring to the fact that they were all well-established profitable businesses with long experience in the specialised sphere of the LPG Import Business. They had regular customers whom they could expect would continue to use their LPG import business and a reasonable expectation that they might attract new customers based on their repute. It was obvious, they said, that they had substantial goodwill in the LPG Import Business.

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<sup>185</sup> Respondents, 'Respondents' Written Submissions responding to 3<sup>rd</sup> Appellant dated 29 October 2024', Submission in *Controller of Supplies v Gas Tomza*, BZCV2024/003, 29 November 2024, 11.

<sup>186</sup> *ibid.*

[163] Following the passage of the legislation, the respondents said, they could no longer import LPG or make the profit associated with such importation and:

In order to survive as businesses, the respondents had to resort to a new business of purchasing LPG from the NGC, thus foregoing the profit associated with importation. However, because the regulated wholesale price was always equal to the NGC's wholesale price – they were now limited to selling LPG on a retail basis only and not to wholesale customers as before.<sup>187</sup>

### **Consideration of Goodwill**

[164] In their written response submissions, the companies accepted that, except for one company which closed, they continued to do business. It was undisputed and immaterial that the respondents suffered a loss of profit, but this had no bearing on the issue in dispute, which was whether the loss of the ability to import, whether by express legislative prohibition under the Original Act or by the requirement to satisfy allegedly impossible conditions under the Amended Act, was a loss that amounted to a breach of s 17 of the Constitution. Did that loss of the ability to import take the property of the companies, which they identified as the goodwill that they possessed as importers?

[165] There was no disagreement on the meaning and nature of goodwill, which Bulkan JA summarised by saying that as used in connection with a business activity, the expression ‘goodwill’ captures the positive reputation of a business and its likely continued patronage by clients considered as part of its market value. In *Ulster*<sup>188</sup> Lord McDermott LCJ explained the concept as follows:

“Goodwill” is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense the word may connote much more than this. It is, as Lord Macnaghten observed in *Inland Revenue Commissioners v. Muller* ... “the attractive force which brings in custom,” and it may reside, not only in trade connections, but in many other quarters, such as particular premises, long experience in some specialised sphere, or the good repute associated

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<sup>187</sup> *ibid* 13.

<sup>188</sup> *Ulster Transport* (n 60).



with a name or mark. It is something generated by effort that adds to the value of the business.<sup>189</sup>

[166] As the loss of profit that the respondents suffered was not actionable as a breach of their s 17 right to protection of property, this left the companies to pitch their loss as being the loss of goodwill, which is commonly accepted as property for which compensation must be paid for its acquisition or taking. The fact that the Gas Companies continued to operate their businesses contradicted the assertion that the goodwill of the businesses had been acquired or taken. This left the respondents able to claim only that the goodwill in the importation side of their businesses had been taken, forced as they were to concede there was otherwise no taking of goodwill.

[167] The case for the A-G was that goodwill is not divisible in this way. For this, reliance was placed on the statement of Lord Macnaghten in *Commissioners of Inland Revenue*.<sup>190</sup>

To analyze goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.

[168] In that case, a manufacturer who conducted business in Germany sold to an English company his business, manufactory and the goodwill under an agreement by which different amounts were paid for different elements of the business. The agreement was prepared in England, signed by the seller in Holland and signed by the purchaser in England. The issue that arose, for Stamp Duty purposes, concerned where the sale took place and, more materially, whether the goodwill was located abroad. The House of Lords determined that as the business to which the goodwill

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<sup>189</sup> *ibid* at 109.

<sup>190</sup> *Commissioners of Inland Revenue* (n 58) at 224.

was attached began and ended abroad the goodwill was located abroad. Goodwill, it was stated, had no independent existence; it must have a locality and attach to a business and was located where the business was located. To relate this principle of attachment to a business to the instant case, the goodwill in issue attached to the respondents' businesses as wholesalers and retailers of LPG. The customers, in the instant case, bought the product from the respondents because the respondents supplied them; not because the respondents imported the product. This last statement is vindicated by the evidence that there were customers who continued to buy wholesale from the respondents notwithstanding the respondents ceased to be importers.

### **Importation**

[169] The ability of the respondents to import enabled them to determine the markup on the price at which they would sell to the local wholesale and retail market. GOB argued there was no evidence of anything that made importation of LPG a business in itself, distinguishable from the general business of selling LPG. There was nothing that spoke to goodwill in the importation of the product, separate from the goodwill the companies enjoyed as licensed retail dealers.

[170] Bulkan JA rejected the argument by GOB<sup>191</sup> that there was no loss of goodwill by the respondents. The judge correctly identified GOB's argument about goodwill to be that the claimants imported LPG for themselves and had no separate importation business, distinct from their wholesale and retail sales. The judge described the submission as lacking a clear evidential foundation and referenced the testimony of the accountant for Southern Choice Butane Ltd who explained that they never needed storage space as wholesalers because their product would move directly from their supplier's facility through the border to their customers in Belize.<sup>192</sup> This, said the judge, was precisely the opposite of what GOB argued because this witness affirmed that they were not importing for themselves and then re-selling

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<sup>191</sup> *Controller of Supplies* (n 11) at [45].

<sup>192</sup> *ibid.*

but importing and supplying customers directly. The judge regarded the testimony of other witnesses on this aspect, such as Ms Gutierrez for Belize Western Energy Ltd, as hardly reliable since the point being made was obscure and it did not appear from a careful reading of the cross-examination that they understood what was being asked.

[171] The judge continued that, at any rate, even if the course of business was as described by GOB for companies other than Southern Choice—namely that they did not import for customers for a price but would import LPG and then re-sell to customers in Belize—that did not mean that they had no importation business. The judge stated not only is the distinction upon which this submission rests strained and artificial, it also defied logic. He continued:

According to the evidence, the LPG companies were not importing LPG to consume it themselves. They did so as part of a business for profit, in which they would re-sell to customers, many of whom were regulars. *The importation was not a standalone transaction followed separately by resale—rather these were different stages of the same business.*<sup>193</sup>

[172] With respect, the underlined statement in that passage from the judgment collides head-on with the exposition that preceded it. The latter passage recognises and affirms the very thing that was submitted to the judge: importation of LPG was not a separate business distinct from wholesale and retail sales. This fact, which was a finding made by the judge and not an interference on appeal by this Court with a concurrent finding of fact, vindicates GOB's case that there was no separate goodwill in the importation activity of the companies' businesses that was taken or lost.

[173] The case of *Ulster*<sup>194</sup> provides a cogent illustration of the situation where the transportation of the goods or object was the business of the claimants and prohibiting them from continuing to do so took away their property in that business.

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<sup>193</sup> *ibid* at [46] (emphasis added).

<sup>194</sup> *Ulster Transport* (n 60).

In that case, the respondents were in the business of transporting furniture for reward. They also provided storage. The furniture belonged to owners by or for whom the respondents were engaged as movers. The legislation prohibited the respondents from transporting furniture and provided that only the authority could do so. It was decided in favour of the respondents in that case that their interest in carrying on furniture removal work of the type prohibited was property, of which they were deprived by the legislation. The stark difference with the present case is that the current respondents were not the carriers or haulers of the LPG. The current respondents had no customers who paid them to import because they were importing for themselves, to obtain for themselves a supply of the product to sell in their businesses as LPG dealers.

[174] GOB's submission that there was no evidential foundation that importation was a separate business was well supported in the transcript of the cross-examination of the witness, Ms Amira Gutierrez, general manager and accountant for Belize Western Energy. In the High Court, counsel extracted from the witness, in amplification on her witness statement, that customers did not engage her company to import on their behalf.<sup>195</sup> It was hardly an obscure point but central to the evidence of the witness as to the importation side of their business. The witness agreed to the suggestion that her company imported for itself and then sold the LPG it imported to customers on a wholesale and retail basis.<sup>196</sup>

[175] It is recalled that the judge gave weight to the argument of the existence of a separate import business based on testimony by the accountant for Southern Choice Butane Ltd, Mr Uh, who explained that they never needed storage space as wholesalers because their product would move directly from their supplier's facility through the border to their customers in Belize.<sup>197</sup> Again, there is no need to disturb this finding of fact because it is the conclusion drawn from the fact that calls to be examined. Thus, the judge did not appear to have considered this fact as showing

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<sup>195</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 28 June 2021) 4385, 4399.

<sup>196</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 28 June 2021) 4385, 4400–4401.

<sup>197</sup> *Controller of Supplies* (n 11) at [45].

how the respondents made delivery to the respondents' customers in Belize and that the delivery described may have been simply a matter of convenience for that company, given that LPG was transported sometimes daily across the border. The evidence of Mr Bautista Cifuentes, who testified for all respondents, was that the respondents had no need to build terminals because deliveries would be made within 12 to 24 hours.<sup>198</sup> The trucks, called bowzers, used to transport LPG had a capacity of 11,000 gallons and came from Honduras, El Salvador and Guatemala. These trucks, it would appear, were foreign-owned and dispatched.

[176] For the Southern Choice system of importation and direct delivery to wholesale customers to amount to evidence that the company was thereby conducting an Import Business, the evidence would have needed to show that the product being imported was owned by the customers to whom it was being delivered and that they were paying the company to transport it. The evidence, instead, was that the local wholesalers were buying product from Southern Choice (and the other respondents) who themselves bought the product from abroad and had it delivered into Belize to sell it or fulfil orders for sales already made.

[177] In any event, the evidence from Mr Uh on which the learned Justice of Appeal relied, as to the existence of a separate import business, pointed to a conclusion different from that reached by the judge. In cross-examination, responding to the suggestion that the importation the respondents did was merely part of their wholesale and retail business, the witness accepted this as the fact. He testified as follows:<sup>199</sup>

Q: You regard the importation activity as a separate activity from your retail and wholesale businesses?

A: I would say it's the same process. It's part of the same.

Q: Well, that's what I asked just now when you told me no. The importation activity is part of your retail and wholesale business, is that not so?

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<sup>198</sup> Record of Appeal, 'Third Affidavit of Aureliano Rafael Bautista Cifuentes' 183.

<sup>199</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 28 June 2021) 4385, 4452.

A: The importation we do is as a central --- how can I explain this? When we used to import LPG into the country, we import it and brought it to our facilities and from there is where we made our wholesale and retail sales.

Q: So you imported the LPG for the benefit of yourself in order to create your inventory of LPG for sale to others, is that not so?

A: Correct.

Q: Mr. Uh, I'm going to suggest to you that Southern Choice Butane Limited in fact engage in no separate import business, isn't that so? You can say agree or disagree.

A: Disagree.

Q: I'm going to suggest to you further that the importation of LPG by Southern Choice Butane Limited merely allowed Southern Choice to earn a greater profit from the sale retail and wholesale of LPG in Belize, isn't that so?

A: Yes.

...

In my view, that was the clearest evidence that the respondents did not have Import Businesses. I find it conclusive.

### **Competition**

[178] The Government's policy decision to regulate the LPG market provided in the Definitive Agreement<sup>200</sup> for NGC to sell to wholesale buyers generally and not only to the respondents. This meant that the respondents now had a competitor in selling on the wholesale market. As the respondents appreciated, the price at which they could sell was fixed. The price at which the respondents could sell was the same as the price at which NGC could sell generally, and at which it could and did sell to the respondents.<sup>201</sup> As a matter of regulation, therefore, and consistent with the

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<sup>200</sup> Record of Appeal, 'Second Affidavit of Giacomo Sanchez' 3873-3912.

<sup>201</sup> *ibid* 3887.

evidence of the Financial Secretary,<sup>202</sup> the respondents and NGC were statutorily placed and kept on an equal price footing for attracting wholesale customers.

[179] The analysis presented above indicates that the respondents' loss of customers in the wholesale sector was the consequence of competition. The customers that the respondents lost were the previously mentioned competing wholesalers who had their own retail customers, and who previously were forced to buy wholesale from the respondents at a manipulated price, as GOB saw it. As mentioned, these competing wholesalers would hardly have had any goodwill towards the respondents.<sup>203</sup> More dispositively, an analysis of the legislation shows nothing in it that forced the respondents' former wholesale customers to cease buying from the respondents. The reality was that the legislation created a competitor—NGC. The legislation gave the competing wholesalers a choice, where before there was no choice. Those customers were now free to choose from whom to purchase and to whom to give their custom.

[180] The customers the respondents lost in droves were those who made the choice the legislation gave to them. Notwithstanding the trial judge's metaphorical expression that the direct effect of the legislation was that NGC 'abruptly seized' the customers, the customers were not taken from the respondents. It is significant that it was not claimed that the respondents lost *all* their wholesale customers, which necessarily means the respondents kept some wholesale customers, even if others left 'in droves'. The fact that the respondents kept some of their wholesale customers<sup>204</sup> is full support for the proposition that the legislation did not take away the respondents' customers. As a matter of legal reasoning and interpretation, it would have been impossible for the legislation, in the terms enacted, to seize some, but not all, the wholesale customers. The customers were not legislatively seized.

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<sup>202</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 26 July 2021) 4385, 4603–4659.

<sup>203</sup> See [140] above.

<sup>204</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 26 July 2021) 4385, 4630–4634. See also Record of Appeal, 'First Affidavit of Lennox Nicholson', 3720.

[181] As a further matter of legal interpretation and at the risk of repetition, neither the Original nor the Amended Act prevented the respondents from continuing to sell LPG to wholesale customers. All the previous wholesale customers of the respondents were completely free, after the legislation, to continue buying from the respondents and, to repeat, some wholesale customers continued to do so.<sup>205</sup> Some did not; they turned away from the respondents. It is a wry observation that the respondents did not lose the goodwill of those customers who had been competing wholesalers. As discussed,<sup>206</sup> the respondents never had their goodwill.

### **Right to Work**

[182] The decision herein that the legislation did not take or acquire the respondents' purported import businesses and did not seize their customers reduces the scope of consideration needed of whether the legislation violated the respondents' constitutional right to work. Section 15 of the Belize Constitution provides:

15.-(1) No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise.

[183] The Court of Appeal reversed the trial judge who had decided this right had not been violated and, instead, found the right had been breached because the respondents lost their import businesses and, therefore, the right to work in that business. The court concluded that the conditions on importing were an unjustifiable violation of the respondents' s 15 right and therefore unconstitutional.<sup>207</sup>

[184] The premise of the court's decision was that importation of LPG was the business or work that was denied to the respondents. The preceding analysis in this judgment shows that this view failed to recognise that the business or work of the respondents

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<sup>205</sup> Record of Appeal, 'First and Second Appellants Skeleton Argument dated 29 October 2024' 40.

<sup>206</sup> See [140] above.

<sup>207</sup> *Controller of Supplies* (n 11) at [114].



was the selling of LPG. Significantly, at one point the court did recognise that the respondents imported to re-sell.<sup>208</sup> Reselling, in truth, was the business of the respondents. Not importing. The comparison with *Ulster* returns to mind where the business that was involved was a service business, the business of transportation. In this case, the business involved was the sale of a product. The transportation and importation of the product were ancillary to obtaining a supply of the product to sell.

[185] The courts below failed to appreciate that the respondents paid to have their foreign suppliers deliver LPG to them across the Guatemalan border and into Belize. The importation the respondents did was simply by way of paying the cost of getting into Belize the product they wished to sell. The evidence of the Controller of Supplies,<sup>209</sup> based on his personal observations<sup>210</sup> when he held a lower rank, told of the foreign ownership of the trucks and that these would pass 15 to 20 strong through the border daily or every two days.<sup>211</sup> He spoke of GOB lacking information, in conducting the exercise of deciding what prices to permit the respondents to charge. The information that was lacking was of the cost of the ‘terminalling’, throughput and brokerage fees in Honduras, the in-transit and entry fees in Guatemala and even the brokerage fees paid by the suppliers for the entry of the product into Belize.<sup>212</sup> It was clear that these were all costs paid by the foreign suppliers of the respondents, who passed these on to the respondents in the price the suppliers charged the respondents. Naturally, the respondents simply passed these costs on in the prices the respondents charged their customers in Belize for LPG. On the evidence, that was the whole story of the work as importers that respondents said they lost the right to do.

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<sup>208</sup> *ibid* at [100].

<sup>209</sup> *ibid* at [55].

<sup>210</sup> *ibid* at [107]. And, hence, not caught by the finding of Bulkan JA that his answers as to the rationale of the legislation being to secure sufficient inventory had been devastated in cross-examination.

<sup>211</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 19 July 2022) 4385, 4901. See also, the evidence of Mr Bautista Cifuentes summarised above at [49].

<sup>212</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 19 July 2022) 4906.

[186] In any case, inability to import LPG did not deny the respondents the opportunity to work because, as discussed, they previously imported only to obtain a supply for sale. After the legislation restricted importation, the respondents could equally have obtained a supply from NGC, without themselves importing. The reality is they did exactly this. It is from NGC they obtained the supply to continue their LPG distribution businesses. The problem for the respondents was that selling wholesale from that supply source was largely unprofitable because their supplier was also selling to all comers at the same, fixed selling price. As a matter of law, therefore, the respondents were not denied the opportunity to earn a living by work which they freely chose. They still could engage in the trade or business of LPG dealers. That was and remained how they earned a living. They never had businesses as truckers or importers, at which they worked, so the prohibition on importing LPG overland did not violate their s 15 right to work.

### **Other Rights**

[187] The other rights alleged in the underlying proceedings to have been violated were the respondents' right to freedom of association and their right to equal treatment. The respondents failed in the courts below in establishing breaches of these rights and cross-appealed to this Court against those decisions. The determination by this Court of the substantive issue on appeal would appear to make axiomatic the result of the cross-appeals. This Court having found that the respondents could continue their businesses as LPG distributors, without being forced to associate with NGC by using their terminal, there was no violation of the rights of the respondents to freely choose with whom they would or would not associate. In addition, I would agree with the determination of Bulkan JA (at [124]) that the right of freedom of association is not implicated in a situation involving a commercial relationship of a purely private nature.

[188] As regards the claim that the favourable treatment NGC was given amounted to discrimination against the respondents, the short response to this is that the treatment and concessions given to NGC had no effect on the respondents and made

no difference to their businesses. In their claim, the respondents adopted the stance that building a terminal was a ‘gargantuan’ undertaking beyond their contemplation. As far as the evidence goes, the respondents did not even begin to consider or explore what concessions and treatment they could expect if they were to contemplate building a terminal or importing through the NGC terminal. To decide on the matter of unequal treatment, therefore, is as simple as recognising that there was no treatment by GOB or in the legislation to attack as discriminatory or unequal, because there was nothing against or in relation to which there could have been such treatment.

### **Disposal**

[189] There was no opportunity in this judgment to remark, as I now do, on the high quality of the advocacy in this appeal and cross-appeal. Both sides were represented by the best on the roll of lawyers at the Belize Bar and the Court benefitted greatly from it. The absence, on my part, of any discussion on the several erudite and well-crafted and presented submissions indicates no lack of appreciation and gratitude but was simply a result of the flow in the development of issues. I thank all counsel and am grateful.

[190] For the reasons stated above, I am satisfied that there was no violation in the legislation of any of the constitutional rights of the respondents. I would allow GOB’s appeal and dismiss the cross-appeal. I would make no order as to costs.

### **ONONAIWU J:**

[191] I concur with Anderson P and Barrow J that the National Liquefied Petroleum Gas Project (Amendment) Act 2021 (‘Amended NLPGP Act’) does not violate the respondents’ right to property, right to work, right to freedom of association or right to equality before the law or equal protection of the law under the Constitution of

Belize. I agree that the appeal should be allowed and the cross-appeal dismissed with no order as to costs.

[192] In this judgment, I offer additional views on the respondents' claim that their right to equality under s 6(1) of the Constitution was breached. I find that the respondents failed to discharge their burden of proving a *prima facie* infringement of this right. They did not substantiate their contention that the Amended NLPGP Act differentiates between them and the National Gas Company ('NGC') by prescribing unattainable requirements for importation of LPG and thereby perpetuating the NGC's monopoly on importation.

[193] In *Lucas*,<sup>213</sup> this Court found that the first hurdle to be cleared by a claimant invoking the equal protection clause in Belize's Constitution is proof of different treatment from another similarly circumstanced comparator.<sup>214</sup> The respondents' case was that they have not been afforded equality before the law or equal protection of the law under the National Liquefied Petroleum Gas Project Act 2019 ('Original NLPGP Act') and the Amended NLPGP Act by virtue of preferential treatment which has been bestowed on the NGC. The Gas Companies did not claim that they and the NGC are alike but rather that they are dissimilarly placed. They argued that the Original NLPGP Act conferred on the NGC a monopoly on importation of LPG for nearly a year and a half, which allowed that entity to take over their customers and made the erection of a 1.5 million US gallon facility economically feasible. The respondents therefore maintained that when the Amended NLPGP Act was passed, they and the NGC were in an unequal position. They submitted that the Amended NLPGP Act breached s 6(1) of the Constitution by imposing unattainable requirements for re-entry into the LPG import market on dissimilarly placed persons (that is, the NGC which had a monopoly, on the one hand, and the LPG companies on the other). In other words, the respondents contended that the Amended NLPGP Act breached the guarantee of equality under

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<sup>213</sup> *Lucas* (n 128).

<sup>214</sup> *ibid* at [81].

the law and equal protection of the law by treating persons who are not similarly circumstanced in the same way.

[194] The Court of Appeal concluded that there was clearly a statutory differentiation between the NGC and other companies. The court found that the preferential treatment arising from the Original NLPGP Act, which only allowed the NGC to import LPG and granted the NGC a raft of favourable fiscal benefits, remained even after the Act was amended because the conditions required to meet eligibility to import were prohibitive and/or unrealistic, thus effectively keeping companies other than the NGC from re-entering the import market.<sup>215</sup>

[195] I accept in principle that preferential treatment of some persons or categories of persons could result from differently circumstanced persons being treated in the same way. While there was clearly differentiation between the NGC and other companies under the Original NLPGP Act, I have difficulty with the Court of Appeal's reasoning that a statutory differentiation remained under the Amended NLPGP Act because the prescribed conditions for importation of LPG were effectively unattainable by entities other than the NGC.

