

The Role of the Caribbean Court of Justice in the Private Sector*

Presented by:

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Introduction

Let me first express my gratitude to the President and Executive body of the Guyana Manufacturing Services Association for affording me this opportunity to engage in this dialogue. Periodic conversations of this nature, between representatives of the Court and of the people of Guyana are important. The CCJ is a multi-national court serving countries separated by sea. Occasions like these therefore provide a welcome opportunity for its judges to learn more about and to understand better the values, ethos and culture of the people of Guyana; to feel the pulse, the heartbeat of Guyana. This is sometimes vital to accurate, fair and sensitive decision-making. On the other hand, you are afforded the chance to meet the judges of the court and to hear first-hand about its work methods and processes. In this way each of us, in the context of principled engagement, derives a significant benefit.

You have asked me to speak on this important topic of the future of the role of the Caribbean Court of Justice in the private sector. First of all, I think we must place the CCJ in some historical perspective. From the time this country became a colony of Britain right up to 1970, your final civil and criminal appeals were determined by a British institution. That institution was sited in far-away London. Very few Guyanese had the opportunity to take their appeals before that court. Even fewer Guyanese lawyers argued the cases of Guyanese litigants before that court. Dr Fenton Ramsahoye being a rare and notable exception. The judges of that court rarely visited Guyana. I seriously doubt whether any of them ever drank creek water or had a bit of labba.

When an appeal is lodged with that British institution, the judges listen politely to the oral arguments, read the documents prepared for them and then humbly advise the British monarch on how the appeal should be determined. Now, Britain has always had a fine tradition of law and justice and the judges of the Privy Council have always

been excellent British judges. But a court that functions in the manner that I have just described offers a limited range of services to the country whose final appeals it hears. That is not meant to disparage. It is simply an undeniable truth.

This limited role of the Privy Council was underscored a few years ago by Lord Hoffman, who, at the time, was one of Britain's better-known judges. He gave his views while speaking at the Trinidad and Tobago Law Association's Annual Dinner on the evening of Friday 10th October 2003. Lord Hoffman noted then that the CCJ is necessary if Trinidad and Tobago was going to enjoy the full benefits of what a final court can do to maintain democratic values in partnership with the other two branches of Government — the Executive and the Legislative. At the time he was making these remarks, he was well aware that a debate was raging at that time, in Trinidad and specifically among the members of his audience, about the issue of the CCJ. It is so sad that the same debate continues to rage some 15 years later. At any rate, back in 2003, Lord Hoffman

shocked many in his audience by pointedly informing them that their arguments that the JCPC should be retained undervalued the importance of a Caribbean final court. He properly noted that a final court does not merely provide technical and legal services. Such services can be contracted out. A real final court, instead, must be an integral part in the architecture that supports national development.

These views are unremarkable. Outside the Caribbean, they are well appreciated by peoples the world over. The simple fact is that the interpretation and application of the law can never be divorced from an appreciation of and sensitivity to social realities. The law serves interests, and courts must understand precisely what those interests are in order to inform themselves better about the manner in which effect should be given to the law. I made a speech some years ago in which I noted that the interpretive function should always consider the history of the law, the purposes it served when it was made and the interests it currently serves. This is especially the case with us in the Caribbean in light of our fractured past of slavery, indentureship

and colonialism. Many of the statutes still on our law books were enacted to serve interests that were not ours. In constructing an independent and just society the law must be an instrument for reaffirming our independence and sovereignty, for expanding democracy and human rights, for promoting better governance, for stimulating social and economic development, for creating appropriate conditions for the private sector to flourish and for securing the welfare of the citizenry.

It should hardly have come as a surprise that Guyana was the first English speaking Caribbean country to recognise the limited role of a foreign court whose judges were British and which sat way across the Atlantic. After becoming an independent nation in 1966, Guyana lost no time in becoming the first Commonwealth Caribbean country to terminate appeals to the JCPC. Unfortunately, at the time this was done, Guyana lacked the human and material resources to establish a second tier court of appeal. And there was no regional court that could perform that role. Such a court actually existed during the

period of the West Indies federation, between 1958 and 1962. It was a fine court. Second to none. On it there were distinguished Guyanese jurists. Judges like Sir Donald Jackson. But after the collapse of the federal experiment, it too folded. Each state went its separate way with Guyana establishing its own indigenous court of appeal which, for 35 years, served also as its final court.

In my respectful view, having a first-tier court of appeal as a country's *final* appellate court is not an ideal situation. First of all, while first tier courts of appeal normally sit in panels of 3, second tier appellate courts, like the CCJ or the UK Supreme Court, usually sit in panels of at least 5. The US Supreme Court always sits in panels of 9 judges. It goes without saying that having at least five experienced judges looking at a legal dispute is always likely to produce a better result than having only 3 examining the same issue. But more importantly, first tier courts of appeal are primarily, if not exclusively, consumed with the tasks of supervising and correcting errors of trial courts. And because first level courts of appeal must

handle appeals from *all* the trial courts, invariably they carry an enormous workload. They are therefore challenged to find the time and space to engage in those matters which a second-tier final court, an apex court, can and must do.

What are some of those matters with which final courts should grapple? Here, we are speaking about large issues; about judicial policy-making that is consistent with the goals and aspirations of Guyana and its people; we are, as Hoffman said, speaking about being a true partner with the legislature in national development. We are thinking about closing the gap between law and society.

The Agreement establishing the Caribbean Court of Justice captures this responsibility of the court. In the preamble to that Agreement it is stated that the member States of CARICOM are convinced that the CCJ would play a determinative role in the further development of Caribbean Jurisprudence. The promotion of Caribbean jurisprudence naturally requires the CCJ to protect democracy and

human rights; to play a defining role in the improvement of the quality of judges and the administration of justice and to promote economic and social development.

I think the CCJ has particular relevance to Guyana at this time. Guyana is currently well poised for serious economic take-off. All indicators suggest that the economic prospects for this country could easily make it the envy of its CARICOM sister states, including Trinidad and Tobago. The basic ingredients are present for this to occur. Your huge and fertile land mass, the abundant deposits of oil, gas and precious metals; the abundance of rivers with huge volumes of fresh water; the country's natural beauty; all of these things provide rich raw material for tremendous social and economic progress. That progress can be thwarted. Or it can significantly be enhanced with good governance and faithful adherence to the rule of law.

The rule of law in this sense implies legal accountability, fairness, respect for minorities, the observance of human rights, judicial independence, the separation of powers, equality before the law and the absence of arbitrariness. Ultimately, it is the Courts that the people will look to for setting appropriate standards in these matters and, in a multi-ethnic and multi-cultural society as Guyana is, the courts have a special responsibility to ensure equality of treatment. Adherence to the rule of law will increase business confidence, attract investments and ensure respect for and enforcement of property rights and freedoms.¹

An important feature of the rule of law is guaranteeing proper access to justice. The CCJ has an enormous stake in this. I will give you two instances to illustrate how the Court seeks to give effect to that important principle. The first is the case of *Ross v Sinclair* which we decided in the early years of the Court. This was a case involving a

¹ The World Development Report 1997, The State in a Changing World.

very poor elderly Guyanese lady who wished to appeal a decision but who lacked the funding to do so. The Court had to decide whether she was entitled to ownership of a condominium unit that was originally owned by the Central Housing and Planning Authority. Recognising her indigent status, the CCJ granted the lady leave to appeal as a poor person and we further facilitated her access to justice by asking the Bar Association to provide her with *pro bono* legal representation and by conducting the hearings via audio and video conferencing which spared the parties and the lawyers the burden of travel to Trinidad.