[196] The conditions which must be satisfied for importation of LPG into Belize are prescribed by ss 5A, 6, 6A and 6B of the amended legislation. First, a person must hold an import licence issued by the Controller of Supplies. By virtue of s 5 (as amended), the Developer (defined as the NGC) has the right to import LPG into Belize, subject to the other conditions for importation being met. Second, all purchases of LPG for importation must be made by open, selective or limited tendering procedures. Third, the importer must receive, store and subject to conformity assessment, quality assurance and other requisite testing LPG at the Project Terminal (defined as the NGC's terminal) or at an Authorized Import Landing Terminal. Fourth, the terminal to which the LPG is destined (whether the

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<sup>215</sup> *Controller of Supplies* (n 11) at [142].

NGC's terminal or an Authorized Import Landing Terminal) must meet and/or exceed the specified minimum requirements. These requirements, set out in sch II, are a minimum installed storage capacity of 1.5 million US gallons, compliance with applicable codes and standards, possession of certain permits, licences and authorizations, implementation of specified plans, programmes and manuals and maintenance of particular insurance.

[197] The trial judge and Court of Appeal considered construction of an import facility with a minimum storage capacity of 1.5 million US gallons to be a condition or requirement for obtaining a licence to import LPG. The Amended NLPGP Act permits importation of LPG through a landing terminal other than the NGC terminal that meets the minimum requirements of sch II and is authorized by the Government for receipt, storage, blending, testing and wholesale distribution of LPG. However, it is worth emphasising that the legislation does not prescribe construction of an authorized import landing terminal to be a condition for importation of LPG into Belize. Rather, receipt and storage of imported LPG at such a terminal, so that the product can undergo the requisite testing by or on behalf of the Government, is a requirement for importation of LPG into the country.

[198] The respondents' evidence was that it was not feasible for them to build an Authorized Import Facility with a minimum storage capacity of 1.5 million US gallons. They explained that a storage facility of that magnitude would not be in line with their business strategy. The General Manager of Belize Western Energy Ltd testified that such a facility would result in 'tremendous overcapacity' because of the company's level of sales and its need to sell the LPG it acquired quickly to meet its expenses.<sup>216</sup> The Accountant for Southern Choice Butane Ltd (Zeta Gas) averred that a 1.5 million US gallon storage facility was not consistent with the company's sales strategy, which involved importing LPG directly from its overseas supplier and forwarding it directly to its wholesale customers in Belize, without the

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<sup>216</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 26 July 2021) 'Cross-examination of Amira Gutierrez' 4811-4812.

need for large storage capacity in Belize.<sup>217</sup> Similarly, the General Manager of Gas Tomza testified that the respondents had no need to create a ‘massive terminal’ as they used to import their LPG across the border using trucks which could transport large quantities of gas to their respective distribution centres within 12 to 24 hours.<sup>218</sup> The respondents also relied on the expert report commissioned by Gas Tomza, which concluded that investment in an Authorized Import Landing Facility is not a viable option for Gas Tomza or other industry participants, whether investing alone or through a joint venture, and that the NGC had effectively retained its monopoly status.<sup>219</sup> The trial judge appreciated that building an Authorized Import Facility was not a ‘viable option’ for the respondents because of the ‘expensive price tag’. Bulkan JA found at [74] that the ‘condition’ of building an Authorized Import Facility was not feasible as ‘constructing such a massive facility could only be done at a prohibitive cost...and even then there would be no guarantee of obtaining the licence.’

[199] Even if it was not viable or feasible for the respondents to construct an authorized import landing terminal, they could still obtain an import licence once they complied with the tendering procedures and passed the imported gas through the NGC’s terminal or an authorized import landing terminal constructed by another entity, which meets the minimum requirements. The respondents did not satisfactorily explain why importing LPG through the NGC’s terminal was ‘unrealistic’. They indicated that they have not explored this option because of the absence of regulation of the commercial arrangement between the importer and the NGC which could control any impulse of the NGC to impose conditionalities that would frustrate the importer. Notably, the trial judge found that she had heard no arguments nor seen any evidence to convince her on a balance of probabilities that storing LPG in the NGC’s terminal was not viable for the Gas Companies or any other potential investor in the LPG industry in Belize.<sup>220</sup> However, without

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<sup>217</sup> Transcript of proceedings, *Gas Tomza v A-G* (Supreme Court of Belize, Claim No 159 of 2020, 28 June 2021) ‘Cross-examination of Ernesto Uh’ 4829–4831.

<sup>218</sup> Record of Appeal, ‘Third Affidavit of Aureliano Rafael Bautista Cifuentes’ 183.

<sup>219</sup> Record of Appeal, ‘First Affidavit of Giacomo Sanchez, Expert Witness’ 3769.

<sup>220</sup> *Gas Tomza v A-G* (n 9) at 43.

reference to this finding of the trial judge, the Court of Appeal assessed that importing LPG through the NGC's terminal was 'unpalatable' or 'unrealistic'. This Court has observed that an appellate court should not easily interfere with the factual findings of the trial judge who had sat through the entire case and whose ultimate judgment reflected the total familiarity with the evidence.<sup>221</sup>

[200] In light of the foregoing considerations, I disagree with the Court of Appeal's finding that the Amended NLPGP Act perpetuates the differentiation between the NGC and the Gas Companies by continuing to afford the former a monopoly on LPG importation, even though the Act stipulates standard conditions for importation of LPG.

[201] The Court of Appeal ultimately concluded that there was no breach of s 6(1) of the Constitution. The court held that in order to establish inequality under s 6(1), a claimant must show that any difference in treatment is 'unfair by reason of some improper motivation' and found that the respondents had not established such improper motivation for the statutory differentiation. The respondents cross-appealed the finding that there was no violation of s 6(1), alleging that (1) the Court of Appeal wrongly introduced a requirement of improper motivation for there to be a breach of that provision, and (2) in any event, there was an improper motivation for the legislation, namely, taking the companies' goodwill and conferring and maintaining a monopoly in favour of the NGC. The appellants similarly objected to the 'improper motivation' test for establishing inequality under s 6(1).

[202] Belize's Constitution provides a general guarantee in s 6(1) that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law', as well as protection under s 16 against discrimination on six specified grounds.<sup>222</sup> Bulkan JA was correct to be attentive to any implications

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<sup>221</sup> *Browne v Griffith* [2013] CCJ 6 (AJ) (BB), (2013) 83 WIR 62 at [9]; *Campbell v Narine* [2016] CCJ 7 (AJ) (GY), (2016) 88 WIR 319.

<sup>222</sup> Section 16(3) defines 'discriminatory' as affording different treatment to different persons attributable wholly or mainly to their respective descriptions by 'sex, race, place of origin, political opinions, colour or creed'.



of having multiple equality guarantees within Belize's Constitution and to avoid an interpretation of s 6(1) that would render that provision or s 16 meaningless.

[203] Bulkan JA rejected an approach to interpretation of s 6(1) that would require the ground of differentiation to be one of those listed in s 16(3) for a breach of the guarantee of either equality before the law or the equal protection of the law to be established. While I agree that such an approach would render s 6(1) irrelevant, I concur with the respondents that the view that the Court of Appeal of Belize adopted this approach in *Fort Street Tourism Village*<sup>223</sup> is not supported by any express statement to this effect in the judgments of the Court of Appeal. In *Lucas*,<sup>224</sup> this Court stated that it would be unfair to suggest that the Court of Appeal in *Fort Street* in fact held that there could be no breach of s 6(1) unless unlawful discrimination within s 16(3) of the Constitution was established.<sup>225</sup> Moreover, this Court did not adopt in *Lucas* that restrictive approach to the interpretation of the right to equal protection of the law in s 6(1).

[204] Bulkan JA also did not favour the alternative approach based on the Privy Council's interpretation in *Webster*<sup>226</sup> of s 4(d) of the Trinidad and Tobago Constitution,<sup>227</sup> according to which any difference in treatment would be impermissible and require justification on the basis that it pursues a legitimate aim and adopts proportionate means. He expressed difficulty with this approach to interpretation of s 6(1) of the Belize Constitution because it would treat all legislative classifications as suspect, requiring the state to justify them, where challenged, under the proportionality approach, and would thereby 'swallow up' the grounds listed in s 16(3) of the Belize Constitution.

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<sup>223</sup> *Fort Street Tourism Village* (n 125).

<sup>224</sup> *Lucas* (n 128).

<sup>225</sup> *ibid* at [78].

<sup>226</sup> *Webster* (n 7).

<sup>227</sup> Chap 1:01 s 4(d) affords protection to 'the right of the individual to equality of treatment from any public authority in the exercise of any functions'.

[205] Instead, the Court of Appeal was persuaded by the approach of the South African Constitutional Court to interpretation of the expansive right to equality and the more detailed anti-discrimination clause in the South African Constitution.<sup>228</sup> In s 9 (Equality) of the South African Constitution, there is a general guarantee in sub-s (1) of equality before the law and equal protection and benefit of the law as well as a prohibition under sub-s (3) of ‘unfair discrimination’ on both specified *and* unspecified grounds. Discrimination on the specified grounds is presumed to be unfair unless it is established that the discrimination is fair. Bulkan JA opined that a key aspect of the South African approach is that the wider equality right is not fenced in by the grounds listed in the subsequent non-discrimination clause (*à la Fort Street*). He suggested that, at the same time, the wider equality right does not mean that every legislative classification is necessarily forbidden (*à la Webster*) – only those that would distinguish between persons for some reason connected to personal attributes bearing upon human dignity or that would otherwise affect persons adversely are considered to be unfair. He was of the view that under the South African approach, there must be some factor motivating the difference in treatment which is improper in some way for there to be a violation of the wider equality right. This view of the South African approach supported the Court of Appeal’s finding that a claimant must prove the further element of ‘improper motivation’ for any difference in treatment in order to establish a breach of s 6(1) of the Belize Constitution. This element of improper motivation would serve to distinguish between legislative classifications done for a legitimate purpose and which are not unfair and those where the underlying motive is suspect.

[206] This ‘improper motivation’ test adopted by the Court of Appeal actually incorporates into s 6(1) of the Belize Constitution the approach of the South African Constitutional Court to interpreting unfair discrimination under s 9(3) rather than its approach to interpreting the wider equality guarantee under s 9(1) of the South African Constitution. The equality jurisprudence of the South African Constitutional Court has distinguished between differentiation which does not

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<sup>228</sup> Constitution of the Republic of South Africa 1996.

involve unfair discrimination and differentiation which does involve unfair discrimination. Differentiation between people or categories of people infringes s 9(1) if it bears no rational connection to a legitimate government purpose. Recognising that it is impossible to regulate effectively without differentiation and without classifications which treat people differently and impact on people differently, the court has found that the purpose of this aspect of equality is to ensure that the state is bound to function in a rational manner.<sup>229</sup>

[207] Guided by the history of the country, the South African Constitutional Court has found that differentiation which passes the rational connection threshold will constitute unfair discrimination if it impairs human dignity or affects people adversely in a comparably serious manner. Determining whether differentiation amounts to unfair discrimination requires a two-stage analysis: first determining whether the differentiation amounts to discrimination and if it does, then determining whether it amounts to unfair discrimination. Differentiation on a specified ground in s 9(3) establishes discrimination, while differentiation on an unspecified ground constitutes discrimination if it is *based on* attributes and characteristics which have the potential to impair human dignity or affect people adversely in a comparably serious manner. The determining factor regarding the unfairness of the discrimination is its *impact* on the person discriminated against. If the discrimination is found to be unfair and the measure complained of is contained in a law of general application, the court will enquire into whether it can be justified under the limitation of rights provision in s 36 of the Constitution. This determination involves a weighing of the purpose and effect of the measure and a determination as to the proportionality thereof in relation to the extent of its infringement of equality.<sup>230</sup>

[208] In my view, there are important differences between the equality provisions in the Belize Constitution and the South African Constitution which make it unnecessary

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<sup>229</sup> *Prinsloo v Van der Linde* [1998] 1 LRC 173 at [24]–[26].

<sup>230</sup> The approach of the South African Constitutional Court to interpretation of the equality clause is usefully summarised in *Hoffmann v South African Airways* [2001] 2 LRC 277 at [24] and *Harksen v Lane NO* [1998] 2 LRC 171 at [53].

and problematic to incorporate the improper motivation test into s 6(1) of the Belize Constitution. In contrast to s 9(3) of the South African Constitution, s 16 of the Belize Constitution prohibits discrimination on *only* six specified grounds and expressly exempts certain laws which would otherwise discriminate on prohibited grounds. Unlike the Belize Constitution, the general equality guarantee in the South African Constitution coexists with a prohibition of ‘unfair discrimination’ on specified *and* unspecified grounds. It was therefore essential for judges to develop an understanding of what constitutes unfair discrimination on grounds which are not specified in s 9(3) of the South African Constitution and to interpret the equality provisions in the Constitution in a manner that would allow them to operate harmoniously alongside each other. I agree with the respondents that the Belize Constitution does not throw up the same issues which would warrant adoption of the same approach used by the South African Constitutional Court to the reconciliation of the particular provisions in the South African Constitution.

- [209] While both sides rejected the ‘improper motivation’ test for establishing inequality under s 6(1), each advanced different tests for justification of any difference in treatment under the legislation. The respondents asked the Court to apply the proportionality test developed by the Privy Council in *Webster* in relation to s 4(d) of the Constitution of Trinidad and Tobago, noting that the Board had subsequently held in *Suraj v Attorney General of Trinidad and Tobago*<sup>231</sup> that the proportionality test was a means of balancing the fundamental rights conferred under s 4 of the Constitution against the public interest and against each other. The respondents maintained that the proportionality test is a coherent, systematic and widely accepted tool for balancing the rights of the individual against the public interest. They submitted that the Government of Belize had the burden of justifying the difference in treatment under the legislation by demonstrating that the conditions for importation had a legitimate aim and there was a reasonable relationship of proportionality between those conditions and the aim sought to be realised.

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<sup>231</sup> [2022] UKPC 26, [2023] AC 337 (TT).

[210] In contrast, the appellants argued that reliance on the *Webster* proportionality test to determine whether differentiation is justified is wrong as s 4(d) of the Constitution of Trinidad and Tobago is materially different from s 6(1) of the Belize Constitution. They submitted that s 6(1) should be considered together with s 3(a), which subjects the right to equality before the law and equal protection of the law in s 6(1) to ‘respect for the rights and freedoms of others and for the public interest’. The appellants argued that where the legislature differentiates and creates classifications, the law will be justified if such classifications are based on clear criteria that promote a legitimate purpose and such criteria have a rational relation to the purpose of the law. In support of their submission that the appropriate test is rationality to avoid arbitrariness, the appellants cited authorities from Commonwealth jurisdictions, including India,<sup>232</sup> Malaysia<sup>233</sup> and Namibia.<sup>234</sup>

[211] I agree with the appellants that s 6(1) of the Constitution must be read together with s 3,<sup>235</sup> which expressly permits the guaranteed fundamental rights and freedoms to be limited in the public interest and to protect the rights and freedoms of others. If the respondents had met their burden of proving a *prima facie* breach of s 6(1), the appellants would bear the burden of demonstrating that the law can be justified in the public interest. Determining whether a law that limits a protected fundamental right can be justified in the public interest involves weighing and balancing the interests of society and the interests of the persons affected.<sup>236</sup>

[212] In *Titan*,<sup>237</sup> this Court held that the three-tiered test set out in *de Freitas*<sup>238</sup> is an appropriate test for assessing whether limitations on the right to protection from

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<sup>232</sup> *Shri Ram Krishna Dalmia* (n 145) at 296–297. It was held that art 14 (Equality before the law) of the Constitution permits reasonable classification founded on intelligible differentia having a rational relation to the object sought to be achieved by the legislation.

<sup>233</sup> *Malaysian Bar v Government of Malaysia* [1988] LRC (Const) 428. The court held that a law which created differences did not violate the equal protection clause under art 8(1) of the Constitution if the law was founded on intelligible differentia having a rational relation to the object sought to be achieved by the law.

<sup>234</sup> *Mwellie v Ministry of Works, Transport and Communication* [1995] 4 LRC 184. The High Court held that art 10(1) of the Constitution (Equality before the law) permitted legislation providing for differential treatment if reasonable classifications were made, rationally connected with the legitimate object of the statute.

<sup>235</sup> The indivisibility of the opening and detailed provisions of Caribbean bills of rights is emphasised in Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitution Law* (2nd edn, Sweet & Maxwell 2021) 456.

<sup>236</sup> *ibid* 474–475.

<sup>237</sup> *Titan International Securities* (n 12).

<sup>238</sup> *de Freitas* (n 13).

arbitrary search or entry and the right to privacy, guaranteed under ss 9 and 14 of the Belize Constitution, make ‘reasonable provision’ for the goals explicitly referred to in those provisions. This test enquires into whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right, (ii) the measures designed to meet the legislative objective are rationally connected to it, and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. The *de Freitas* test evaluates not only the reasons for the law but also the extent of the law’s interference with the protected right. Bulkan JA noted that this three-step test had been accepted as the applicable approach to measuring the constitutionality of limits in Belize.<sup>239</sup> He further emphasised that the *de Freitas* approach ‘reflects a global trend that cuts across diverse constitutional frameworks’, is ‘endorsed at the highest levels of human rights adjudication’, ‘represents the culmination of decades in the evolution of interpretation of limitation clauses in conventional Caribbean bills of rights’ and therefore should not be lightly distinguished.<sup>240</sup>

[213] This Court also has found that similar considerations as those outlined in *de Freitas* are relevant when assessing the constitutionality of restrictions on fundamental rights which are not subject to a specific clause allowing limitations that make ‘reasonable provision’ or are ‘reasonably required’ for listed public goals. In *McEwan v Attorney General of Guyana*,<sup>241</sup> this Court, drawing on the seminal Canadian case *R v Oakes*,<sup>242</sup> identified considerations that are relevant to determining whether legislation infringing the right to equality and non-discrimination under ss 149D and 149 of the Constitution of Guyana can be justified. The Court stated:

[T]he infringing law must pursue some pressing objective and be rationally connected to that objective. The infringing law should impair only such of the right as is necessary to be impaired. And there must be proportionality

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<sup>239</sup> *Controller of Supplies* (n 11) at [20].

<sup>240</sup> *ibid* at [24].

<sup>241</sup> [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332.

<sup>242</sup> [1986] 1 SCR 103.

of effects between the deleterious and salutary effects of the infringing law in question.<sup>243</sup>

[214] In assessing whether a law infringing the right to equality under s 6(1) of the Belize Constitution can be justified in the public interest, consideration should similarly be given to not only whether the difference in treatment is rationally connected to a legitimate objective but also the proportionality of the measure. This would enable the court to evaluate the reasons for the differentiation under the law in question as well as the impact or effect of that law.

[215] Although Bulkan JA accepted that the three-tiered *de Freitas* test was the applicable approach to measuring the constitutionality of limits in Belize, he was concerned about an interpretation of s 6(1) that would regard legislative distinctions as an infringement of the right to equality requiring justification by the state using a proportionality approach. In his view, this would impose an ‘enormous burden’ on the state given that legislation routinely makes distinctions between classes of people for legitimate reasons. Having found that the ‘improper motivation’ test should not be used to establish inequality under s 6(1), I do not consider that it would be unduly burdensome for the state to justify legislative distinctions by reference to the reasons for the law and the proportionality of the measure.

[216] As I have concluded that the respondents did not establish a *prima facie* infringement of their right to equality before the law and equal protection of the law under section 6(1), there is no need to assess whether that Act can be justified in the public interest.

**JAMADAR J:**<sup>244</sup>

### **Introduction**

*WHEREAS the people of Belize - (b) respect the principles of social justice and therefore believe that the operation of the economic system must result*

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<sup>243</sup> *McEwan* (n 241) at [62].

<sup>244</sup> I express my deep appreciation to the two CCJ Judicial Counsel who assisted me with the research for this opinion.

*in the material resources of the community being so distributed as to subserve the common good, that there should be adequate means of livelihood for all ...*<sup>245</sup>

[217] The Preamble to the Constitution of Belize appropriately sets the tone for the issues raised in this case. It informs the *vires* of executive and legislative interventions in the areas of socio-economic policy as they may intersect with socio-economic (social justice) rights and freedoms. Also, it influences constitutional review of any such interventions. The consideration of constitutional preambular clauses has been well established by this Court over the last two decades and turning back that jurisprudence at this time would be unfortunate.<sup>246</sup>

[218] The People of Belize have chosen to organise their state and lives according to the architecture of their Constitution. It is their ‘supreme law’.<sup>247</sup> It declares Belize to be ‘a sovereign democratic State’.<sup>248</sup> The rule of law is foundational,<sup>249</sup> and Belize has entrenched certain fundamental rights and freedoms.<sup>250</sup>

[219] Thus, Belize has opted for a rights-centric, rights-privileging model of constitutional democratic governance that permeates all aspects of the state. The governance structure of the Constitution also organises the state generally among three branches – the executive, legislature, and judiciary. All are subject to this rights-centric, rights-privileging governance model, as indeed are all state authorities and public bodies.

[220] What this means, is that in Belize the concepts of democracy and legality are informed by this rights-centric, rights-privileging governance model, which necessarily creates inevitable tensions among the branches of state, as will be explored.

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<sup>245</sup> Preamble to the Belize Constitution (n 2) cl (b) (emphasis added).

<sup>246</sup> *A-G v Joseph* [2006] CCJ 3 (AJ) (BB), (2006) 69 WIR 104 at [18]–[19]. Compare *Corp of Hamilton* (n 83) at [197].