Another instance illustrating the Court's interest in access to justice is the role the court played in revamping Guyana's civil procedure rules. These are the rules that tell you how to begin a civil case; what procedure to follow; what timelines apply; how your lawyer should process the case; what the Court Registry must and must not do. One of the urgent tasks that confronted Guyana's justice system was the adoption of modern civil procedure rules. Since the turn of the last century, the rest of the Caribbean region had embraced such rules.

Unfortunately, Guyana had lagged behind everyone else. It was as if every other justice system was driving a modern SUV while Guyana's was chugging along in a horse and buggy. I say this not with disrespect. The Guyanese judges and court staff were doing the best they could. But I use that metaphor to convey a sense of the vast disparity between the rules in operation here and those that were prevalent in the rest of Caricom. The Guyana rules had become hopelessly inadequate. This inadequacy was reflected in the dismissal of meritorious cases on flimsy technical grounds and the utilization of antiquated forms and procedures that were totally unsuited for the 20th century far less the 21st century. Business men and women know well that time is money. And they were, and rightly so, utterly frustrated at the inordinate length of time it took to hear simple disputes and the massive backlogs in the civil courts.

The CCJ responded to this situation by working with the Guyana judiciary to introduce new civil procedure rules that are currently in place. Judges of the CCJ spent time training the judges, lawyers and

court staff of Guyana in the new rules that are now in operation. The present transition period from the old to the new rules will naturally occasion some teething issues, but the Guyana private sector is now far better served.

The CCJ and the CSME

One of the critical responsibilities of the CCJ is to interpret and apply the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (the CSME). The court's role is crucial to the success and survival of the Caricom single market. In this sphere of our operations the court's work has particular relevance to the private sector. The rights conferred by the Treaty are designed to enable greater intra-regional and international trade all geared towards creating a stronger Caribbean economy. The CSME is aimed at encouraging the free movement of capital, people, services and enterprise among CARICOM states. The idea is that this movement and exchange of the factors of production will maximise our talents and

resources, thereby leading to greater efficiency and increased profits and prosperity throughout our single economic space. This is intended to create greater investment opportunities for companies and businesses. It is the CCJ that polices these arrangements; that brings them under the rule of law, ensuring that no Caricom state ignores its obligations under the treaty.

There is a particular Article of the RTC that is of special relevance to the private sector. It is Article 222. That Article gives standing to private entities to come to the Court to complain against the conduct of States in the region. Once certain requirements are met, private individuals – which includes companies - are free to seek a remedy for any prejudice to their rights under the Revised Treaty.

Unfortunately, only a few private entities have to date used the court in this fashion. It would require a whole lecture to tell you in detail about how Article 222 works, but let me simply note in passing some of the decisions and rulings that we have made when interpreting

and applying this Article. We have determined that although the Revised Treaty was an international treaty, nevertheless a private entity of a state can sue its own state if that state violated the treaty to the prejudice of its own national. In another case we decided that a private entity can get redress against Caricom if Caricom interfered with the rights and benefits of the private entity in an unlawful manner. We stated that the Caricom Community must be held accountable for their actions and that “no conduct or exercise of power by a Caricom organ should escape the judicial scrutiny of the Court.” The Community could not therefore trample on rights accorded to private entities by the RTC. Unless an overriding public interest consideration so required, States and the Community had to respect any legitimate expectations they had created. The Court has also held that states are not entitled to discriminate between or among regional private entities. So, if you are exporting, for example, to Suriname and competing there with a Surinamese company, the Surinamese authorities cannot extend preferential

treatment to the Surinamese company to your disadvantage. Within Caricom we are all one.

This approach led the court to order one State to repay to a private entity of another state, millions of dollars in taxes that had been imposed on the private entity in circumstances where local private entities were being exempted from paying the tax.

Remedies, enforcement and compliance

What about remedies? For breaches of the treaty, the Court can award and actually has awarded both pecuniary and non-pecuniary damages. Two weeks ago, for the first time, we also awarded interim measures; that is, we gave a complainant interim relief pending the hearing of its case.

One of the fascinating aspects of the court's operation is that all of the judgments we have given in the CSME or "Original Jurisdiction" have been obeyed. But the court never leaves to chance compliance

with its orders. After we give a judgment in the Original Jurisdiction the Court regularly follows up on its enforcement. Every six months or so we call the parties back and make inquiries. We have the parties file a report on their compliance with the judgment. Has the judgment been satisfied? If not, why not? If the judgment is fully satisfied, then we close our file on that case. If it is not, we then impose reasonable timeframes for whatever is left outstanding. And we meet with the parties again when those timeframes expire. This routine monitoring ensures that judgments are properly satisfied and that the successful party is not simply left to fend for itself with a sterile paper judgment.

Referral to the CCJ by the domestic courts

One of the challenges we face is in having lawyers and private entities recognize and take proceedings to enforce the rights the treaty affords to persons of Caricom. Now that there is a functioning CCJ, manufacturers and business people who engage in extra regional trade should not simply grumble if they come up against unlawful or

unfair trade practices. If you are prejudiced, then do like Shanique Myrie and bring the matter to the court. Shanique Myrie was the young Jamaican girl who took on one state and succeeded.

Similarly, the CSME treaty requires local courts and tribunals to refer to the CCJ questions concerning the interpretation or application of the treaty if and when such questions arise in a domestic case. This referral procedure is intended to promote the rule of law in the Community and to guarantee stability and predictability in the application and interpretation of the Treaty. The idea is for investors and business people to benefit uniformly across the entire region.

Conclusion

Going forward, the CCJ will continue to strengthen its progressive approach to the interpretation of the Treaty and enforcement of the rule of law. The rule of law on the one hand and economic and social development on the other are strongly interrelated and mutually

reinforcing. The advancement of the rule of law at the national, regional and international levels is essential for sustained and inclusive economic growth².

In particular, the court will improve access to both its Appellate and Original Jurisdiction. Currently the court boasts one of the most advanced court technology platforms in this hemisphere. Parties may file cases from their homes, appear before the Court via video conferencing and read court files on their Smart Phones. These mechanisms significantly reduce the cost of instituting or filing claims. They create easy access to justice for the ordinary CARICOM citizen or small business owners.

What we must do over the coming years is to reach out more to the ordinary man, woman, boy and girl. There still exists throughout the region a significant gap between the perception and reality of the

² UNGA 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', A/RES/67/1 (30 November 2012)

court's ability, of its processes, of the level of its expertise and of its performance record. We need to close that gap. We need to employ more creative ways to disseminate information about the court so that the information reaches a larger audience. We need to dispel the myths that surround the court and which, regrettably, are readily used by detractors to try to tarnish the image of the court even as their arguments can easily be proved to be baseless. We need to fight these myths that abound with objective facts and figures presented in an attractive and appropriate format.

In the English speaking Caribbean, a noticeable gap exists between on the one hand, judicial performance - even where the same is characterized by excellence - and on the other hand, public trust. The Caribbean public exhibits an appalling lack of trust in their judges. Does this lack of public trust extend as well to officialdom occupying other organs of the State? Is this attitude perhaps a hangover from a people's instinctive cynicism towards the local institutions of the colonial state? Does it reflect a mentality that suggests that judicial

office is too sacred for occupancy by those with whom we went to school? I don't know. Perhaps our social anthropologists can help us here. What is apparent, however, is that, sadly, across the English speaking Caribbean, people, even those whom you think should know better, are quick to voice a lack of confidence not so much in a particular judge but in the judiciary as a whole. We must engage with this negativity. The CCJ is my court, your court, the region's court. We need to build public trust and confidence in it.

Your invitation to me today is one small measure in which persons like you can help us to achieve these goals. I thank you most sincerely for affording me this opportunity.