<sup>247</sup> Belize Constitution Act (n 2) s 2.

<sup>248</sup> *ibid* s 1.

<sup>249</sup> Preamble to the Belize Constitution Act (n 2) cl (d).

<sup>250</sup> Constitution of Belize (n 2) s 69 and see also sch 2.



- [221] Thus, and as Vanessa MacDonnell points out: ‘... we cannot understand the rhythms of the constitutional state or the mechanics of the separation of powers without understanding how executive power operates.’<sup>251</sup> And it is this understanding of how executive power operates in Caribbean states like Belize, that must inform how the tensions between the judiciary on the one hand, and the executive and legislature on the other hand, are to be managed and conducted.
- [222] Clearly the executive and legislature have a primary responsibility to govern in a rights-centric, rights-privileging manner. Equally clearly, the judiciary has the supervisory jurisdiction and power of constitutional review in this regard. Independent and impartial courts of integrity are therefore necessary – but this inevitably agitates the tension among the branches.
- [223] How then is this tension to be resolved in ways that allow for effective and efficient governance according to constitutionally set standards? This is not an easy conundrum to solve and how it is resolved may evolve over time. This opinion explores these considerations in the circumstances of this case.
- [224] This opinion will address three discrete areas as they arise in this case, as follows: (i) What is the appropriate degree of judicial deference owed to the legislature in socio-economic policy-making? (ii) Were the respondents’ (the LPG companies) property rights constitutionally infringed by reason of any arbitrary deprivation or taking or acquisition of their property without compensation? (iii) What is the nature and extent of the respondents’ constitutional right to work and was it contravened?
- [225] Two other issues were also raised, but I will not address these in this opinion: (iv) Were the respondents’ rights to freedom of assembly and association contravened? (v) What is an appropriate approach to unequal and discriminatory treatment under the Belizean Constitution? As such, and in relation particularly to issues (ii) and (iii), ss 3, 15, and 17 of the Constitution of Belize will be considered. In my opinion,

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<sup>251</sup> In Vanessa A MacDonnell, ‘Theorizing about the Executive in the Modern State’ (2023) 21(1) Int’l J Const L 356, 358.

the conclusions of the Court of Appeal on issues (ii) and (iii) ought to be upheld. I also agree that any assessment of damages should be remitted to the High Court for determination.

[226] Conscious that this is a minority opinion, what I propose to do in this opinion is a ‘pointing-to’ areas of attention, concern, and nuanced difference/divergence from what may be otherwise written by panel members. In writing this opinion, I reserve my positions on the future development of the areas of law raised and especially on areas not expressly addressed, mindful as I am of the majority position.

[227] However, before addressing the specific substantive issues, I will spend some time exploring relevant first principles. These principles reflect the mainstream and, I would like to think, settled corpus of the developmental Caribbean constitutional jurisprudence of this Court over the last twenty years-and at least up to this point.

[228] Departures from these approaches are to be expected over time, especially as some of them are at variance with parallel approaches by the Judicial Committee of the Privy Council (‘JCPC’), and the jurisprudential dialogue between these two Caribbean apex courts is bound to bring about deeper levels of insights.

[229] Thus, and to facilitate meaningful engagement with this opinion, what I propose to do is as follows.

[230] First, spend some time exploring first principles as indicated. While this may feel on initial impression quite academic and even detached from the specific issues to be addressed, I consider it important to lay the foundation for my analysis by discussing these relevant theoretical underpinnings. In my view, they are the keys to understanding and unlocking the approaches that I propose as appropriate.

[231] Second, and in light of these first principles, I will interrogate the three specific issues that I intend to address. Thus, the discussion of these first principles is considered important for the fullest appreciation of how and why I address the

issues as I do. If the reader prefers, this aspect can be bypassed, and one can proceed immediately to the substantive issue-analysis section beginning at [301].

### **First Principles**

*Caribbean constitutionalism is in an embryonic stage; it remains incomplete, encumbered by colonial sentiments and laws and weakened by the unresolved vestiges of the past. ... True constitutional patriation must manifest in textual, institutional and cultural forms; it requires reckoning with the past but with an eye towards the future.*<sup>252</sup>

[232] Both the judges of this Court, and Bulkan JA in the Court of Appeal (writing on behalf of that court) recognise that this matter needs to be grounded in first principles – though, in my opinion, they differ significantly in their approaches and outcomes. I agree that the starting point in this matter lies in the analytical frameworks for assessing the constitutionality of statutory measures in Belize.

[233] As to whether there is, and if so, what may be, a due measure of judicial deference owed to the legislature in socio-economic policy-making in Belize, or whether the socio-economic rights to property or work have been contravened, will also reveal themselves through a first principles approach to these issues.

[234] A first principles approach is salient, because, as demonstrated in the High Court and Court of Appeal judgments, and now as well in this Court's opinions, the approach taken to the issues and decisions around what principles are to be prioritised, directly impact the analysis and outcomes that flow from them. In a very real sense, in constitutional law our beginnings can deeply influence our endings.

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<sup>252</sup> Se-shauna Wheatle and Yonique Campbell, 'Constitutional Faith and Identity in the Caribbean: Tradition, Politics and the Creolisation of Caribbean Constitutional Law' (2020) 58(3) *Commonwealth & Comparative Politics* 344, 362 (emphasis added).

## United Kingdom and Caribbean Constitutional Dissonance on Deference

- [235] A persistent point of debate in Caribbean constitutionalism occurs because of sometimes uncritical reliance on certain approaches emanating from the UK's Privy Council. This is compounded, in the particular circumstances of this case, all too often by a theoretical and romanticised articulation of the doctrine of the separation of powers, informed by UK theory, convention, and jurisprudence. The impact of this in this appeal, shows up in how this Court will choose to approach and apply the presumption of constitutionality and both the threshold and justification limbs of the tests for constitutionality.
- [236] To be clear, in the UK, parliamentary sovereignty is constitutionally normative. The UK is thus referred to as a parliamentary democracy. This understandably and rationally leads to how doctrines such as the presumption of constitutionality and the separation of powers are epistemologically experienced and articulated. In the Caribbean, and in Belize, our point and process of constitutional embarkation is radically different. We exist in constitutional democracies in which the constitution of each state is supreme and normative.
- [237] Thus, unlike in the UK, in which, as among the three conventional branches of government (executive, legislature, and judiciary), the legislature is supreme, in the Caribbean this is not so, and not intended to be so. In the Anglo-Caribbean, as in Belize, as among the three branches, if anything, the judiciary is 'first among equals' (*primus inter partes*). Why? Because, pragmatically, under Anglo-Caribbean constitutions and in relation to bills of rights and basic deep structure constitutional principles, the courts can strike down laws passed by the legislature as well as executive decisions and actions. This is possible by virtue of constitutional review.<sup>253</sup>

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<sup>253</sup> Belize Constitution Act (n 2) ss 2, 20–22, 134. And see *Joseph* (n 246) at [17] (Wit J): 'Caribbean Parliaments are not at liberty to legislate whatever or however they see fit without having regard to the limits enshrined in the Constitutions which ultimately have to be construed, and guarded, by the judiciary' (emphasis added).

[238] This is not the case in the UK – Parliament is the supreme legal authority which can create and terminate laws; the courts cannot strike down legislation.<sup>254</sup> Their constitutional role is to interpret (and at times clarify) and apply laws made by Parliament. However, they can declare legislation incompatible with provisions of the UK Human Rights Act if a statute is determined to be in breach of rights declared in it.<sup>255</sup> Thus, unlike in Caribbean states, such as Belize, where supreme courts have the jurisdiction and power to declare primary legislation void, the UK Supreme Court has no such jurisdiction or power – because of the doctrine of parliamentary sovereignty.

[239] As with so many things, the matter is not always as clear cut as may appear on first appearance. In Caribbean constitutions, outside of bills of rights sections, there are generally no enforcement provisions, and in fact the legislature can change any law (subject to requisite majorities) and can introduce laws to change or override judicial decisions (interpretations and applications of existing laws). However, the core distinctions with the UK remain apt.

### **Jay Chandler: The Interpretive Impact of Dissonance**

[240] This dissonance, and the influence of parliamentary sovereignty, is most acutely revealed, arguably, in the recent (2022) JCPC judgment in *Chandler v The State (No 2)*.<sup>256</sup> What had earlier resulted in strongly and closely divided opinions before the JCPC,<sup>257</sup> in *Chandler's* case became the unanimous opinion of a nine-member panel made up entirely of UK judges.<sup>258</sup>

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<sup>254</sup> Kirk Meighoo and Peter Jamadar, *Democracy and Constitutional Reform in Trinidad and Tobago* (Ian Randle Publishers 2008) 22, 25. Alison L Young, 'Constitutional Entrenchment and Parliamentary Sovereignty' (Institute For Government Bennett, Institute of Public Policy Cambridge, March 2023) 4 < <https://www.bennettschool.cam.ac.uk/publications/constitutional-entrenchment/> <https://www.bennettschool.cam.ac.uk/wp-content/uploads/2023/03/constitutional-entrenchment.pdf>> accessed 11 October 2025.

<sup>255</sup> 'Parliament's authority' (UK Parliament, 2 April 2016) < <https://www.parliament.uk/about/how/role/sovereignty/> > accessed 1 October 2025.

<sup>256</sup> [2022] UKPC 19, (2022) 101 WIR 520 (TT).

<sup>257</sup> *Boyce v R* [2004] UKPC 32, (2004) 64 WIR 37 (BB).

<sup>258</sup> *Chandler* (n 256).

- [241] Essentially, the issue was about the constitutionality of the mandatory death penalty (execution by hanging) and whether it is saved from constitutional scrutiny and review by general saving law clauses in the constitution.
- [242] In July 2004, by a narrow 5:4 majority in *Boyce v R*,<sup>259</sup> a nine-member panel, the JCPC upheld the mandatory death penalty in Barbados. The majority held that the savings law clause completely ousted the jurisdiction of the court to review existing laws, effectively shielding them from constitutional scrutiny.<sup>260</sup> In fact, *Boyce* reversed an earlier decision of the JCPC (*Roodal v The State*<sup>261</sup>) which had held by a 3:2 majority that the mandatory death penalty in Trinidad and Tobago was open to constitutional review and unconstitutional.<sup>262</sup>
- [243] In 2022 the very issue returned to the JCPC in an appeal from Trinidad and Tobago (effectively inviting the JCPC to review its own earlier decision in *Matthew v The State* which had adopted the reasoning of *Boyce v R*).<sup>263</sup>
- [244] In the interim and before *Chandler* was determined by the JCPC, this Court in a series of decisions on the very issue, declined to follow the JCPC's reasoning in *Boyce v R* and aligned itself more with the reasoning of the majority in *Roodal* and the minority in *Boyce*.
- [245] In 2018, *Nervais v R*,<sup>264</sup> an appeal from Barbados, this Court heard and upheld appeals from Barbados against mandatory death sentences—the savings law clause did not protect the mandatory death penalty. Byron P reasoned that it was the ultimate role of the judiciary, and not the executive or the legislature, to ensure that laws were in conformity with the Barbadian Constitution. He stated the following about the savings law clause:<sup>265</sup>

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<sup>259</sup> *Boyce* (n 257).

<sup>260</sup> See also *Matthew v The State* [2004] UKPC 33, (2004) 64 WIR 412 (TT) in which the JCPC came to the same conclusion in the context of Trinidad and Tobago. In both *Matthew* and *Boyce*, the JCPC, by a majority of 5:4, decided not to follow its earlier decision in *Roodal v The State* [2003] UKPC 78, (2003) 64 WIR 270 (TT). See *Chandler* (n 256) at [19].

<sup>261</sup> [2003] UKPC 78, (2003) 64 WIR 270 (TT).

<sup>262</sup> *ibid*.

<sup>263</sup> *Chandler* (n 256) at [13]; *Matthew v The State* [2004] UKPC 33, (2004) 64 WIR 412 (TT).

<sup>264</sup> *Nervais* (n 20).

<sup>265</sup> *ibid* at [58].

The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned.

[246] Indeed, Byron P would explain further:<sup>266</sup>

It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. ... This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.

[247] Also in 2018, in *McEwan v Attorney General of Guyana*,<sup>267</sup> this Court determined an appeal concerning the question whether the savings clause in the Constitution of Guyana, which also purported to protect existing laws against constitutional review. The law in question<sup>268</sup> made it an offence for a man to wear female clothing in a public place for an improper purpose. Saunders J, citing [59] in *Nervais*, stated:<sup>269</sup>

Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest.

### **Rights-Centric, Rights-Privileging**

[248] In these two and in other decisions,<sup>270</sup> this Court set out its rights-centric, rights-privileging approach to constitutional review, an approach that the JCPC has been

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<sup>266</sup> *ibid* at [59].

<sup>267</sup> *McEwan* (n 241).

<sup>268</sup> A provision of the Summary Jurisdiction (Offences) Act, Cap 8:02 (GY) (the ‘cross-dressing law’).

<sup>269</sup> *McEwan* (n 241) at [41].

<sup>270</sup> See, for example, *Bisram v DPP* [2022] CCJ 7 AJ (GY), (2022) 101 WIR 370 which was decided before *Chandler*.

unable to embrace, even as it accepts that ‘the jurisprudence of the CCJ show(s) that there were and are tenable arguments on both sides.’<sup>271</sup> A remarkable position, to accept the reasonableness of this Court’s approaches yet choose not to adopt them, given that what is at stake are fundamental rights and freedoms.

[249] In *Chandler*, the JCPC granted permission to appeal because of the judgments of this Court in *Nervais* and *McEwan* and to consider whether it should depart from its earlier jurisprudence as explained in *Boyce* and *Matthew*.<sup>272</sup> Essentially, the JCPC had to choose whether to follow this Court’s rights-centric, rights-privileging approaches. The JCPC declined to do so,<sup>273</sup> relying on the principle of *stare decisis*<sup>274</sup> and ultimately choosing judicial restraint and deference to Parliament (as the arm of state responsible for legislation).

[250] The JCPC would opine, consistent with a constitutional (and judicial) mindset of parliamentary supremacy: ‘Nonetheless, such a provision is not unconstitutional. The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws.’<sup>275</sup> In this approach, the JCPC also eschewed the living tree approach espoused by this Court,<sup>276</sup> and this Court’s assertions that the separation of powers and rule of law can function as overriding constitutional principles.<sup>277</sup>

[251] However, in Anglo-Caribbean constitutional democracies such as Belize, the separation of powers doctrine encompasses the supremacy of the constitution, the independence of the judiciary, and the supervisory jurisdiction and duty of the courts in the exercise of due power, to strike down legislation and/or executive actions when required to do so. Hence, the courts as the guardians of democracy. What we can take away from this discussion is the need to be vigilant in how we approach Caribbean constitutionalism, and of relevance to this matter, how we

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<sup>271</sup> *Chandler* (n 256) at [74].

<sup>272</sup> *ibid* at [50].

<sup>273</sup> *ibid* at [54]. See also [68].

<sup>274</sup> *ibid* at [57]–[61], [64]–[65].

<sup>275</sup> *ibid* at [98].

<sup>276</sup> *ibid* at [62].

<sup>277</sup> *ibid* at [70], [75], [95].



understand and apply concepts like the separation of powers, presumption of constitutionality, and judicial deference.

### **Law and Society: Wither the Separation of Powers**

[252] Furthermore, in relatively small and democratically developing independent Caribbean states, there is a certain pragmatic fiction in relation to the separation of powers. In theory, and as per the Latimer House Principles,<sup>278</sup> Parliament is the primary branch of state that is intended to hold an executive accountable, which may be understood as a ‘responsibility of the legislature in the system of government’.<sup>279</sup>

[253] Thus, an independent Parliament’s ‘purpose is not to reduce the power of the executive, but to ensure that the executive acts responsibly.’<sup>280</sup> In fact, this principle is enshrined in the Belizean Constitution in s 44<sup>281</sup> and, it is exemplified by the constitutional provisions that provide for Parliament to remove a Prime Minister or a government by way of a vote of no-confidence.<sup>282</sup>

[254] Practically, in the UK, the Parliament holds the executive accountable, for among other reasons, because of the size and composition of the legislature relative to the cabinet and executive, the relative autonomy and independence of parliamentarians, especially backbenchers, and as well because of a vibrant parliamentary tradition and culture of holding the executive accountable.<sup>283</sup>

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<sup>278</sup> ‘Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government’ (Commonwealth Secretariat, 2006) < <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf> > accessed 16 September 2025.

<sup>279</sup> Meighoo and Jamadar (n 254) 25.

<sup>280</sup> *ibid.*

<sup>281</sup> Belize Constitution Act (n 2) s 44 (emphasis added). (1) There shall be a Cabinet of Ministers for Belize which shall consist of the Prime Minister and the other Ministers, ... (2) The Cabinet shall be the principal executive instrument of policy with general direction and control of the Government *and shall be collectively responsible to the National Assembly* for any advice given to the Governor-General by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.

<sup>282</sup> Belize Constitution Act (n 2) ss 37(4), 40(4), 45(2), 84(4).

<sup>283</sup> Thus, in the UK, for example, ‘... from 1966 to 1997, every government in the UK has been defeated on whipped votes in Parliament at least once, meaning that even where party members have been directed by their party whips to vote with the government, a significant number of governing party MPs have voted against the government anyway, and defeated their party leadership’s wishes.’ Meighoo and Jamadar (n 254) 32.

[255] In most Anglo-Caribbean states this is a virtually unknown phenomenon, or at best a rare occurrence.<sup>284</sup> Where there are small legislatures, and where cabinets are disproportionately large in relation to seats held by a governing party, the consequence is a virtually non-existent independent backbench, and certainly not one that historically chooses to stand against prime ministerial decree, executive will, or the party whip.<sup>285</sup> Indeed, in Belize a Prime Minister can advise the Governor General to dissolve Parliament at any time and the Governor General ‘shall act in accordance with the advice ...’<sup>286</sup>

[256] Though not unique to the Caribbean, what this effectively means is that every member of Parliament’s seat is at risk and beholden to the Prime Minister. This prime ministerial power is amplified in relatively small Anglo-Caribbean independent states. The impact on parliamentary autonomy and independence relative to the executive is obvious. Executive power, in this regard, is not to be overlooked when one comes to consider the separation of powers and role of courts in constitutional review of legislation.

[257] Indeed, in Belize this preponderance of executive power is also discernible in relation to the higher judiciary, in what one may categorise as ‘enhanced’ executive power. Not only are the chief justice and the judges of the court of appeal appointed ‘acting in accordance with the advice of the Prime Minister’,<sup>287</sup> but judges of the supreme court are also appointed only ‘with the concurrence of the Prime Minister.’<sup>288</sup>

[258] Also, in states such as in Belize, where the first-past-the-post electoral system is used, opposition presence in parliament can be underrepresented relative to its share of the popular vote.<sup>289</sup> The same phenomenon has been carefully researched and is

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<sup>284</sup> *ibid* 32.

<sup>285</sup> *ibid* 29–31.

<sup>286</sup> Belize Constitution Act (n 2) s 84(4).

<sup>287</sup> *ibid* ss 97(1), 101(1). The appointments are made by the Governor General, and there is also a requirement for the Prime Minister to consult with the leader of the opposition.

<sup>288</sup> *ibid* s 97(2). The appointment is made by the Governor General acting in accordance with the advice of a Judicial and Legal Services Commission, but it must also be with the concurrence of the Prime Minister (after consultation with the Leader of the Opposition).

<sup>289</sup> Examining Belize’s general election results for the past 40 years, the following are noteworthy. The electoral system is first-past-the-post. In 1984, out of 28 seats, the winning party secured 21 to 7 seats, with a voter support percentage differential of 54.07 per cent to

also observed in Trinidad and Tobago.<sup>290</sup> For a more extreme example, consider Dominica, which is not in any way an indictment of the electoral process that exists there or of the legitimacy of its outcomes. Since January 2000, for six consecutive general elections, a single party has been in power. Since 2005 there has been a single Prime Minister. And, generally, the seats-to-votes ratios between ‘winners’ and ‘losers’ have been disproportionate.<sup>291</sup>

[259] Lest it be thought that this is cherry-picking examples, in Saint Vincent and the Grenadines, for five consecutive general elections a single party has been in power since 2001, also with a single Prime Minister. And in Saint Kitts and Nevis, where there has been rotation of executive power, the seats-to-votes ratios between ‘winners’ and ‘losers’ have been disproportionate.

[260] What this means, pragmatically, is that the theory of parliamentary autonomy and independence in relation to the executive and the power of Parliament to hold an executive accountable, can be practically something of a fiction. The risks of monopolies of executive power are therefore real in Caribbean spaces.

[261] Anglo-Caribbean majoritarian Parliaments are therefore all too often virtual executive rubber-stamp legislatures in relation to government members, that hardly ever hold an executive to account, and certainly not as it happens in practice in ‘Westminster’. In this context, it must be acknowledged that the executive plays a

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44.0 per cent of the popular vote, respectively. In 1989, out of 28 seats, the winning party secured 15 to 13 seats, with a voter support percentage differential of 50.9 per cent to 49.0 per cent of the popular vote, respectively. In 1993, out of 29 seats, the winning party secured 16 to 13 seats, with a voter support percentage differential of 48.7 per cent to 51.2 per cent of the popular vote (ie the winning party did not secure a majority of the popular vote). In 1998, out of 29 seats, the winning party secured 26 to 3 seats, with a voter support percentage differential of 59.67 per cent to 39.41 per cent of the popular vote. In 2003, out of 29 seats, the winning party secured 22 to 7 seats, with a voter support percentage differential of 53.54 per cent to 45.19 per cent of the popular vote. In 2008, out of 31 seats, the winning party secured 25 to 6 seats, with a voter support percentage differential of 56.61 per cent to 40.72 per cent of the popular vote. In 2012, out of 31 seats, the winning party secured 17 to 14 seats, with a voter support percentage differential of 50.43 per cent to 47.99 per cent of the popular vote. In 2015, out of 31 seats, the winning party secured 19 to 12 seats, with a voter support percentage differential of 50.52 per cent to 47.77 per cent of the popular vote. In 2020, out of 31 seats, the winning party secured 26 to 5 seats, with a voter support percentage differential of 59.6 per cent to 38.84 per cent of the popular vote. In 2025, out of 31 seats, the winning party secured 26 to 3 to 2 seats, with a voter support percentage differential of 67.91 per cent to 10.56 per cent to 18.95 per cent of the popular vote.

<sup>290</sup> Meighoo and Jamadar (n 254).

<sup>291</sup> For example, out of 21 seats: in 2005 the DLP won 12 (57 per cent) seats with 52 per cent of the votes; in 2014 the DLP won 15 (71 per cent) seats with 57 per cent of the votes; in 2019 the DLP won 18 (86 per cent) seats with 59 per cent of the votes; and in 2022 the DLP won 19 seats as there was an election boycott and many seats were uncontested. In 2005, 2014, and 2019, the main opposition party (United Workers Party (UWP)) consistently won about 42 per cent of the vote but consistently was proportionately underrepresented in Parliament.

dominant role in both determining the legislative agenda, and as well, in shaping the content of primary legislation.

[262] In post-colonial Anglo-Caribbean independent states, there is often little separation of powers between the executive and the legislature (barring the opposition). The idea of the executive and legislature being autonomous and independent branches of government that act as checks and balances on each other, certainly in relation to the executive and the government members in the legislature, dissolves in the sea of Anglo-Caribbean political reality. As theoretically inconvenient as this may appear, it is a practical socio-political truth in the Caribbean, and those of us who live here know it all too well.

[263] Thus, when we come to examine the doctrine of separation of powers and the presumption of constitutionality, we in the Anglo-Caribbean need to view and consider what these may truly mean in light of our socio-political realities.

[264] And when we read and interpret our constitutions, we must ask why the powers of constitutional review of legislation and executive actions that are vested in the judiciary were so prescribed – looking carefully at it through the lenses of our lived experiences and socio-political realities.

[265] And when we must determine, for example, the burden and standard of proof on the state to justify legislation that may or does *prima facie* infringe guaranteed rights and freedoms, we have to do so in light of our Caribbean socio-political realities.

[266] Law must have meaning in its real-life contexts and for the societies that it aspires to serve. The judging of law detached from societal realities can too easily become an exercise in fantasy.

[267] Even if one were to reject the socio-political context analysis described above as too tenuous for meaningful jurisprudential use, then even a more conventional ‘first principles approach’ to constitutional interpretation will yield similar outcomes.

[268] Thus, I propose to discuss the following five specific overarching first principles that inform the interrogation of the substantive issues and are therefore relevant to this appeal. These first five principles address: (i) the living tree doctrine, (ii) privileging rights and freedoms, (iii) the basic deep structure, (iv) preambular values, and (v) concurrent findings of fact.

[269] In resolving the issues in this appeal, this Court's approaches to each and all of these are critical. When taken together, as strands of rope woven into a coherent whole, they confirm the approaches taken by the Court of Appeal to the three issues that I am addressing. However, if as a reader you prefer to pass these over and get to the substantive issue-analysis, you can proceed to [301].

**(i) The Constitution as a 'living tree'**

[270] This Court has unreservedly adopted the living tree approach to Caribbean constitutionalism from as early as 2007: 'Since this instrument is seen to be a living instrument and always speaking, the words contained therein it must be viewed as eminently susceptible to interpretation in order to accommodate ever-changing social realities.'<sup>292</sup>

[271] This approach is neither new nor novel. In 1930, the Privy Council, in *Edwards v Attorney General for Canada*,<sup>293</sup> stated:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written Constitutions it has been subject to development through usage and convention": Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within fixed limits, may be mistress in her own house ...

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<sup>292</sup> See *R v Lewis* [2007] CCJ 3 (AJ) (BB), (2007) 70 WIR 75 at [74] (Pollard J) .

<sup>293</sup> [1930] AC 124 at 136.

[272] Se-shauna Wheatle and Yonique Campbell<sup>294</sup> provide relevant contextualisation for the living tree approach to Caribbean Constitutions:

Caribbean constitutionalism is in an embryonic stage; it remains incomplete, encumbered by colonial sentiments and laws and weakened by the unresolved vestiges of the past. The constitutions of the Commonwealth Caribbean did not emerge from an indigenous process. Rather, the Westminster Whitehall model was exported at the time of independence with very little effort to adapt it to the realities of the Caribbean. ... Encouraging the growth of Caribbean constitutional identity requires recognition of the intersecting and divergent communities and practices of the region. True constitutional patriation must manifest in textual, institutional and cultural forms; it requires reckoning with the past but with an eye towards the future.<sup>295</sup>

[273] As we will come to see in the textual warrants, and as already foreshadowed, the socio-political realities that gave birth to the doctrine of the separation of powers in the UK are significantly different from those that exist in most independent Anglo-Caribbean states.

[274] This recognition by Se-shauna Wheatle and Yonique Campbell, that ‘Caribbean constitutionalism is in an embryonic stage; it remains incomplete, encumbered by colonial sentiments and laws and weakened by the unresolved vestiges of the past,’ is therefore apposite. The implications for certain all too often uncritically accepted precepts, such as the presumption of constitutionality and judicial deference to executive or legislative actions, remain live issues in our spheres.

[275] This appeal brings these considerations into sharper focus.

[276] In *McEwan*,<sup>296</sup> this Court would emphatically declare that:

Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to

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<sup>294</sup> Wheatle and Campbell (n 252).

<sup>295</sup> *ibid* 362.

<sup>296</sup> *McEwan* (n 241)

its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest.<sup>297</sup>

[277] Thus, a consideration that we need to keep in mind, is whether the use of the doctrine of separation of powers or of the presumption of constitutionality in this appeal, is being deployed in ways that constitute hindrances to giving effect to the fullness of the rights and freedoms implicated. And whether they yet remain ‘encumbered by colonial sentiments and laws and weakened by the unresolved vestiges of the past.’<sup>298</sup>

[278] In *Bisram*,<sup>299</sup> this Court would also state:

A Constitution embodies the most fundamental aspirations of a nation and its people. It is crafted to endure through all manner of, sometimes unforeseeable, circumstances. Interpretation of such a document absolutely requires an examination of, not just its text, but also its structure, its history and antecedents, and the moral values and governing principles underlying and/or proclaimed by it. We must also bear in mind that Anglophone Caribbean Constitutions are evolutionary in nature, and the Constitution and its parent enactment constitute a single organic law emanating from an appropriate law giver.<sup>300</sup>

[279] These statements all confirm this Court’s living tree approach to Caribbean constitutionalism. Moreover, they confirm an approach to constitutional interpretation that is historical, structural, evolutionary, organic, and that privileges human rights above all else.<sup>301</sup> What is required is, yes, a ‘contemporary appreciation of the constitutional human rights guarantees’,<sup>302</sup> but one that is also grounded in Caribbean realities and aspirations.<sup>303</sup>

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<sup>297</sup> *ibid* at [41].

<sup>298</sup> *Wheatle and Campbell* (n 252) 362.

<sup>299</sup> *Bisram* (n 270).

<sup>300</sup> *ibid* at [62].

<sup>301</sup> *Nervais* (n 20) at [39]: ‘This Court should give effect to the interpretation which is least restrictive and affords every citizen ... the full benefit of the fundamental rights and freedoms.’

<sup>302</sup> *ibid* at [102].

<sup>303</sup> *ibid* at [39]: ‘It is a general principle of constitutional interpretation that derogations from the fundamental rights and freedoms must be narrowly construed and there should be applied an interpretation which gives voice to the aspirations of the people who have agreed to make this document their supreme law.’

[280] Indeed, and as pointed out quite refreshingly in *R v Lewis*: ‘But what may be self-evident in one generation may not be so regarded in the next!’<sup>304</sup> And if I dare say so, what may be regarded as self-evident to one jurist may also not be so regarded by the next – as this is also a part of the evolutionary and dialogical nature of the law’s growth and development. In a dialogical model of legal development, the evolution of the law is natural and to be welcomed, as law must remain relevant to society.

[281] As a Court still in its embryonic stages, a plurality of voices may be a good and necessary thing – if not an inevitable occurrence of growth and development into freedom and self-actualisation.

(ii) **Privileging Human Rights and Freedoms**

[282] The privileging of human rights is central to how we should approach considerations of the separation of powers and presumptions of constitutionality. In *Bisram’s case*,<sup>305</sup> Saunders P, was adamant (citing *Nervais* and *McEwan*), that:

In *Nervais v R*, and some months later in *McEwan*, this Court’s majority came down on the side of the approach posited by ... *The gist of our opinion was that, in a democracy, courts must construe the Constitution and laws so as to promote fundamental rights and freedoms. Where the Constitution can be interpreted in two ways, one which furthers fundamental rights and one which infringes them, a court has a responsibility to adopt the former...*

[283] More recently, in *Marin v R*,<sup>306</sup> this Court, in a unanimous decision, consolidated its general living tree approach to constitutional interpretation, especially in the context of fundamental rights. This consolidation may be summarised in six assertions as follows:

(a) The primary lens of interpreting constitutional provisions, values and principles is that Caribbean Constitutions are *sui generis*;<sup>307</sup>

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<sup>304</sup> *Lewis* (n 292) at [75].

<sup>305</sup> *Bisram* (n 270) at [66] (emphasis added).

<sup>306</sup> *Marin* (n 135).

<sup>307</sup> *ibid* at [30].



(b) The *sui generis* nature of constitutions includes ideological interpretations that:<sup>308</sup>

- (i) fully recognise and give effect to fundamental rights and freedoms,
- (ii) are open-minded,
- (iii) are generous, broad, and purposive,
- (iv) treat a constitution as a living instrument capable of responding to evolving societal attitudes and norms,
- (v) re present and future facing,
- (vi) are democratically justifiable, and
- (vii) are consciously independently developmental.

(c) Practical aids to interpretation include matters such as the specific language of the text, the textual context, discoverable intent, constitutional common law, core and basic deep structure influences, relevant international values, principles and conventions, local, regional and comparative international precedents, relevant judicial interpretations and applications (bearing in mind stare decisis), and relevant academic and research literature.<sup>309</sup>

(d) Taking an integral and holistic approach to Caribbean constitutionalism, by reading and interpreting the entire constitutional text, in all of its multiple and relevant intersecting contexts.<sup>310</sup>

(e) Adopting a radial and linear lines of causation analysis. The former being the intersection of multiple lines of causation and consequence and the latter being the line-up of key factors or considerations.

(f) The Court uses these approaches to ensure that interpretations are coherent and consistent with constitutional values. This involves considering multiple lines of argumentation and their implications for both present and future legal contexts.<sup>311</sup>

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<sup>308</sup> *ibid* at [32].

<sup>309</sup> *ibid* at [36].

<sup>310</sup> *ibid* at [37]–[40].

<sup>311</sup> *ibid* at [41]–[46].

[284] This comprehensive approach finds broader regional Caribbean academic support in the text, *Fundamentals of Caribbean Constitutional Law*.<sup>312</sup> According to Robinson, Bulkan and Saunders, judges in the region emphasise the need to look closely to the actual words used in the constitution in their context and surrounding circumstances. The context can include internal elements like the structure, history and traditions of the constitutions. There is also reliance on the intention of the framers of the Constitution (original intent), but they opine that this is not strictly followed or limited to just that.<sup>313</sup>

[285] They point out that it has been widely accepted across the region that Caribbean constitutions have been regarded as *sui generis*<sup>314</sup> and that they should be interpreted generously to reflect the broad intent and/ or spirit of the instrument.<sup>315</sup> In interpreting the language used in the constitution, they reiterate that it is necessary to look at the language used and the instrument as a whole, including preambular clauses. In sum, this Court's approach to Caribbean constitutionalism may be best described as a rights-centric, rights- privileging approach.

### (iii) Basic 'deep' Structure

[286] In *Belize International Services Ltd ('BISL') v Attorney General of Belize*<sup>316</sup> I explored in some depth, the interpretative implications of the basic 'deep' structure doctrine in Caribbean constitutionalism. This is at times an overlooked perspective, but it is a salient one in appropriate circumstances. It is relevant to our explorations in this case, because the presumption of constitutionality and judicial deference to executive or legislative actions are treated as grounded in the doctrine of the separation of powers, which is in turn considered a part of the basic 'deep' structure

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<sup>312</sup> Tracy S Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet & Maxwell 2021).

<sup>313</sup> *ibid* 123, para 3-001.

<sup>314</sup> *Minister of Home Affairs* (n 133) at 113.

<sup>315</sup> Robinson, Bulkan and Saunders (n 312) para 3-017; *Whitfield v A-G* (1989) 44 WIR 1 (BS SC) at 19; *A-G v Whiteman* (1990) 39 WIR 397 (TT PC) at 412: 'The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights.'

<sup>316</sup> [2020] CCJ 9 (AJ) BZ, (2020) 100 WIR 109.

in Belizean constitutionalism. Thus, a Caribbean patriation of the separation of powers doctrine, that is grounded in lived realities and responsive to constitutional value-laden aspirations, is necessary.

[287] The basic ‘deep’ structure doctrine recognises that there are basic underlying principles of a constitution that form part of Belizean constitutionalism, that are so foundational and essential to the identity and nature of the State of Belize, that the Constitution itself as text and all executive actions are subject to it.<sup>317</sup> As an example, the *BISL* case uses the decision in *Nervais*, where even the literal text of a constitution (‘the savings law clause’) was not inviolable and is subject to these basic underlying principles.<sup>318</sup>

[288] In *BISL*, by determining the basic ‘deep’ structure of Belize’s constitution, it was asserted that this could be used to determine whether the Government’s actions met acceptable standards of constitutionalism. It was thought that the basic ‘deep’ structure in Belizean constitutionalism establishes Belize as a sovereign and democratic state, and includes the following (i) constitutional supremacy, (ii) enshrined fundamental rights that demand protection, (iii) the separation of powers, (iv) limitations of legislative power, (iv) an independent judiciary, and (v) the rule of law.<sup>319</sup>

[289] On a deeper examination of the rule of law, which was considered apposite in that case, I concluded that, in Belize, the rule of law and in particular its requirements of fairness, good faith, accountability and good governance, are part of the basic ‘deep’ structure of Belizean constitutionalism (Wit J agreed).<sup>320</sup> A relevant consideration in this matter, therefore, is how do these basic ‘deep’ constitutional values and principles intersect and what are the consequences of the state’s actions, given the rights and freedoms being interrogated.

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<sup>317</sup> *ibid* at [319].

<sup>318</sup> *ibid* at [320].

<sup>319</sup> *ibid* at [325].

<sup>320</sup> *ibid* at [16].

[290] For example, if a state was to interfere with a person's property or their right to work, and seeks to justify its decisions and actions on bases of fairness and equality of treatment – by, say, a proclaimed policy to 'level the playing field', a question that arises is whether a rule of law requirement for good faith, as a part of good governance, is applicable? And if so, what are the implications for the approaches to determine constitutional breach or compliance. After all, in *BISL*,<sup>321</sup> this Court would assert that: '[T]he State is indeed under the Constitution obliged to treat [with parties] ... in accordance with the rule of law, not understood as a mechanical but as a rich and normative principle, and, flowing therefrom, the principle of good governance.'

(iv) **Preambular Values**

[291] This Court has articulated its approach to the usefulness of constitutional preambles through various cases. These cases establish that from the very beginnings of this Court, the preamble of a constitution was valued and considered as an interpretative guide for the foundational values and principles governing constitutional interpretation.

[292] In *Attorney General of Barbados v Joseph*,<sup>322</sup> Wit J has perennially opined:

I now turn to the Barbados Constitution. This founding document clearly embodies and constitutes a constitutional democracy. Although this Constitution is largely concerned with seemingly formal and institutional issues, it is undoubtedly a qualitative and normative document. This is not only clear from the content of Chapter III on the protection of fundamental rights and freedoms of the individual, but also from *the preamble ... It is in this [preambular] light that the Barbados Constitution as a whole has to be understood and interpreted as these words fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general and that of Barbados in particular.*

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<sup>321</sup> *BISL* (n 316) at [16].

<sup>322</sup> *Joseph* (n 246) at [18] (emphasis added).

[293] In *Nervais*, Byron P would reiterate this Court’s approach to both the content and usages of preambular clauses:<sup>323</sup>

It is a preliminary statement which *embodies the fundamental values and the philosophy*, on which the Constitution is based, *and the aims and objectives*, which the founding fathers of the Constitution enjoined the people of Barbados *to strive to achieve ...*

[294] And in *McEwan*, Saunders P, would emphatically advise: ‘In adjudicating complaints of human rights infringements, *this Court must be guided by these statements of fundamental principle.*’<sup>324</sup>. Returning to Wit J, and in a 2015 appeal from Belize, this Court again endorsed his statements on the value of preambular clauses, as follows:<sup>325</sup>

*The preamble of a Constitution cannot be treated as mere surplusage. This court has recognised the normative functions served by the preamble in the Boyce decision with Wit JCCJ noting that, they ‘fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general’ and further that ‘[t]hese normative parts of the Constitution breathe, as it were, life into the clay of the more formal provisions in that document.’*

[295] Preambular clauses are, constitutionally, to be considered normative and values-laden statements of fundamental principle. Critically, this Court is now committed to being guided by these fundamental values-laden statements of intent, content, and objective. Regard must therefore be had to the Preamble of the Constitution of Belize as we progress through the analysis of the issues in this appeal. Clause (b) of the Preamble of the Constitution of Belize creates a constitutional ethos for socio-economic policy, one that imagines equitable access to and sharing of economic opportunities so as to provide an adequate means of livelihood for all.<sup>326</sup>

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<sup>323</sup> *Nervais* (n 20) at [22] (emphasis added).

<sup>324</sup> *McEwan* (n 241) at [61] (emphasis added).

<sup>325</sup> *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015)87 WIR 178 at [54] (emphasis added).

<sup>326</sup> Preamble to the Belize Constitution Act (n 2) cl (b): WHEREAS the people of Belize - (b) respect the principles of social justice and therefore believe that the operation of the economic system must result in the material resources of the community being so distributed as to sub serve the common good, that there should be adequate means of livelihood for all.

(v) **Concurrent Findings of Fact**

[296] Though not part of the Court's constitutional jurisprudence *per se*, the approach to concurrent findings of fact is relevant as a first principle in this appeal. In *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd*,<sup>327</sup> this Court explored this issue in depth. The approaches of the judges on the panel are not all in complete accord; there are nuanced differences. My thoughts are set out at [318] to [322] of that judgment. At [322], I summarised my approach, as follows:

Thus, if it can be demonstrated that a trial court in its assessment and determination of primary facts has made a clear, manifest, or obvious error in, and/or has reached conclusions that cannot be supported having regard to the totality of the evidence, and/or not provided clear, cogent, and reasonable justifications for making those findings, and/or there is otherwise no sufficient basis for its findings, an apex court can re-visit and review them even when there are concurrent findings (that is, the findings are affirmed by an intermediate appellate court). *In the case of concurrent findings of primary facts, the deference afforded is achieved by applying the standard that any mistake must be demonstrated to be both significant and obvious. In relation to concurrent inferences no such equivalent deference is due* as an intermediate appellate court is not in any more privileged position than an apex court. *And in relation to credibility the position is the same as in relation to primary facts.* [I]t may very well be that this approach can be accommodated within the conventional nomenclature of 'exceptional circumstances', ... and if so, that is fine. But what is critical is the flexibility that this formulation affords, and which is necessary at this time in Caribbean contexts.<sup>328</sup>

[297] In my understanding, a majority in *Apsara* also articulated the Court's approach, as follows.<sup>329</sup> Concurrent findings of fact deserve appropriate deference from this Court. This Court (as an apex court) will not interfere with concurrent findings of primary facts unless there are exceptional circumstances, such as a miscarriage of justice, or a violation of some principle of law or procedure. Contrastingly, inferences are not protected by the same deference as primary facts.

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<sup>327</sup> *Apsara Restaurants* (n 57).

<sup>328</sup> *ibid* at [322] (emphasis added).

<sup>329</sup> *ibid* at [59], [79].

- [298] This approach is justified in the need for certainty and finality in proceedings, understanding the Court's function as the final appellate court, while maintaining flexibility to correct injustice.
- [299] The differences between what this majority view states and my own understandings, may be in the details, and as to what constitutes the exact limits of 'exceptional circumstances', and correspondingly, what 'flexibility' is considered apt.<sup>330</sup>
- [300] In this matter, there have been concurrent findings of material and determinative facts by the trial judge and the Court of Appeal on the issues related to property rights and the right to work – issues (ii) and (iii). In my opinion, and *on these two issues*, it has not been shown that the Court of Appeal (i) committed any mistake in law that is both significant and obvious, or (ii) either the trial judge or the Court of Appeal in their assessment and determination of *relevant primary facts as relied on below*, has made a clear, manifest, or obvious error, and/or has reached conclusions that cannot be supported having regard to the totality of the evidence, and/or has not provided clear, cogent, and reasonable justifications for making those findings.

### **Analysis**

- [301] The first principles discussed above intersect in different ways in the analysis that follows. They may be referenced and explored at points, without revisiting in any detail their theoretical underpinnings. It is to be assumed that the discussion above will be appropriately read into the discussions that follow.

### **Burdens and Standards of Proof in Constitutional Review**

#### *Whether any Presumption of Constitutionality as a Burden of Proof*

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<sup>330</sup> *ibid* at [59], a majority opine: 'The "more flexible approach" ... is now to be interpreted as no more than the willingness to entertain arguments to overturn concurrent findings of fact in "exceptional" cases ...'.

When judges speak, to what extent are we aware on whose silencing our own capacity to speak, to write, to exist, depends? This is an important question of legal methodology, especially in post-colonial societies. *The interpretation and application of the law, the use of precedent, reliance on so called ‘rules’ of statutory interpretation and judicial policy such as stare decisis or the presumption of constitutionality, as method, if applied uncritically, can result in injustice, and undermine fundamental human rights and core constitutional values*, including the rule of law, in current Anglo-Caribbean contexts.<sup>331</sup>

[302] Conventionally, the presumption of constitutionality is a policy that courts apply when reviewing legislation. It has been held to operate in two ways (i) as a burden of proof, and (ii) as a canon of construction.<sup>332</sup> In relation to the presumption creating a burden of proof, it has conventionally operated according to the following logic: (i) legislation passed by a duly constituted legislature is presumed to be constitutional until proven otherwise, and therefore (ii) the burden is on the party challenging the impugned law to demonstrate that it is inconsistent with or breaches provisions in the constitution, rather than on the state to prove its consistency.

[303] This has been taken to mean that courts should adopt an approach of judicial deference to the legislature as the democratically elected law-making body. The presumption is traditionally presented as anchored in certain policy considerations: (i) respect for the separation of powers, (ii) legislative competence, (iii) democratic legitimacy, and (iv) stability and predictability in the law.

[304] However, in Caribbean spaces the presumption has become an area of some contestation, especially when a law is challenged based on infringements of entrenched fundamental rights and freedoms or core constitutional principles or values. In this context, it may very well be that what now exists jurisprudentially, is less of a legal ‘presumption’ *per se*, and more of a parliamentary administrative ‘assumption’ of regularity (as parliamentary procedural compliance).

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<sup>331</sup> *Nicholson v Nicholson* [2024] CCJ 1 (AJ) BZ, BZ 2024 CCJ 1 (CARILAW) at [1] (emphasis added); and see also [126]–[133].

<sup>332</sup> *Bar Association of Belize* (n 36) at [22].



- [305] First, all laws are subject to the overriding constitutional principle, that the constitution is the supreme law and that all and any laws inconsistent with it are void to the extent of the inconsistency. (The supremacy-consistency principle) The Belize Constitution expressly provides for this at s 2(1).<sup>333</sup>
- [306] Second, because constitutions are the supreme law, and because fundamental rights are privileged and must be interpreted purposively and generously, the presumption cannot override constitutional inconsistency.
- [307] Third, in Anglo-Caribbean independent states, it is the separation of powers that also vests in an independent judiciary, the jurisdiction, power and responsibility of constitutional and judicial review of legislation and executive actions.
- [308] Fourth, in Anglo-Caribbean independent states, democratic legitimacy includes judicial review of legislation and executive actions, and an independent judiciary is constitutionally deemed the guardian of democracy (not the executive or the legislature).
- [309] Fifth, for pragmatic socio-political reasons, the law-making autonomy and independence of the legislature on the one hand, and its capacity to hold an executive accountable on the other hand, may be weaker in Caribbean states (along legislative competence and democratic legitimacy sliding scales).
- [310] Thus, on first principles, resort to the doctrine of separation of powers, and/or the use of a presumption of constitutionality as a burden of proof bar or hindrance to constitutional review, when what is implicated are fundamental rights and freedoms, is constitutionally fraught. Indeed, it would, in my opinion, be a retrograde step if the deployment of such a presumption operated to stymie the protection and enabling of guaranteed rights and freedoms.

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<sup>333</sup> Belize Constitution Act (n 2): 'This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.'

[311] It is important to note that the supremacy-consistency principle makes the governing standard of review ‘inconsistency’, and therefore resort to expressions such as ‘clear violations’ or ‘heavy burdens’, and the like, are outwith the language and intention of s 2 of the Belize Constitution. The presumption, if it operates for any practical purposes beyond a *prima facie* threshold in relation to the initial evidential burden of proof on a claimant in constitutional review, cannot be deployed to save legislation that is inconsistent with constitutional provisions, principles, or values (the supremacy-inconsistency principle). Where fundamental rights are entrenched, the presumption is even weaker if it functions or operates as an evidential burden of proof. And, in Belize, fundamental rights are entrenched.<sup>334</sup>

[312] In the Court of Appeal, a comprehensive overview of the evolution of the law in relation to the presumption of constitutionality was undertaken by Bulkan JA and agreed to in that court’s unanimous judgment.<sup>335</sup> He notes along the way, that any ‘eviscerating application of the presumption has long since been discredited’,<sup>336</sup> and that ‘instead of constituting an evidential burden, the presumption of constitutionality is meant to operate as an interpretative technique, whereby a court can save a statute if its meaning is ambiguous, and only then if it is possible to read words into it to make it intelligible.’<sup>337</sup>

[313] Bulkan JA concludes his analysis by making the point in relation to the presumption operating as an evidential burden of proof bar to constitutional review: ‘On the contrary, precisely as part of the separation of powers principle, it is the right and duty of the judiciary, as guardian of the constitution, to scrutinise state action for conformity therewith.’<sup>338</sup> I agree.

[314] In this matter, Bulkan JA and the Court of Appeal therefore properly point out:<sup>339</sup>

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<sup>334</sup> *ibid* s 69, sch 2, (Part II of the Constitution deals with fundamental rights and freedoms).

<sup>335</sup> *Controller of Supplies* (n 11) at [25]–[37].

<sup>336</sup> *ibid* at [29].

<sup>337</sup> *ibid* at [29]; citing *A-G of the Gambia v Jobe* [1984] AC 689.

<sup>338</sup> *ibid* at [37].

<sup>339</sup> *ibid* at [37].

Belize is an independent constitutional democracy where every branch of government is accountable under a supreme constitution. In this dispensation, references to parliamentary omnipotence are equally misplaced and cannot be used as an impervious shield for executive or legislative action.

[315] In Jamaica, Sykes CJ, in *Robinson v Attorney General*,<sup>340</sup> makes a similar point in discussing governance in a constitutional democracy, when he says: ‘All power is subject to constitutional restraint. ... It is the text of the Constitution, its interpretation, and application that determines constitutionality. The final say on this is a judicial function and not an executive one.’

[316] The eminent authors of *Fundamentals of Caribbean Constitutional Law*<sup>341</sup> acknowledge the distinction between the presumption of constitutionality operating as a burden of proof and as a canon of construction. However, they point out: ‘These two consequences ... motivated by the same logic of showing strong respect for the democratic law-making process – take us in very divergent directions.’<sup>342</sup>

[317] That is to say, whereas as a canon of construction the goal is to save legislation by interpreting it in ways that are consistent with the constitution (where that is possible), when it operates as a burden of proof its effect is to act as a bar or hindrance to constitutional review. This latter effect is what some in the Caribbean consider outwith the constitutional framework of governance, as it can undermine the protection of guaranteed rights and freedoms.<sup>343</sup> As a canon of construction it advances the development of a rights-centric, rights-privileging legal culture, whereas as a burden of proof bar, it can operate to suppress this development.

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<sup>340</sup> *Robinson* (n 21) at [167].

<sup>341</sup> Robinson, Bulkan and Saunders (n 312) paras 3-039–3-042.

<sup>342</sup> *ibid* para 3-039.

<sup>343</sup> See, for example, *Maccabee v Commissioner of Police* KN 2019 HC 26 (CARILAW), (3 May 2019) at [86] (Ventose J): ‘It harks back to an earlier time in the immediate post-colonial period, the dark ages even, when British judges ... adopted interpretations that did not give our citizens the full benefit of the wide scope of ... the fundamental rights and freedoms found in our Constitutions.’ See also Robinson, Bulkan and Saunders (n 312) para 3-041.

[318] While it is accepted that respect for the democratic law-making process does create an *assumption* that a law that is duly passed is constitutionally *vires*, it is important, in a constitutional democracy like Belize, to note:<sup>344</sup>

There is a crucial caveat to the burden. Once the applicant *establishes that the law in question prima facie infringes a guaranteed fundamental right, the applicant is deemed to have met the burden of establishing a clear transgression* of constitutional principles. The *burden then shifts to the respondent to establish that the limit on the right can be constitutionally justified*.

[319] It may be worth pausing to state the obvious, and to say that when lawyers use the term *prima facie*, all that is intended and meant is what the literal meaning of the term signifies – ‘*at first face/sight*’ or ‘*on the face of it*’. In philosophy, the expression signifies that an idea seems plausible at first glance, though it might be disproven or modified on further interrogation.

[320] Practically, in law and in the context of a burden of proof on an applicant in constitutional review, it means nothing more than ‘*just enough evidence, at first sight, to suggest that a claim has some merit*’. It is clearly neither about proof on a balance of probabilities, nor about proof beyond doubt, and as explained, it cannot be deployed to undermine the development of a rights-centric, rights-privileging legal culture.

[321] Why should this be so? Why should there be such a low threshold, of only *prima facie* proof, in constitutional review of legislation and executive actions when fundamental rights and freedoms are implicated?

[322] First, because fundamental rights are to be privileged above all else in the liberal constitutional democracies that exist in independent Anglo-Caribbean states like Belize. Fundamental rights are privileged because: (i) in a liberal democracy they are an integral part of the rule of law and the rule of law is part of the basic ‘deep’ structure of Belizean constitutionalism, (ii) textually and structurally, pt II of the

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<sup>344</sup> *ibid* para 3-040 (emphasis added); and see also para 9-022.

Constitution of Belize, which deals with the ‘Protection of Fundamental Rights and Freedoms’, is entrenched and is also proximally prioritised, following only the sections that declare the sovereignty of the State and the supremacy of the Constitution. Part II is therefore intended to be accorded that prioritised status and function in the governance of Belize, and (iii) the preamble to the Constitution of Belize expressly confers this privileged status.<sup>345</sup>

[323] Second, bills of rights have been (and remain) principally ‘concerned with public law, not private law,’<sup>346</sup> and operate to guarantee these rights specifically against encroachment and infringement by the state. The guarantees of rights and freedoms therefore constantly exist in potential tension with legislative and executive (state) actions that may threaten them and are to be privileged under the guardianship of the courts, absent appropriate justification.

[324] Third, even within the constitution, tensions in interpretation among provisions are resolved in favour of upholding these rights and freedoms.<sup>347</sup> Fourth, fundamental rights and freedoms are to be given a broad and generous interpretation so as to give the fullest permissible effect to them.

### **A Two-Stage Approach**

[325] What this all means, is that any deployment of a presumption of constitutionality, as a burden of proof filtering device, that inappropriately undermines any of these considerations is *arguendo* unconstitutional. It is in this context that this Court’s jurisprudence has developed an evolving two-stage test as apposite for determining the appropriate use of the presumption.<sup>348</sup>

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<sup>345</sup> Belize Constitution Act (n 2) cl (a): ‘WHEREAS the people of Belize (a) affirm that the Nation of Belize shall be founded upon principles which acknowledge ... faith in human rights and fundamental freedoms ...’.

<sup>346</sup> *Maharaj v A-G* (No 2) [1978] 30 WIR 310 (TT PC) at 318.

<sup>347</sup> *Nervais* (n 20).

<sup>348</sup> *Corp of Hamilton* (n 83) at [197].

[326] The JCPC itself has explained, in *Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co Ltd*,<sup>349</sup> and reasoning by analogy from the European Court of Human Rights decision in the *Autronic AG v Switzerland*,<sup>350</sup> that in Dominica (and therefore generally in relation to Anglo-Caribbean constitutions), this two-stage approach is apt when reviewing alleged infringements of fundamental rights in which what is at stake are socio-economic governmental policies.<sup>351</sup>

### **Stage-One**

[327] First, at stage-one, it is to be ascertained whether the impugned law or executive action *prima facie* contravenes a fundamental right or freedom. That is, the inquiry is whether the impugned law or executive action, *prima facie*, ‘has or is or will likely’ *contravene (engage or impact or implicate or infringe or interfere negatively) any guaranteed fundamental rights and freedoms*. This is what is meant by ‘*prima facie*’ as the standard of proof on an applicant alleging a breach or infringement of a guaranteed fundamental right or freedom.

[328] As explained, it is a relatively low threshold, given the constitutional status and privileging of these rights and freedoms in relation to state actions. The focus is on the effect or impact of the law or executive action on the asserted right or freedom.

[329] In relation to this first determination, there is a constitutional standard of proof that exists for redress that is also relevant to this analysis. Section 20(1) of the Constitution of Belize, which deals with the enforcement of pt II rights and freedoms, provides that:

If any person *alleges that* any of the provisions of sections 3 to 19 inclusive of this Constitution *has been, is being or is likely to be contravened* in relation to him (or, in the case of a person who is detained, if any other

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<sup>349</sup> [2000] 57 WIR 141 (DM PC) at 152.

<sup>350</sup> (1990) 12 EHRR 485 at [61].

<sup>351</sup> See also *Corp of Hamilton* (n 83) at [197].

person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) *may apply to the Supreme Court for redress* (emphasis added).

[330] The textual standard of proof on an applicant is described by using the words, ‘*has been, is being, or is likely to be contravened*’. Thus, an applicant who can show, that a law or executive action has, is, or is likely to go against, or be contrary to, or violate a guaranteed right or freedom, has crossed the constitutional threshold and is entitled to consideration for obtaining redress. And notice, an allegation (‘*If any person alleges ...*’) of any such infringement constitutionally and sufficiently justifies an application for relief (‘*may apply ... for redress*’).

[331] The determinative question is, therefore, can a *prima facie* burden of proof presumption of constitutionality, be interpreted and applied so as to impose a higher standard of proof than that prescribed by the Constitution of Belize for an application and consideration for final redress?

[332] This Court, in *Bar Association of Belize v Attorney General* and in endorsing the two-stage approach,<sup>352</sup> has explained this first-stage as follows, ‘*courts presume that the impugned law is valid and place the burden of establishing at least a prima facie transgression on the party alleging breach.*’<sup>353</sup> This is instructive, because the standard required to move to stage-two is simply some proof of ‘*at least a prima facie transgression.*’ Nothing more is required. This is what this Court’s jurisprudence is, and in my opinion can only properly be. And this is the approach that must be adopted in this matter.

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<sup>352</sup> *Bar Association of Belize* (n 36) at [22].

<sup>353</sup> *ibid* at [22] (emphasis added).

## Stage-Two

- [333] Second, at stage-two, and once a *prima facie* transgression has been shown,<sup>354</sup> the burden of proof shifts to the state, to establish to the appropriate standards that any negative engagement or impact or implication or infringement of or interference with guaranteed rights and freedoms is constitutionally justifiable and consistent (the supremacy-consistency principle).<sup>355</sup>
- [334] At stage-two different considerations apply. The onus is on the state to demonstrate justification and consistency. It is here that executive or legislative intention, purpose and policy may be relevant. However, a law that *prima facie* negatively engages or impacts or implicates or infringes or interferes with guaranteed rights and freedoms is now presumed invalid unless the limitations are justified.
- [335] The test is an objective one, and there is generally a stricter or heightened scrutiny.<sup>356</sup> Justification must be established by clear and cogent evidence.<sup>357</sup> The standard of proof is often described as ‘a high degree of probability’ or as ‘demonstrably justified’.<sup>358</sup> Indeed, as the Privy Council explained in *Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co Ltd*:<sup>359</sup> ‘The necessity for restricting them must be convincingly established.’ The rationale is that entrenched rights and freedoms are involved and implicated, and these must be jealously guarded against the clichéd ‘tyranny of the majority’.<sup>360</sup>
- [336] This stage-two test is the familiar ‘aims-measures-means’ proportionality test that this Court endorsed in a 2018 appeal from Belize, *Titan International Securities Inc v Attorney General*.<sup>361</sup> Summarised, that test was articulated then as follows. In

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<sup>354</sup> *Corp of Hamilton* (n 83) at [197].

<sup>355</sup> In the Caribbean, this approach was established as early as 1964, in *Lilleyman v Inland Revenue Commissioners* [1964] 13 WIR 224 (GY SC) at 232: ‘if any law *prima facie* appears to hit any of the fundamental rights specifically guaranteed by the Constitution, the burden shifts to the State to establish that it is constitutionally justifiable.’

<sup>356</sup> *Oakes* (n 242) [69].

<sup>357</sup> *ibid* at [68].

<sup>358</sup> *ibid* at [68]–[71].

<sup>359</sup> Canadian Charter of Rights and Freedoms, s 1. See *Oakes* (n 242) at [71]–[72].

<sup>360</sup> *Cable and Wireless* (n 349) at 152 (emphasis added).

<sup>361</sup> Alexis de Tocqueville, *Democracy in America* (1835).

<sup>361</sup> *Titan International Securities* (n 12).



order to determine whether a limitation/restriction on a fundamental right was arbitrary or excessive, a court had to ask itself the following questions: Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>362</sup> Since 2018, this test has been nuanced as discussed below.

[337] Noteworthy, is that by the overarching operation of s 3 of the Constitution of Belize, the protection of the specific provisions listing rights and freedoms in Belize (ss 4 to 17), is ‘*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 person does not prejudice the rights and freedoms of others or the public interest.*’ The onus is clearly, textually, and pragmatically, on the state to satisfy and justify these requirements.

[338] Practically,<sup>363</sup> the state must prove that the measures limiting the protected right are justified in the public interest or in order to protect the rights and freedoms of others. To do so, it must be demonstrated to the requisite standard of proof that: (i) the limitations are pursuant to a legitimate law – the sufficiency requirement, (ii) there is a rational connection between the measures used and the public purposes listed in the relevant limitation clauses, and (iii) the measures adopted are proportionate.

[339] As to what is meant by proportionate, however, is now no longer simply the conventional ‘minimum means’ – no more than is necessary test.

[340] In the *Sanatan Dharma Maha Sabha case*, I explained, and remain of the view, that ‘*the more substantial the interference with a protected fundamental right the greater must be the justification for any limitation or inhibition.*’<sup>364</sup> This is in keeping with a right-centric, rights-privileging jurisprudential approach to

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<sup>362</sup> See also *de Freitas* (n 13); *Oakes* (n 242).

<sup>363</sup> See Robinson, Bulkan and Saunders (n 312) para 9-021.

<sup>364</sup> *Sanatan Dharma Maha Sabha* (n 156) at 441 (emphasis added).

entrenched bills of rights. What this requires is a case sensitive weighting of the encroachment/infringement on the right or freedom against public interest benefits derived from pursuing the aims (assuming the limitations are pursuant to a legitimate law and the measures used are rationally connected to the aims).

[341] In this regard, and *in relation to the degree of interference*, the nature of the right or freedom, taken in context, is a significant consideration. The interdependence, interrelatedness, and intersections, and as well the practical or instrumental primacy of rights and freedoms, in context, are also relevant considerations.<sup>365</sup> This therefore requires more holistic and intersectional approaches and analyses.

[342] The minimum means evaluation remains relevant but may not in all cases be sufficient. As the authors of *Fundamentals of Caribbean Constitutional Law* explain, in addition to the three stated elements, a fourth should be included, to wit:

*‘The law meets the overriding consideration of striking an appropriate balance between the interests of the society and those of the individuals and groups affected,’<sup>366</sup> and to which I would add, bearing in mind the degree of interference with a protected right or freedom and the nature of that right or freedom.*

[343] In summary, the inquiry on this limb is whether the means used by the law to impair the right or freedom are disproportionately more than required to achieve the stated objectives, bearing in mind the nature of the right, the degree of interference, and the need to achieve a contextually appropriate balance between the interests of those affected and of society.

[344] It is here, *arguendo*, at stage-two, if at any point in the overall analysis, and with say a law that introduces socio-economic policy - as in this matter, that a court may

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<sup>365</sup> The CCJ’s jurisprudence, in cases such as *Nervais* (n 20), *McEwan* (n 241), and *Joseph* (n 246) seems to recognise that there can be a values-based hierarchy among rights where, for example, say, the right to life, human dignity, and equality may be considered ‘source’ rights and foundational.

<sup>366</sup> Robinson, Bulkan and Saunders (n 312) para 9-023 (emphasis added).

pay some ‘deference’ or exercise some ‘restraint’ in relation to executive and/or legislative decision-making.

[345] However, in doing so a court cannot water down its constitutionally mandated role and responsibility as the guardian of the Constitution, and especially as protector and enabler of the fullness of guaranteed rights and freedoms. In this context, Sykes CJ, in the Jamaican case of *Robinson*, has presciently pointed out (no doubt based on his lived experiences), that the executive and legislative branches of government ‘have been known to abuse their power’.<sup>367</sup>

[346] To be clear, notions of deference are not a stage-one applicant burden of proof consideration. Judicial deference or restraint in this context, may only impact the court’s analysis and assessments at stage-two when the burden of proof, to the standard described, has now shifted onto the state to justify its decisions and actions. And, just as with any tension between provisions within the text of a Constitution, so also here, if there are tensions between socio-economic policies and rights, rights and freedoms are to be privileged, subject to satisfactory proof of constitutionally due justification by the state.

[347] The focus on deference or restraint in stage-two is further misplaced, if emphasis is placed first and foremost on the governmental policies in question. This inverses the proper approach. The proper and primary focus must be on the rights and the nature of the rights alleged to be infringed.

[348] A rights-centric, rights-privileging approach to Belizean constitutionality demands nothing less (the supremacy-consistency principle). This is the only constitutionally legitimate starting point – and it is the one mandated by this Court’s consistent jurisprudence. Otherwise, the entire corpus of this Court’s jurisprudence on approaches to bills of rights is upended.

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<sup>367</sup> *Robinson* (n 21) at [203].

## Public Law Parallels: Duty of Candour; Two-Stage Approaches

[349] Reasoning further, and by analogy from administrative law, which is considered a branch of public law – and which also deals primarily with a review of administrative actions, the principle of full disclosure is apposite. The focus is on governmental exercise of power. And there is now an unquestioned duty on the state and state agencies to make full disclosure of all relevant materials and information in order to facilitate challenges.

[350] This general duty of candour was resisted by state authorities for a long time. It has now been extended to the pre-trial stages of litigation, as evidenced in the recent JCPC decision in the 2025 *National Bank of Anguilla* case.<sup>368</sup>

[351] In that case, the Board summarised the appropriate approach to disclosure and the special onus on the state to make full and frank disclosure at all stages throughout the proceedings. It is worth citing *in extenso*, as follows:<sup>369</sup>

Judicial review proceedings are not conducted in the same way as ordinary disputes between private parties ... The supervisory jurisdiction is designed to protect the public interest in the lawful use of the powers conferred under public law, as well as the private interests of those who may be affected by the abuse of those powers. *It is intended to secure the constitutional value of the rule of law, to which public authorities, and the other parties to judicial review proceedings, are or should be committed.* In consequence, the parties to such proceedings are expected to ensure that the court is in possession of all the information which it requires to decide the case correctly.

...

This obligation, usually described as the duty of candour, is well established. ... In *Graham v Police Service Commission* [2011] UKPC 46, Sir John Laws said at para 18 that it “*is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the court to arrive at an accurate decision*”. More recently, ... Lady Simler said... that a

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<sup>368</sup> *National Bank of Anguilla (Private Banking and Trust) Ltd (in administration) v Chief Minister of Anguilla* [2025] UKPC 14.

<sup>369</sup> *ibid* at [89]–[91] (emphasis added).

*respondent to a judicial review claim is under “a very high duty ... to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide”. Breach of the duty may (but will not necessarily) lead to the court drawing inferences which are adverse to the party in breach (R v Civil Service Appeal Board, Ex p Cunningham [1992] ICR 816, 822–824)*

...

Although the duty of candour was said in some older cases to arise once leave to apply for judicial review had been granted, more *recently it has been held that the duty applies at the stage of an application for leave ...* That approach is in accordance with principle: the reasons underlying the recognition of the duty of candour—the importance of enabling the court to perform its function in judicial review proceedings of protecting the rule of law, and the fact that material information will often be solely within the knowledge of the respondent—can be relevant at the leave stage as well as after leave has been granted. Indeed, ... *similar considerations can be relevant in the parties’ dealings with each other at the pre-action stage*, as a matter of good practice. That is recognised in England and Wales ... [and] endorsed by the Court of Appeal of the Eastern Caribbean Supreme Court in *Burke v Sam*, SVGHCVAP2014/002, 15 September 2015, para 18.

[352] In *Graham v The Police Service Commission*,<sup>370</sup> in the Court of Appeal of Trinidad and Tobago, I endorsed the recognition that in public law administrative review, the duty of candour on the state was a necessary requirement to ensure the highest standards of public administration. I also asserted then, and maintain, that this duty in public law constitutional review is no different and certainly no less when fundamental rights are implicated.

[353] In *Graham’s case*, which was a judicial review application grounded in, among other things, an alleged contravention of the right to equality of treatment under s 4(d) of the Trinidad and Tobago Constitution (and thus a hybrid form of public law action), I put it this way:<sup>371</sup>

In my opinion all that I have stated above in relation to judicial review proceedings ought to operate with equal if not greater force when what is involved is a legitimate assertion of a breach of the fundamental human

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<sup>370</sup> TT 2010 CA 15 (CARILAW), (26 March 2010) (Jamadar JA).

<sup>371</sup> *ibid* at [21], [25] (emphasis added).

rights provisions of the Constitution. *Thus, in my opinion, an assertion of a breach of the right to equality of treatment ... ought not to be hindered or fettered by a rule based on an interpretation and application of the presumption of regularity ...*

*Once a prima facie case of the violation of the right to equality of treatment is raised, the onus shifts to the public authority to explain and justify its decision* and to show that there is no breach of the right. It is in this context, of an evaluation of all the evidence (in which the role of the court may be viewed in somewhat of an investigative light), that the presumption of regularity may play a role in determining the outcome of that exercise.

- [354] What is the point and what is the relevance of this for these proceedings? Constitutional review of legislation or executive actions, like judicial review of administrative actions, is concerned with the protection of private citizens' rights against abuses and the overreach of state powers. In this context and to uphold the rule of law, courts have recognised a disparity in power and access to information between state actors and private citizens. To do justice and to uphold constitutional rights and freedoms, a presumption of constitutionality or a doctrine of separation of powers which does not accommodate this reality undermines the rule of law and the supremacy-consistency principle.
- [355] In constitutional review, like in judicial review, a duty of candour lies on all parties, but is especially so on the state with all the implications described above. It would therefore be jurisprudentially inconsistent to take the presumption of constitutionality beyond a requirement for *prima facie* proof by an applicant, and to make it into an undue bar or hindrance to the protection of rights and freedoms.
- [356] At stage-two, this duty of candour further demands that the state be held fully responsible and accountable for cogently/convincingly<sup>372</sup> establishing justification of impugned legislation or executive actions.

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<sup>372</sup> See *Cable and Wireless* (n 349) at 152: *The test is stated as 'The necessity for restricting them must be convincingly established.'* (emphasis added).

[357] In *Paponette v Attorney General of Trinidad and Tobago*,<sup>373</sup> the consistency of this two-stage approach across public law is made explicit. In that case, in the context of legitimate expectation: (i) the initial burden lies on the applicant, (ii) once this has been crossed the onus shifts to the state to justify, (iii) it is for the state to produce the evidence and proofs that objectively meet the requirements of justification, and (iv) there is no legal burden on the applicant to prove a lack of justification.<sup>374</sup>

[358] Furthermore, and importantly so, there is no inference to be drawn that the state must have had justifying reasons for its actions and/or that they are in furtherance of an overriding public interest. Indeed, without evidence of justification a court is unlikely to draw an inference in favour of the state – because, in the case of a legitimate expectation, the breach of a promise or representation is ‘a serious matter’.<sup>375</sup> All the more so in relation to *prima facie* infringements of fundamental rights and freedoms.

### **What is the Appropriate Degree of Judicial Deference Owed to the Legislature in Socio-Economic Policy-Making?**

[359] In the Jamaican case of *Robinson*, Sykes CJ makes the following point, relevant to this issue of the stage-two burden of proof on the state and in relation to notions of judicial deference and restraint:<sup>376</sup>

The executive’s or legislature’s assertion that they are solving something so important that fundamental rights and freedoms can be trespassed upon is no longer sufficient. This is the ultimate logic of constitutional supremacy and not Parliamentary supremacy.

[360] We have come full circle from where we started. The supremacy-consistency principle of Anglo-Caribbean constitutionalism forces us to confront, and overturn,

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<sup>373</sup> [2010] UKPC 32, (2010) 78 WIR 474 (TT) at [37].

<sup>374</sup> *ibid* at [37]–[38].

<sup>375</sup> *ibid* at [41]–[42].

<sup>376</sup> *Robinson* (n 21) at [203].

*colonial sentiments, laws, principles, and approaches that have weakened our jurisprudence by the unresolved vestiges of the past.*<sup>377</sup>

[361] In the *Cable and Wireless (Dominica)* case, the Privy Council also discussed the notions of judicial deference and restraint in the context of executive/legislative socio-economic policies and the right to freedom of expression, as follows:<sup>378</sup>

The right to freedom of communication would be a fragile thing if it could be overridden by general political or economic policy. So, too, the stress placed ... on the need for judicial restraint cannot be allowed to discourage the courts from a firm performance of their proper constitutional role.

Where, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in para (1) of art 10, the supervision must be strict, because of the importance of the rights in question ... *The necessity for restricting them must be convincingly established.*

[362] These statements are consistent with what has been explained above and are of salience in the circumstances of this appeal. The key takeaways are, (i) consider the nature of the rights or freedoms allegedly contravened, (ii) if the rights or freedoms are considered of especial importance in the context of Belize, the necessity for any restrictions or abridgments must be convincingly/cogently established by the state, (iii) the court's supervision must be strict, and (iv) the fact that the impugned legislation may be purporting to implement socio-economic policy cannot discourage courts from a firm performance of their constitutional role in protecting fundamental rights and freedoms.

[363] Even if it be thought that freedom of expression is a 'higher order' human right in Western liberal democracies, let us be clear, in Caribbean societies the right to property is not some sort of 'second order' right to be undervalued. In the Caribbean, given our historical socio-political contexts, property rights are to be highly valued – and the quoted statements in *Cable and Wireless* are apt.

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<sup>377</sup> To adapt the insights of Wheatle and Campbell (n 252) 362.

<sup>378</sup> In the context of art 10(1) of the European Convention on Human Rights and Fundamental Freedoms (n 144) which guarantees freedom of expression; the impugned right in *Cable and Wireless* (n 349) at 151–152 (emphasis added).



[364] Bulkan JA is therefore correct, in my opinion, when he opines:<sup>379</sup>

There is no question that the government, in its executive and legislative roles, has the legal right to make decisions shaping socio-economic and financial policy. But this right is not equivalent to imperious royal will, unquestionable and unaccountable. There may well be an area of policy, involving complex financial or economic matters, where the judiciary is institutionally incapable of second-guessing legislative decisions; despite this, however, all policy must be consistent with the constitution, and the judiciary is well-equipped (and best placed) to determine whether fundamental rights have been unduly or excessively limited.

[365] To be clear, even if repetitive, this is a position also espoused by the Privy Council in the *Cable and Wireless (Dominica) case*.<sup>380</sup> Moreover, in this matter any judicial deference must also stand the severe scrutiny that the Privy Council thought apt in the *Cable and Wireless (Dominica) case*.

[366] The core facts are apposite. In the *Cable and Wireless (Dominica)* matter, relevant considerations were the creation of a business-driven monopoly in favour of Cable and Wireless (Dominica) ('CWD'), in which the government had a common financial interest. In these circumstances, the Board opined:<sup>381</sup>

In the opinion of their lordships *the fact that the Government and CWD had a common financial interest in exclusivity* does not preclude a claim that it was reasonably required for the purpose of protecting the rights and freedoms of other persons. *It [does militate] against over-cautious judicial deference* in scrutinising the claim, *for it suggests that protection of such rights and freedoms may not have been the dominant purpose*.

[367] Consistent with what has been explained throughout this opinion, the Board concluded:<sup>382</sup>

In the end, however, *the question for the court is the objective one whether, in authorising and granting exclusivity, the Act and the licence make*

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<sup>379</sup> *Controller of Supplies* (n 11) at [35].

<sup>380</sup> *Cable and Wireless* (n 349) at 151.

<sup>381</sup> *ibid* at 152 (emphasis added).

<sup>382</sup> *ibid*.

*provision that is reasonably required* for the purpose of protecting the rights and freedoms of other persons.

[368] The point is that the Board did not place much reliance on notions of deference or restraint in the context of governmental socio-economic policy, but rather, was quite dismissive of such reliance as a bar or hindrance to constitutional review and instead, focused on the need for state justification. Clearly, this is consistent with the rights-centric, rights-privileging approach to constitutional review which this Court has long advocated.

[369] There is also settled support for this approach in the jurisprudence of Canada. In relation to socio-economic rights and the role of the courts in interpretation, two decisions from the Supreme Court of Canada are of note: *Irwin Toy Ltd v Quebec (Attorney General)*,<sup>383</sup> and *Newfoundland (Treasury Board) v NAPE*.<sup>384</sup>

[370] In *Irwin Toy Ltd*, it was held that a balance is to be struck between the government's duty and the impairment of the right, and that it is first and foremost the legislature's duty and responsibility to do so: 'Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.'<sup>385</sup>

[371] However, ultimately, it is the courts' duty and responsibility to determine whether the right balance has been achieved by the legislature. In *Newfoundland (Treasury Board)* the Supreme Court considered the separation of powers principle and the deference to be had to the legislature when making policy decisions.

[372] At [116] the Supreme Court summarised the correct approach (to stage-two justification), in the context of the Canadian Charter of Rights, as follows:<sup>386</sup>

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<sup>383</sup> *Irwin Toy* (n 119).

<sup>384</sup> [2004] 3 SCR. 381.

<sup>385</sup> *Irwin Toy* (n 119) at [80].

<sup>386</sup> Note, the *Oakes* test is the 'aims-measures-means' proportionality test that this Court has also adopted.

In summary, whenever there are boundaries to the legal exercise of state power such boundaries have to be refereed. Canadian courts have undertaken this role in relation to the division of powers between Parliament and the provincial legislatures since Confederation. The boundary between an individual's protected right or freedom and state power must also be refereed. The framers of the Charter identified the courts as the referee. While I recognize that the separation of powers is an important constitutional principle, I believe that the s. 1 test set out in *Oakes* and the rest of our voluminous s. 1 jurisprudence already provides the proper framework in which to consider what the doctrine of separation of powers requires in particular situations ...

[373] The 'degree of deference' owed, if any is owed to the legislature in socio-economic policy-making at stage-one in an action for constitutional review, is nothing more than a requirement that an applicant demonstrates, *prima facie*, a contravention of a fundamental right or freedom, as explained above. If this is done, the burden shifts to the state to justify its policy according to law and as also explained above.

[374] As the Supreme Court also explained in the *Newfoundland (Treasury Board) case*:<sup>387</sup>

The "political branches" of government are the legislature and the executive. Everything that they do by way of legislation and executive action could properly be called "policy initiatives". *If the "political branches" are to be the "final arbitrator" of compliance with the Charter of their "policy initiatives", it would seem the enactment of the Charter affords no real protection at all to the rightsholders that the Charter, according to its text, was intended to benefit. Charter rights and freedoms, on this reading, would offer rights without a remedy.*

[375] Simply put, whether in socio-economic policy-making legislation or executive actions, or otherwise, the fundamental operating principles for constitutional review in bills of rights cases remain largely the same and the courts are deemed the appropriate arbiters of whether a right balance has met constitutional standards. In the discharge of this function, courts are playing their properly ascribed role according to the separation of powers under the Constitution of Belize.

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<sup>387</sup> *Newfoundland (Treasury Board)* (n 384) at [111] (emphasis added).

[376] Finally, in *Graham's case*, I framed the approach of a court dealing with public law matters rather robustly, as some have opined, but which I maintain is as follows:<sup>388</sup>

Finally, I think it is also worth stating that where there are allegations of breaches of the fundamental human rights provisions of the Constitution, there ought to be a policy consideration by the courts that asserts that state protection is not inviolable and intervention is permissible. *One may describe this as 'a right to intervene' that is vested in the courts to ensure that violations of the human rights provisions are exposed and appropriately vindicated.* This in my opinion is the true import of section 14 (1) and (2) of the Constitution.<sup>389</sup> ... There is thus *a responsibility to protect the values enshrined in the human rights provisions that falls squarely on the shoulders of the courts.*

**Were the Respondent's Property Rights Constitutionally Infringed by Reason of any Arbitrary Deprivation or Taking or Acquisition of their Property Without Compensation?**<sup>390</sup>

*Crossing the Prima Facie Threshold – Have the Applicants Crossed the Prima Facie First-Stage Threshold?*

[377] First, what are the relevant rights and freedoms alleged to have been contravened? The relevant sections are ss 3 and 17 of the Constitution. Section 3<sup>391</sup> sets out an overarching framework that gives context and meaning to the specific rights that follow. It specifically identifies as a protected right 'protection from arbitrary deprivation of property'. This is fundamentally a protection of property right. In this regard it is relevant that s 3(c), which precedes s 3(d), guarantees 'protection for ... property ...' in the contexts of family life, privacy, and human dignity. These sections must also be read and interpreted in light of the Preamble to the Constitution of Belize.

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<sup>388</sup> *Graham* (n 370) at [26] (emphasis added).

<sup>389</sup> The relief section in the Trinidad and Tobago Constitution, akin to s 20 in the Constitution of Belize.

<sup>390</sup> Belize Constitution Act (n 2) ss 3, 17.

<sup>391</sup> *ibid* s 3(d), in so far as it is relevant, states: 'Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, 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– (d) *protection from arbitrary deprivation of property*, the provisions of this Part shall have effect for the purpose of affording protection to those 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 person does not prejudice the rights and freedoms of others or the public interest.'

[378] In relation to s 3 of the Constitution, it is very important to note that in Belize the redress section in the Constitution (s 20), that s 20(1) specifically includes s 3 as among the protected provisions for which enforcement applies: ‘If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him ... that person ... may apply to the Supreme Court for redress.’ Therefore, in Belize the Constitution specifically provides that s 3 rights and freedoms are enforceable.<sup>392</sup>

[379] Certainly, in the Caribbean, given our colonial antecedents and our fraught relationships and entitlements to property rights, especially at the hands of state powers, this is a right of great significance in Belize. Deprivation is therefore constitutionally and remedially addressed and entrenched.

[380] Margaret Demerieux points out:<sup>393</sup> ‘A clause using the term “deprivation” can more readily broaden the scope of property protection as there can be deprivation without acquisition.’ Therefore, the key constitutional concept here is the protection of property, from ‘arbitrary deprivation’ by the state. The notion of deprivation is foundational. In this regard, deprivation means a loss or consequential restriction of the enjoyment (ownership, use, possession, benefits etc) of property.

[381] Further, in Belize the meaning of property is undefined constitutionally for the purposes of s 3. It clearly includes income (‘money’) derived from and/or the goodwill of a business, an issue which is now no longer in debate in the Caribbean – and note that the threshold standard is adverse effects on goodwill or value to a degree that is not trivial.<sup>394</sup>

[382] Section 17<sup>395</sup> provides a more specific guarantee of property rights. Its marginal note states, ‘Protection from the deprivation of property’, thereby linking it to s 3.

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<sup>392</sup> Compare and contrast, *Campbell-Rodriguez* (n 82) (Lord Carsell).

<sup>393</sup> DeMerieux (n 71) 389.

<sup>394</sup> *ibid* 389–392. See also *Corp of Hamilton* (n 83) at [193]: ‘Depending on the facts, this may involve establishing a substantial (or even a total) restriction on the ability to control use and enjoyment of the property and/or *adverse effects on the goodwill or value of the property rights* involved’ (emphasis added).

<sup>395</sup> Belize Constitution Act (n 2) s 17(1) states: ‘No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that,

This Court in its jurisprudence from *Nervais* through to *Marin*, has consistently explained that a constitution is *sui generis* and must be read as a whole, in its many intersecting contexts, purposively, and so as to give a generous and fulsome meaning to protected rights and freedoms (as explained above).

[383] Thus, both ss 3 and 17 must, at minimum, be read together purposively, considering relevant preambular clauses, so as to achieve the objectives of ss 3 and 17.

[384] Section 17 states affirmatively, that: ‘No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that ...’. First, this is a protection from compulsory possession or acquisition by the state, which must be read, interpreted and analysed through the lenses of s 3 and preambular cl (b) of the Belize Constitution, to include any arbitrary deprivation of property. Doing so is in keeping with this Court’s jurisprudence on constitutional interpretation.

[385] Second, the guarantee is made explicitly subject to a constitutional requirement that legislation that provides for acquisition, possession or deprivation of property, must also provide for reasonable compensation within a reasonable time and access to the courts to prove and enforce such an entitlement. Neither the Original nor the Amended Acts contain any such provisions, and to that extent they are *ultra vires* the Constitution – if ss 3 and/or 17 apply.

[386] Section 17 also provides that any possession or acquisition (or, per s 3, deprivation) of property must also be ‘for a public purpose’.<sup>396</sup> In this matter, this element is

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- (a) prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and
  - (b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of,
    - (i) establishing his interest or right (if any);
    - (ii) determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorising the taking of possession or acquisition;
    - (iii) determining the amount of the compensation to which he may be entitled; and
    - (iv) enforcing his right to any such compensation.’ (emphasis added).

<sup>396</sup> *ibid* s 17(1)(b)(ii).

arguably satisfied. However, the core function to s 17 is to provide compensation where there is possession, acquisition, or deprivation of property by the state, that does not fall within the allowances listed at s 17(2) and (3), none of which apply in this case.

[387] Therefore, if the LPG companies have had their ss 3 and 17 rights contravened in relation to the state taking possession, acquiring, or arbitrarily depriving them of property, they are entitled to reasonable compensation within a reasonable time, even if the taking, acquisition or deprivation is legitimately in furtherance of a public purpose.

[388] The analytical process to be followed is simply to ask, has a *prima facie* contravention of and/or interference with the LPG companies' ss 3 and 17 rights been demonstrated, and if so, is that contravention and/or interference justifiable. In this regard the Court of Appeal's approach to this issue cannot be flawed.<sup>397</sup>

[389] At [38] to [47] of the Court of Appeal judgment, Bulkan JA effectively, and in my opinion correctly, assesses and analyses the relevant evidence on whether there was property at stake and a loss thereof ('has or is or will likely be') suffered by the LPG companies. In this, his conclusions constitute findings of fact concurrent with the trial judge. These are largely concurrent primary findings of fact, with some inferential conclusions. As Bulkan JA explained: 'The trial judge's finding was not against the weight of the evidence and none of the arguments made demonstrates that the LPG companies could or did not acquire goodwill or did not establish importation businesses.'<sup>398</sup>

[390] In essence, the courts below have both agreed, after a careful review of the relevant facts and documents, that the LPG companies did in fact suffer loss of goodwill and customers. This is an irresistible conclusion in my opinion, especially as it is grounded in the common finding of both courts that the Original Act had the effect

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<sup>397</sup> *Controller of Supplies* (n 11) at [54], [18]–[19], [23]–[24].

<sup>398</sup> *ibid* at [48].

of creating a monopoly that excluded the LPG companies. This Court's approach to concurrent findings, as stated above, is apposite. The LPG companies have crossed the first-stage threshold.

[391] It is now well established for over a decade in the Caribbean,<sup>399</sup> that even with regulatory laws of a socio-economic character, and certainly in relation to infringements to the right to property, 'it is not necessary to show in a business context that the infringement makes the operation of the business impossible.'<sup>400</sup> In regulation cases, all that is required is to show a substantial interference.<sup>401</sup>

[392] Furthermore, it is now trite that economic interests connected with the running of a business are property, and adverse effects on the goodwill and value of a business constitute a *prima facie* interference with the right to property.<sup>402</sup>

[393] Once the *prima facie* standard of proof is met, it is then for the state 'to justify the interference', and '[i]f they failed to do so, the breach was established.'<sup>403</sup> *A fortiori*, these basic principles also apply in non-regulation cases (with appropriate adjustments to the requirement to prove substantial interference).

### *Justification*

[394] The second stage of the analysis involves an inquiry into whether there has been constitutionally due justification by the state. The four-limb aims-measures-means approach discussed above is applicable.

[395] In this case the analysis must take place in two parts: (i) the period from the Original Act to the Amendment Act, and (ii) the period after the Amendment Act. This is important because the LPG companies' claim for constitutional redress begins with the impact of the Original Act on their businesses. It would be akin to resorting to

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<sup>399</sup> See *Paponette* (n 373) at [23]–[25] (albeit in the context of Constitution of Trinidad and Tobago (n 153) s 4(a)).

<sup>400</sup> *ibid* at [23].

<sup>401</sup> *ibid* at [25].

<sup>402</sup> *ibid* at [21].

<sup>403</sup> *ibid* at [25].



‘tabulated legalisms’ to suggest that since the agreed (amended) issues focus on the constitutionality of the Amended Act, the constitutional impact of the Original Act for the purposes of relief is somehow wiped away.

[396] I consider such an approach undermining of the jurisdiction, power and duty on this Court, that is conferred by s 20 of the Constitution of Belize and appropriated by its own constitutional jurisprudence. I also note that the Amendment Act was not retrospective, but even if it was, it would make no difference to the impact of the Original Act on the rights and freedoms of the LPG companies.

[397] First, Bulkan JA has, in my opinion, effectively resolved the ‘regulation’ argument of the state.<sup>404</sup> As he has explained,<sup>405</sup> ‘What this means is that even if a measure is indeed regulatory, once it effects a taking it will only be exempt from providing compensation where it falls within one of the exceptions set out in section 17(2) of the Belize Constitution.’

[398] To this I would only add, and if the legislative measure effects a taking, acquisition, or deprivation. In my opinion, with the promulgation of the Original Act and given the monopoly that it introduced, for the period from its coming into force until it was amended, it is undisputable that the state cannot justify that there is no obligation to pay compensation for the acquisition, possession or deprivation of the LPG companies’ property.

[399] Second, and in this regard, it is also worth recalling s 20 of the Constitution of Belize in relation to granting relief: ‘If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution *has been, is being or is likely to be contravened* in relation to him ... then, ... that person ... may apply to the Supreme Court for redress.’ Thus, by the time of the Amended Act, there had already been a breach of ss 3 and 17 which did not fall within any of the s 17(2) exceptions.

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<sup>404</sup> *Controller of Supplies* (n 11) at [54]–[70].

<sup>405</sup> *ibid* at [70].

Reasonable compensation within a reasonable time is due to the LPG companies for at least this period.

[400] Under the Definitive Agreement ('DA') the state agreed (i) that NGC is the 'Developer', which is confirmed in the definition section of the Original Act;<sup>406</sup> (ii) to pass primary and subsidiary legislation and take executive action to appoint the Developer to construct an LPG Terminal and serve as the sole wholesale importer of LPG products in Belize for the duration of the term of the DA,<sup>407</sup> (iii) to exempt the Developer from import duties, (iv) to exempt the Developer from GST during construction phase, (v) to exempt Developer from all exchange control laws,<sup>408</sup> (vi) to acquire 25 per cent of the authorised share capital of the Developer,<sup>409</sup> (vii) that at the conclusion of the term of the DA, the state would acquire full ownership of the project facility,<sup>410</sup> (viii) and, to incorporate the DA as part of the Original Act (which was done).

[401] Thus, it is beyond question that the state has a significant financial and vested interest in the NGC and in its success, and to achieve this, created an exclusive monopoly in the NGC's favour (and of which it was also a direct beneficiary).

[402] Recall further that the DA between the state and the NGC was in July 2018, the Original Act was gazetted in September 2019, NGC became commercially operational in May 2020, the LPG companies' claim was filed in July 2020, and the Amended Act is dated 11 November 2021. This chronology underlines that the initial impact of the statutory monopoly on the LPG companies is incontestable.

[403] In answer to the inquiry whether the creation of such a monopoly was the minimum means necessary to achieve the state's avowed policy objectives in passing the Original Act, one has to ask in turn: Whether, given the degree of interference with the LPG companies' rights and freedoms, and given the nature of the rights

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<sup>406</sup> National Liquefied Petroleum Gas Project Act (n 163) s 1.

<sup>407</sup> *ibid* ss 4, 5, 7(2).

<sup>408</sup> *ibid* ss 7, 8.

<sup>409</sup> *ibid* s 9.

<sup>410</sup> *ibid* s 9(2)–(3).

infringed, and balancing these against public interest considerations (the balance between the interests of those affected and of society), was the creation of this statutory monopoly by the Original Act proportionate (and among other things, did it implement the minimum means necessary)?

[404] The deprivation is self-evidently arbitrary, given the state's need to amend the Original Act during the course of this litigation before the trial judge, and additionally, if only because the creation of the monopoly was a disproportionate and unjustifiable measure. The creation of this monopoly in favour of the NGC (and therefore indirectly also the state) – which goes to the degree of interference with rights and freedoms, has not been justified even to the minimum means, '*no more than necessary*' standard of proof.

[405] Section 5 of the Original Act states: 'As of the Commercial Operations Date, the Developer [NGC] shall have the exclusive right to import wholesale LPG into Belize until the expiration of the term of the Definitive Agreement ...'.

[406] As Bulkan JA explained:<sup>411</sup>

Section 5 of the original NLPGP Act conferred the exclusive right on the NGC to import wholesale LPG into Belize, making good on a promise in cl 18 of the Definitive Agreement of 2018. As of May 1, 2020, when the NGC began its commercial operations, the claimants' businesses as importers of LPG came to an end, with the NGC thereafter enjoying a monopoly in the LPG import market. The effect of this statutory monopoly on the claimants was immediate. As found by the trial judge, they abruptly lost their existing customer base that had been built up over the preceding three decades, without receiving any compensation. For one of the companies, Southern Choice Butane Ltd, its exclusion from the import market was catastrophic, as it was eventually forced out of business altogether.

[407] A few things are noteworthy; first, these are concurrent findings of fact by the trial judge and Court of Appeal that fall well within the margin of appreciation that this

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<sup>411</sup> *Controller of Supplies* (n 11) at [71].

Court will respect; second, the monopoly created was statutorily based; and third, there was an immediate loss of business, customer base and goodwill by the LPG companies (in one case, irretrievably and catastrophically so).<sup>412</sup> Therefore, the impact of the Original Act on the LPG companies was substantial.<sup>413</sup>

[408] Third, to suggest that the effect of the Original Act was not a ‘taking’ of property, but merely a re-directing of the LPG companies’ customers to the NGC, fails to appreciate the protection to property that is afforded in the Constitution of Belize. The protection is against ‘takings’, ‘acquisitions’ and ‘arbitrary deprivation’, understood and interpreted through the lens of preambular cl (b).

[409] In any event, the relevant concurrent finding of fact is:<sup>414</sup> ‘But it is not true to describe what happened as the claimants simply being deprived of their customers, because the customers they lost were immediately acquired by the NGC.’ To which I may add, on the facts, the NGC (and therefore indirectly also the state) is a market competitor with the LPG companies.

[410] The Original Act stated that: ‘As of the Commercial Operations Date, the (NGC) shall have the exclusive right to import wholesale LPG until the expiration of the term of the Definitive Agreement.’ Not only was this inconsistent with the concept of statutory regulation of a general nature, but one company was given a monopoly while all others were prohibited from operating LPG Import Businesses.

[411] Fourth, the Amendment Act also does not satisfy the enhanced *Titan International Securities Inc* case framework for state justification (as explained above).<sup>415</sup> There is no dispute that ‘[o]ne and a half years after this action was instituted, in November 2021, the [Original Act] was amended, purportedly to remove the

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<sup>412</sup> The trial judge found that both the Original Act and Amended Act had the effect of abruptly seizing the clients of the LPG companies, and therefore that the impact was substantial.

<sup>413</sup> In *Controller of Supplies* (n 11) at [77], the Court of Appeal acknowledges loss of goodwill/business as a result of the legislative scheme which first conferred a monopoly on a competitor and then maintained it by imposing unattainable conditions for re-entry into the business.

<sup>414</sup> *ibid* at [72].

<sup>415</sup> Here the appropriate question is: Whether given the degree of interference with the LPG companies’ rights and freedoms and given the nature of the rights infringed, and balancing these against public interest considerations (the balance between the interests of those affected and of society), was the new regime created under the Amended Act proportionate (among other things, did it implement the minimum means necessary)?

exclusive right that had been conferred on the NGC to import LPG into Belize.’<sup>416</sup>  
This is the so-called ‘levelling of the playing field’ justification.

[412] This justification, which is open to basic deep structure rule of law democratic fundamental fairness, good faith, and good governance critiques, must also pass the proportionality standard of proof given the degree of interference and nature of rights considerations in this case. The onus is on the state to establish this to the required degree of cogency.

[413] Here the appropriate question is: Whether given the degree of interference with the LPG companies’ rights and freedoms and given the nature of the rights infringed, and balancing these against public interest considerations (the balance between the interests of those affected and of society), was the new regime created under the Amended Act proportionate (and among other things, did it implement the minimum means necessary)?

[414] Again, there are relevant and dispositive concurrent findings of fact and inference, that I also consider unimpeachable given the applicable margins of appreciation. Bulkan JA, explains:<sup>417</sup>

Following the amendment, anyone could now import LPG, provided that they construct an import facility with storage capacity of 1.5 million US Gallons, or alternatively, pass their imported LPG through the NGCs existing LPG Terminal. As established at trial, neither of these conditions was feasible or realistic: constructing such a massive facility could only be done at a prohibitive cost ... and even then there would be no guarantee of obtaining the licence; while the alternative would subject potential importers to a competitor.

[415] The Amended Act fails the justification scrutiny standards because: (i) there is no sufficient rational connection between the measures used and the stated public purposes or those listed in the relevant limitation clauses, and (ii) the measures adopted are not proportionate. The state’s public policy goals were listed as being,

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<sup>416</sup> *Controller of Supplies* (n 11) at [74].

<sup>417</sup> *ibid* at [74]; and see [74]–[77].

health and safety protection for consumers, reduction in smuggling, price transparency and stability, and increased storage capacity to provide reliable and consistent supply. All of which are commendable, but none of which are covered by s 17(2) of the Constitution.<sup>418</sup>

[416] Furthermore, it is tenuous as to whether the alternative of multiple same-size 1.5 million US Gallon parallel facilities is rationally connected (when viewed through the lens of arbitrariness) to the stated public purposes. If the initial 1.5 million US Gallon facility was considered sufficient – and sufficiency was an objective (as per the Original Act and the Definitive Agreement), a question arises at this stage of the analysis as to whether multiple parallel capacity facilities can be rationally justified?

[417] Indeed, a legitimate inquiry is also whether the state in passing the Amendment Act, really intended to ‘level the playing field’ or to perpetuate a *de facto* monopoly in NGCs and its favour?

[418] These are legitimate rule of law (equality, fairness and good faith) considerations in a holistic approach to constitutional review. What is important in this matter, is that the onus and burden are on the state to justify its actions and to do so evidentially to the requisite standard of cogency.

[419] Fifth, bearing in mind that the inquiry on this limb is whether the means used by the law to impair the right or freedom are disproportionately more than required to achieve the stated objectives, considering the nature of the right, the degree of interference, and need to achieve a contextually appropriate balance between the interests of those affected and of society, and given the standard of proof required, it is clear to me that these requirements of proportionality have not been met by the state in this case.

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<sup>418</sup> Belize Constitution Act (n 2) s 17(2)(k): ‘by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants’, is inapplicable.

[420] A legitimate question arises: How can it be a proportionate and/or reasonably justifiable measure intended to ‘level the playing field’, to expect multiple competitors of NGC to invest in, construct and run parallel equal capacity 1.5 million US gallon LPG storage facilities, when there is no guarantee of receiving import licences – in circumstances in which their competitor NGC has such a guarantee and, to compound matters, in which the state has a vested and financial interest in supporting?<sup>419</sup>

[421] The following are noteworthy. The Amended Act seeks to achieve this ‘levelling the playing field’ aim. However, (i) the Developer remains exclusively defined as NGC, (ii) the amendment to s 5 of the Original Act only makes the Developer subject to ss 5A, 6 and 6A of the Amended Act, and not to s 6B, and (iii) s 6B specifically legislates in relation to the requirements for importers of LPG into Belize to have import licences to do so: ‘No person shall import LPG into Belize unless that person holds an import licence issued by the Controller of Supplies ...’.

[422] NGC is therefore, apparently, statutorily exempted from this requirement, or at least arguably so. As well, the other core aspects of the DA that define NGC’s relationship with the state and were statutorily incorporated in the Original Act remain intact (see above).

[423] It is difficult to imagine how these changes, now viewed through a further policy of ‘levelling the playing field’, can amount to cogent proof that these satisfy a proportionality and minimum means necessary standard of proof to achieve the state’s policies.

[424] Thus, given the degree of interference with the LPG companies’ rights and freedoms, the nature of the rights infringed, and balancing these against the stated

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<sup>419</sup> ‘Respondents’ response to 1<sup>st</sup> and 2<sup>nd</sup> Appellants’ Skeleton Argument’, Submission in *Controller of Supplies v Gas Tomza Ltd*, CCJ Appeal No BZCV2024/003, 29 November 2025, 9971; Amira Gutierrez, ‘Fourth Affidavit of Amira Gutierrez’, Affidavit in *Gas Tomza v Controller of Supplies* Claim No 159 of 2020, 10 June 2022, 1250.

public interest considerations, taken all together with the requirement to build parallel 1.5 million US gallon facilities, and the state's exclusive vested interests in the success of NGC, the Court of Appeal concluded that the state had not discharged the proportionality evidential burden of proof on it.

[425] In a colloquial sense, the Amended Act in relation to the LPG companies and the state, recalls the Caribbean social commentary lyrics of the calypsonian, the Mighty Spoiler, in his 'Magistrate Try Himself'.<sup>420</sup> The opening verse of which says:

- a. *Aha, well this one is class,*
- b. *They charge a magistrate for driving too fast (You mustn't doubt me).*
- c. *Well this one is class,*
- d. *They charge a magistrate for driving too fast;*
- e. *But is one courthouse in the district,*
- f. *He is the only magistrate there to run it,*
- g. *If you see how the people flock up he place,*
- h. *To see how the magistrate go try he own case.*

[426] The *Cable and Wireless (Dominica)* decision, makes the point that:<sup>421</sup>

*... the fact that the Government and CWD had a common financial interest in exclusivity does not preclude a claim that it was reasonably required for the purpose of protecting the rights and freedoms of other persons. It [does militate] against over-cautious judicial deference in scrutinising the claim, for it suggests that protection of such rights and freedoms may not have been the dominant purpose.*

[427] Again, the onus is on the state to justify and to do so evidentially to the requisite standard of cogency; that is, the justification must be cogently/convincingly<sup>422</sup>

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<sup>420</sup> Mighty Spoiler 'Magistrate Try Himself' (1958).

<sup>421</sup> *Cable and Wireless* (n 349) at 152 (emphasis added).

<sup>422</sup> *ibid* at 152: *The test is stated as '[t]he necessity for restricting them must be convincingly established.* '(emphasis added).



established. The duty of candour transferred to constitutional review demands no less.

[428] The ‘levelling of the playing field’ justification was in effect determined by the Court of Appeal to open the state to basic deep structure rule of law, fundamental fairness, good faith, and good governance critiques, which it determined the state had not overcome on the facts.

[429] What this means is that in addition to the standard of proof to a degree of cogency that lies on the state, there is an additional burden, one that is of a more qualitative nature. It is the duty to disclose all relevant information in fulfilment of the state’s constitutional, basic deep structure obligations for fundamental fairness, good faith, and good governance.<sup>423</sup>

[430] The undisputable fact is that the Original Act created a monopoly. The Amended Act was purportedly introduced to mitigate this. The obligation is on the state to prove that the measures are justified to the requisite constitutional degree. And both the evidential standard of cogency and the duty of fairness, good faith and good governance must be met.

[431] It is therefore a misuse of judicial power and an exercise of judicial overreach to unduly speculate and fill in evidential gaps to rescue the state in this regard.

[432] At [112] to [114] Bulkan JA applies the proportionality test to the facts, and concludes, in my opinion reasonably and permissibly in the circumstances of this case: ‘In other words, the stated goals can be achieved by much less onerous measures.’<sup>424</sup> That is to say, the measures taken in the Amendment Act to achieve its stated goals and objectives are constitutionally disproportionate.

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<sup>423</sup> See BISL (n 316).

<sup>424</sup> *Controller of Supplies* (n 11) at [114].

[433] Bulkan JA summarises the Court of Appeal’s analysis and conclusions, which are more or less consistent with the trial judge’s on this point,<sup>425</sup> as follows:<sup>426</sup>

Accordingly, the claimants suffered a loss of their property involving both goodwill and their business as an ongoing concern as a result of the legislative scheme which first conferred a monopoly on a competitor and then maintained it in a de facto manner by imposing unattainable conditions for re-entry into the LPG market.

[434] Bearing in mind preambular cl (b), ss 3 and 17 of the Constitution of Belize, the concurrent findings of fact on this aspect of the matter (which in my opinion are unimpeachable given the relevant margins of appreciation), and the proper constitutional approach to be taken according to this Court’s settled jurisprudence, the trial judge and Court of Appeal were correct in concluding (i) that the LPG companies’ property rights were contravened, (ii) that they were entitled to constitutional relief, and (iii) that they were also entitled to reasonable compensation within a reasonable time for their losses.

[435] As the Court of Appeal directed, and as the Privy Council did in the *Cable and Wireless (Dominica) case*, the assessment of these damages is appropriately remitted to the High Court for determination. A constitutional court ‘may make any such declarations and orders ... and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions’ guaranteeing rights and freedoms.<sup>427</sup> The duty of the constitutional court is to provide effective relief when it has determined that there is a contravention of rights or freedoms.

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<sup>425</sup> *Gas Tomza* (n 9) at [13]. The trial judge stated: ‘Having considered the arguments for and against this third issue, I find in favour of the Claimants. To my mind, ... there can be no doubt that the direct effect of the Original as well as Amended Act is that the NGC abruptly seized the clients and customer base of all five of these Claimant companies that they had established in Belize over the past 30 years without compensation thereby violating the Claimants’ constitutional right to property.’ See also *Controller of Supplies* (n 11) at [11].

<sup>426</sup> *Controller of Supplies* (n 11) at [77].

<sup>427</sup> See Belize Constitution Act (n 2) s 20(2): ‘The Supreme Court shall have original jurisdiction, ... and may make such declarations and orders, issue such writs and give such directions *as it may consider appropriate for the purpose of enforcing or securing the enforcement of* any of the provisions of sections 3 to 19 inclusive of this Constitution.’ (emphasis added).

[436] Since the close of submissions in this appeal the Privy Council (‘JCPC’) delivered its decision in *Corp of Hamilton*.<sup>428</sup> The decision, in so far as it treats with s 17 property rights, strongly supports the analysis in this opinion. Thus, even though the parties have not had an opportunity to comment on that decision, I will summarise the key aspects of salience and relevance.

[437] First, the structure of the property rights provisions in Bermuda is similar to those in Belize with one notable nuance for our purposes. In Belize, s 3 declares generally that all persons are entitled to protection from arbitrary deprivation of property. Section 17 details the particulars of the right (as discussed above). Section 20(1) specifically provides that s 3 rights are enforceable. In Bermuda there is a similar structure, which corresponds in its Constitution as follows: s 1, s 13, and s 15.

[438] The JCPC held that the general s 1 rights in the Constitution of Bermuda are not independently enforceable,<sup>429</sup> and in doing so, specifically considered and elected to disagree with this Court’s approach on this aspect of constitutional interpretation.<sup>430</sup> Clearly, this Court’s approach must prevail in this matter and was explained in the first principles discussions above.

[439] Second, the effect of the JCPC’s approach is that it has taken a narrower and more restrictive approach to property rights in Bermuda, limiting enforceability to the equivalent of Belizean s 17 (Bermuda s 13) and not incorporating a consideration of Belizean s 3 (Bermuda s 1), or of preambular considerations.<sup>431</sup> In Belize, s 17(1) provides that ‘property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired ...’. Section 13(1) in Bermuda is in identical terms.

[440] Third, even with this circumscribed approach (limited only to the Belizean equivalent of s 17), the JCPC would opine in relation to the deprivation of property

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<sup>428</sup> *Corp of Hamilton* (n 83).

<sup>429</sup> *ibid* at [89], [167].

<sup>430</sup> *ibid* at [87]–[88].

<sup>431</sup> *ibid* at [167], [173]–[174].

rights: (i) a constitution concerned to protect fundamental rights and freedoms should be generously construed;<sup>432</sup> (ii) a broad view of the scope of the provision should be taken;<sup>433</sup> (iii) as a matter of principle there can be a taking of possession which did not involve the direct physical appropriation of property or an ouster of possession;<sup>434</sup> (iv) nor was it necessary to show a transfer of change of ownership or possession;<sup>435</sup> (v) *taking can encompass regulation of use which adversely affects the owner of property to a serious degree*;<sup>436</sup> and (vi) citing *Paponette's case* with approval, (a) *total or substantial loss of control of an asset can amount to a taking*,<sup>437</sup> (b) *it is not necessary to deprive an owner of their businesses altogether*,<sup>438</sup> and (c) *it is necessary that the interference (the intrusion on the business interests) must reach a level of seriousness (of significance) in terms of its adverse consequences*.<sup>439</sup>

[441] Fourth, in *Corp of Hamilton case*,<sup>440</sup> the JCPC (citing *Paponette's case*), would also affirm that there was a substantial interference with and intrusion into an applicant's businesses in circumstances where: (i) they had previously managed and controlled their own businesses but subsequent to the legislative intervention were now *subject to control and management by a competitor*, (ii) they were *subject to tariffs to continue to carry on their businesses* under the new legislative scheme, and (iii) their *qualification for continuing to carry on their businesses depended on the grant of permits (licences) over which a competitor had power, control, or influence*.

[442] Fifth, a taking can happen where the imposition of restrictions or controls go beyond a certain point, in which event they *constitute a constructive taking of possession or acquisition of an interest in or over property*. The determining factor is the level of seriousness in terms of its adverse consequences. The JCPC would,

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<sup>432</sup> *ibid* at [174], [176].

<sup>433</sup> *ibid* at [178].

<sup>434</sup> *ibid* at [180].

<sup>435</sup> *ibid*.

<sup>436</sup> *ibid* (emphasis added).

<sup>437</sup> *ibid* at [185] (emphasis added).

<sup>438</sup> *ibid* at [187] (emphasis added).

<sup>439</sup> *ibid* (emphasis added).

<sup>440</sup> *ibid* at [188].

in this context, point out that ‘this may involve establishing a substantial (or even total) restriction on the ability to control and use and enjoyment of the property *and/or adverse effects on the goodwill or value* of the property or property rights involved.’<sup>441</sup>

[443] As already discussed, under the Original Act the state vested the NGC and itself with exclusive rights to import LPG which had the effect of creating a monopoly. The consequence of this totally excluded the LPG companies from continuing their prior to enjoyed importation businesses. Such a monopoly significantly deprived the LPG companies of their management and control of property without compensation.

[444] This deprivation amounts to a taking, even as narrowly conceptualised in *Corp of Hamilton case*, as the adverse effects of the degree of interference and intrusion meet the standard of seriousness that would constitute a taking.

[445] Furthermore, even though the Original Act was amended, the adverse effects were still catastrophic to the LPG companies, with one company in particular being forced to close altogether. In addition (and as discussed), the onerous conditions that attached to the Amended Act and the continuing loss of goodwill and of value (in property), constructively prevented the LPG companies from competing on a level playing field, notwithstanding the socio-economic reasons advanced by the government.

[446] As *Paponette* established, a total obliteration of the business is not necessary, but the effect of the interference must be significant. In this case, it is inconceivable to me to see how these requirements have not been satisfied.

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<sup>441</sup> *ibid* at [193] (emphasis added).

## **What is the Nature and Extent of the Respondents' Constitutional Right to Work in this Case?**<sup>442</sup>

### **Crossing the *Prima Facie* Threshold**

#### *Have the Applicants Crossed the Prima Facie First-Stage Threshold?*

[447] It is appropriate to contextualise this discussion with a summary of Belize's international commitments as they pertain to the right to work. This properly frames the analysis, and, as this Court has consistently explained, is a relevant interpretative lens. Belize has ratified the International Covenant on Economic, Social and Cultural Rights ('ICESCR').<sup>443</sup> Article 6, provides that:

The States Parties to the present Covenant recognize the right to work, which includes *the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.* (emphasis added)

[448] Notice that the covenant and responsibility undertaken by Belize as a State Party is two-fold, first, to recognise the right (which s 15 of the Constitution of Belize does), and second, to safeguard the right. The safeguarding of the right requires the adoption and implementation of laws and regulations that safeguard the right in real, practical, and effective ways. That is, laws and executive or administrative actions must provide the means and conditions that are required to effectively meet the requirements of the right to work.

[449] More generally, in the academic literature, Bruce Porter<sup>444</sup> cites the general advice of the Committee on Economic, Social and Cultural Rights ('CESCR') (which monitors the international implementation of the ICESCR), given between the CESCR and Canada, that courts should adopt a reasonable interpretation of the Canadian Charter of Rights and Freedoms to ensure protection of socio-economic

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<sup>442</sup> Belize Constitution Act (n 2) s 15.

<sup>443</sup> Belize initially signed the ICESCR in 2000 and subsequently ratified it in 2015. This has made Belize a State Party to the treaty. See also Universal Declaration of Human Rights (n 143) art 23, which links the right to work to free choice and human dignity, as does Belize Constitution Act (n 2) s 3. Belize, as a member of the United Nations is a member of the UN Charter, which is grounded in respect for human rights as outlined in the Universal Declaration.

<sup>444</sup> Bruce Porter, 'Inclusive Interpretations: Social and Economic Rights and the Canadian Charter' in Helena Alviar García, Karl Klare and Lucy Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2014).

rights in alignment with international human rights law.<sup>445</sup> Likewise, this Court in relation to s 15 of the Constitution of Belize. The right to work is a socio-economic right and freedom, and a social justice issue.

[450] How then should s 15 rights and freedoms be adjudicated in Belize? First, what are the specific rights and freedoms alleged to have been contravened? Section 15(1) states that: ‘No person shall be denied the opportunity to gain his living by work which he freely chooses or accepts, whether by pursuing a profession or occupation or by engaging in a trade or business, or otherwise.’ This is a protection of the right to work guarantee. The language of the section protects ‘the opportunity’ to work in areas that a person ‘freely chooses’.

[451] Interpreted through the lens of preambular cl (b), the right to the opportunity to work becomes a social justice mandate, which necessitates that the operation of the economic system must result in the material resources of the community being so distributed as to sub serve the common good, and so that there should be adequate means of livelihood for all. This lens enlarges the understanding of the concepts of ‘person’, ‘opportunity’, and ‘freely chooses’ as used in s 15.

[452] First, the meaning and scope of ‘person’. Is this limited to natural persons? Preambular cl (b) suggests no such limitations. Neither does the *chapeau* to s 3 of the Constitution. Further the right to work is expansively linked to the core constitutional values of life, liberty, dignity and property (per s 3). Moreover, the relief section – s 20 of the Constitution of Belize, also suggests no such limitation. And the Interpretation Act of Belize defines person as meaning: ‘a natural person or a legal person and includes any public body and any body of persons, corporate or unincorporated ...’.<sup>446</sup>

[453] Precedent also supports an expansive interpretation of ‘person’ as used in s 15. In the *Antigua Times*<sup>447</sup> decision, the Privy Council was clear that the reference to ‘any

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<sup>445</sup> *ibid* 220.

<sup>446</sup> Interpretation Act, CAP 1, s 3(1).

<sup>447</sup> *Antigua Times* (n 116).

person' in the equivalent to s 20 of the Constitution of Belize, included both natural and artificial persons (corporations).<sup>448</sup>

[454] In the *Sanatan Dharma Maha Sabha case*,<sup>449</sup> I also explained that once an organisation or corporation or any other non-natural person, is capable of enjoying the benefits of the guaranteed rights and/or freedoms, they qualify as a person entitled to seek constitutional redress (in Belize under s 20). Any contrary interpretation or application would undermine the *sui generis* nature of Anglo-Caribbean constitutions and the broad, generous and purposive interpretations to be given to their bills of rights.

[455] Bulkan JA was correct in determining that the LPG companies can be the beneficiaries of the right to work guaranteed in the Constitution of Belize. A business engages freely in commerce, in markets of its choosing, based on the trade or services it may provide, and in doing so has the opportunity to generate income/revenue and to provide for the livelihood of itself as a corporate entity and as well for its employees, and/or owners, and/or shareholders.

[456] If businesses are deprived of the opportunity to operate freely in a trade or service of its choosing, by a law or by executive action of the state, this has far-reaching effects for Belize, and for the preservation of a just and equitable economic and social order as outlined in the Preamble to the Constitution of Belize. Therefore, in Belize, the right to work must be interpreted to be applicable to natural persons, corporations, and legal entities such as the LPG gas companies.

[457] Second, the meaning and scope of 'opportunity' and of 'freely chooses'. These can be taken together as they are linked. The guarantee is the opportunity to work in an

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<sup>448</sup> *ibid* at 567 (Lord Fraser): 'Having regard to the important place in the economic life of society occupied by corporate bodies, it would seem natural for such a modern Constitution, dealing with inter alia rights to property, to use the word "person" to include corporations.'

<sup>449</sup> *Sanatan Dharma Maha Sabha* (n 156) at 418. In the context of the Constitution of Trinidad and Tobago: 'In this court's opinion it is quite clear that a "person" who may apply to the High Court for s 14(1) relief includes both a "natural person (and) also non-natural persons", such as the First and Third applicants. *The real test, it would appear, is whether it can be shown in relation to the First and Third applicants that by their natures, they are capable of enjoying 4(h) rights and are also entitled to protection for breaches of same.* In my opinion, the answers to both of these questions are in the affirmative.' (emphasis added).



area that a person freely chooses. Interpreted through the lens of Preambular cl (b), the right to the opportunity to work also means the opportunity to have an adequate means of livelihood.

[458] And further, the right is to the opportunity to an adequate means of livelihood that is accommodated by the operation of the economic system in Belize in such ways that must result in the material resources of the community being so distributed as to sub serve the common good – which includes the right of every person to the s 15 guarantees.

[459] Moreover, the inclusion of the concept of ‘freely chooses’, places a further prerogative on how the state must arrange its economic systems to sub serve the common good of the right of all Belizeans (natural and corporate) to equal opportunities for work.

[460] This expansive (generous and purposive) understanding of the s 15 rights and freedoms is bolstered by the core constitutional values of s 3 of the Constitution of Belize to which I have already referred. Relevant historical and social context also reinforces this approach.

[461] In Belize, like in all Anglo-Caribbean independent states, the right to work is a constitutional guarantee of great historical significance – as it must be in all former slave and indentured colonial plantation economies.<sup>450</sup> As Bulkan JA has pointed out:<sup>451</sup> ‘The requirement of being freely chosen must surely resonate powerfully in a society with a dehumanising past as this, where labour was for centuries compelled and unwaged.’

[462] Interpreting Caribbean constitutions from ivory towers and without a sufficient interpretative grounding in relevant historical and social context, is destined to be

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<sup>450</sup> Eric E Williams, *Capitalism and Slavery* (University of North Carolina Press 1944).

<sup>451</sup> *Controller of Supplies* (n 11) at [92].

skewed, if not flawed. The *sitz im leben* (life setting) of Caribbean constitutionalism is an integral interpretative lens.

[463] Thus, in Belize, and as Morrison JA pointed out in *Fort Street Tourism Village*,<sup>452</sup> there can be a contravention of s 15 rights where legislation or executive or administration actions place an ‘unjustifiable fetter’ on the right to freely choose the areas in which persons may wish to work and to earn a livelihood. This Court, in *Lucas*,<sup>453</sup> has endorsed this approach, opining that: ‘No legislative or administrative fetter or regulation may be placed on that right.’

[464] All this accords with a rights-centric, rights-privileging approach to bills of rights. Further, adopting this rights-centric, rights-privileging approach, this Court has properly characterised the right to work in Belize as ‘an important socio-economic right’,<sup>454</sup> noting its international treaty underpinnings.

[465] Constitutionally, state restrictions and limitations (‘fettters and regulation’) on s 15 rights and freedoms are to be closely scrutinised, strictly justified with cogent evidence, and narrowly circumscribed. The focus is on the effect of the legislation or executive or administrative actions on the aggrieved parties’ enjoyment of the right and freedom.

[466] Bulkan JA was therefore correct when he opined:<sup>455</sup> ‘Second, no fetter must be placed on this right by the State, whether by way of law or administrative action, which “disentitles” or even “hinders” the free exercise of the right.’ As Bulkan JA also points out, correctly:<sup>456</sup> ‘Third, any such fetter is only objectionable where it is “unjustifiable”.’

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<sup>452</sup> *Fort Street Tourism Village* (n 125) at [137].

<sup>453</sup> *Lucas* (n 128) at [48]: ‘*The right to work is an important socio-economic right* that has found expression in the 1966 Human Rights covenants adopted by the United Nations. However, the scope of that right must vary from country to country dependent on a State’s economic well-being. Thus, the Belize Court of Appeal has properly concluded that *the right to work is not a guarantee of employment but merely an opportunity to earn a living. No legislative or administrative fetter or regulation may be placed on that right ...*’ (emphasis added).

<sup>454</sup> *ibid.*

<sup>455</sup> *Controller of Supplies* (n 11) at [92].

<sup>456</sup> *ibid.*

[467] This is in keeping with the structure of s 15. Section 15(1) is the rights conferring subsection. Subsection (2) qualifies sub-s (1) and makes provision for the payment of certain fees and charges, and for licences and qualifications. Subsection (3) permits limitation in the stated categories and on the stated conditions.<sup>457</sup> In this regard, the overarching pre-condition is reasonable justification – which imports the four-part proportionality test explained above.

[468] In my opinion, and for the reasons given by the Court of Appeal,<sup>458</sup> the LPG companies have crossed the first stage *prima facie* threshold. The impact of, first, the monopoly created by the Original Act in favour of the NGC (and the state) and then, subsequently perpetuated by the unreasonable conditions for entering into the commercial activity of independent importation of LPG imposed by the Amendment Act, *prima facie* fetter and/or detrimentally regulate the LPG companies' opportunity to engage freely in businesses of their choice.

[469] Essentially, this fetter and/or detrimental regulation negatively impacts the LPG companies' well-established business of importing LPG into Belize. Simply put, with the coming into force of the Original Act, the LPG companies could no longer import LPG, which was one aspect, and an integral and integrated feature, of their business.

[470] As already explained, in my opinion it is rather facile to disregard the impact of the Original Act on the businesses of the LPG companies – an impact that had the initial effects described above and detailed (as concurrent findings of fact) in the judgment of the Court of Appeal.<sup>459</sup>

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<sup>457</sup> Belize Constitution Act (n 2) s 15(3): 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section *to the extent that the law in question makes reasonable provision,*

(a) that is required in the interests of defence, public safety, public order, public morality or public health;

(b) that is required for the purpose of protecting the rights or freedoms of other persons; or

(c) for the imposition of restrictions on the right to work of any person who is not a citizen of Belize.' (emphasis added).

<sup>458</sup> *Controller of Supplies* (n 11) at [94]–[101].

<sup>459</sup> *Gas Tomza* (n 9) at [7]. (The trial judge was clear that: 'While *the previous Act had created a monopoly which legally barred the Claimants from continuing to import LPG into Belize, and mandated that the NGC was the only entity legally allowed to import LPG*, this Amended Act has now removed that provision and replaced it with these two conditions under which a licence to import can now be granted to the Claimants...'. (emphasis added).

[471] It is also somewhat unrealistic and impractical to suggest that the LPG companies never engaged in any importation business *per se*. As explained by this Court in the *CGI Consumers case*,<sup>460</sup> and when dealing with constitutional rights and freedoms that concern social justice issues – as the right to work does, among other considerations, one must adopt a practical and pragmatic approach with a fair degree of juridical common sense. As Bulkan JA pointed out, on the facts:<sup>461</sup>

This contention ... rests upon a strained and artificial distinction in the claimants' operational practices. Their businesses cannot sensibly be divided this way, for it is clear that they each engaged in importation for re-sale, an activity that no one can continue to pursue as a result of the legislative changes.

### **Justification**

[472] The second stage of the analysis involves an inquiry into whether there has been constitutionally due justification by the state. The four-limb aims-measures-means approach discussed above is applicable and as before, the analysis must take place in two stages: (i) the period from the Original Act to the Amendment Act, and (ii) the period after the Amendment Act.

[473] As explained, the s 15 right and freedom to work is of great significance in Belize, and therefore the degree of judicial scrutiny is strict and standard of proof on the state is accordingly high and must be convincingly established.<sup>462</sup>

[474] Bulkan JA has adequately dealt with the analysis of the facts relevant to this second stage inquiry,<sup>463</sup> and there is little that I can usefully add. What I can emphasise, is that a rights-centric, rights-privileging approach recognises that the burden of proving justification is on the state to the requisite standards.

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<sup>460</sup> *CGI Consumers' Guarantee Insurance Co Ltd v Stevenson* [2025] CCJ 11 (AJ) BB at [97], [128].

<sup>461</sup> *Controller of Supplies* (n 11) at [100].

<sup>462</sup> See *Cable and Wireless* (n 349) at 152: *The test is stated as '[t]he necessity for restricting them must be convincingly established.'* (emphasis added).

<sup>463</sup> *Controller of Supplies* (n 11) at [105]–[113].

- [475] The fourth limb requirements are applicable in this case on this issue of the right to the opportunity to work in areas freely chosen by the LPG companies (which is therefore also a constitutional freedom - to choose).
- [476] Further, the analysis of this issue largely rests on a determination of the very factual assessments and conclusions that were relevant to and underpinned the ss 3 and 17 analysis of the right to property (explored above).
- [477] First, I agree that the challenges that the state faced in establishing a rational connection between the purposes-policies and measures purportedly adopted to achieve these - in so far as they have impacted the LPG companies, have not been cogently/convincingly overcome.<sup>464</sup>
- [478] Second, bearing in mind that the inquiry on this limb is whether the means used by the law to impair the right or freedom are disproportionately more than required to achieve the stated objectives, considering the nature of the right, the degree of interference, and need to achieve a contextually appropriate balance between the interests of those affected and of society, and given the standard of proof required, it is clear to me that these requirements of proportionality have also not been cogently/convincingly overcome by the state.<sup>465</sup>
- [479] Third, I hold the view that (i) for the period from the Original Act to the Amendment Act, there can be no dispute as to contravention, and (ii) for the period after the Amendment Act, the analysis of the Court of Appeal is sufficient to also establish contravention.
- [480] In my opinion, Bulkan JA and the Court of Appeal have properly assessed the intersection between relevant facts and law at [114] of the judgment of the Court of Appeal. In this regard, I note that although the trial judge concluded that there was

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<sup>464</sup> See *Cable and Wireless* (n 349) at 152: *The test is stated as 'The necessity for restricting them must be convincingly established.'* (emphasis added).

<sup>465</sup> *ibid.*

no contravention of the LPG companies' s 15 rights and freedoms, the substantive factual bases upon which the Court of Appeal did so, constitute concurrent findings of fact and inference. As before, the assessment of any damages is appropriately remitted to the High Court for determination.

### **Final Issues**

[481] Two further issues were raised: (i) Were the respondents' rights to freedom of assembly and association contravened in this case? (ii) What is an appropriate approach to unequal and discriminatory treatment under the Belizean constitution in this case?

[482] Given how I have disposed of the issues concerning ss 3, 15 and 17 of the Constitution of Belize, and given the opinions of the majority, I do not propose to address these two issues in this opinion and reserve my position on the areas of law that concern them.

[483] Except to say, that both the right to equality and the protection of the law, as well as the protection of freedom of association, have been hard won in our Caribbean societies and not to be lightly trifled with. I may also add, that the right to equality may be relevantly interrelated to and intersect with the ss 3, 15 and 17 rights and freedoms interrogated above.

[484] Indeed, there is much more that can (and maybe should) be said on these issues, but I prefer not to burden an already lengthy opinion. This choice should not, however, be taken to signal my agreement with the views expressed on these issues in this matter.

[485] However, in conclusion, and in response to *all* of the issues raised in this appeal, I will do well to quote Breaux JA in *Lorick v Attorney General of Trinidad and*

*Tobago*,<sup>466</sup> a September 2025 decision of the Court of Appeal of Trinidad and Tobago, writing in the context of ss 4 and 5 of the Constitution of Trinidad and Tobago,<sup>467</sup> as follows:

The constitutional rights conferred by sections 4 and 5 ... are hard won rights. The trials inflicted upon our ancestors by slavery and the slave trade with the mass deprivation of liberty and lives, are matters of record. So too, the trials of indentureship. *We must never surrender or compromise our hard won rights and freedom for which our ancestors paid so dearly. Such compromise usually begins with the most innocuous of executive actions.* As judges we are sworn to uphold the Constitution and the law. *No matter how compelling the emergency, the Executive must always be held accountable for infringements of the rights and freedoms of our citizens.* As a people we must demand nothing less.

[486] In my opinion the declarations and orders of the Court of Appeal of Belize on the issues concerning ss 15 and 17 of the Constitution of Belize should be upheld, and any assessment of damages arising remitted to the High Court for determination.<sup>468</sup>

[487] In so far as the Court of Appeal chose to amend the sch II to the Amended Act by deleting the requirement for an Import Facility of no less than 1.5 million US gallons, I would have also suspended the enforcement of that aspect for a fixed period after discussion with the parties, so as to allow the Parliament to consider the opinion of the Court of Appeal and make such changes as it may have deemed expedient to become constitutionally compliant.

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<sup>466</sup> (TT CA, 29 September 2025) at [39] (emphasis added).

<sup>467</sup> Constitution of Trinidad and Tobago (n 153). Section 4 legislates the recognition and declaration of the rights and freedoms, and s 5 legislates the protection of those rights.

<sup>468</sup> *Controller of Supplies* (n 11) at [165].

/s/ W Anderson

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**Mr Justice Anderson, President**

/s/ M Rajnauth-Lee

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**Mme Justice Rajnauth-Lee**

/s/ D Barrow

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**Mr Justice Barrow**

/s/ P Jamadar

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**Mr Justice Jamadar**

/s/ C Ononaiwu

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**Mme Justice Ononaiwu**