



Presentation to the Dominica Association of Industry and Commerce

The Right Honourable Sir Dennis Byron,
President of the Caribbean Court of Justice

Luncheon Series of the Dominica Association of Industries and Commerce

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The Dominica Association of Industry & Commerce was formed on 22 February, 1973. They are the leading private sector representative body in Dominica with membership across various sectors and industries. The objectives of the Association include fostering economic growth and social development; promoting and protecting the commercial interests of the State; representing members to Governments, including promoting, supporting or lawfully opposing such legislative or other measures as may be deemed necessary.

Presentation

By

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on the occasion of

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Introduction and Protocols

I am indeed pleased and honoured to accept the invitation to speak to you here today.

This presentation comes at a pivotal time in the history of Dominica. Just this month, Prime Minister Skerrit announced that his Government will be moving “*very speedily to recognise the CCJ*”¹ as Dominica’s final court of appeal.

The Caribbean Court of Justice is already a functional reality with a high performance record as a key organ of CARICOM. In 2001, CARICOM ratified the Agreement Establishing the Caribbean Court of Justice and brought into force the Treaty establishing the Caribbean Community including the CARICOM Single Market and Economy (CSME).² Dominica signed the CCJ Agreement in 2003. CARICOM has since implemented unique and transparent institutional arrangements for the operation of the Court.

¹ “Dominica to cut ties with Privy Council, join CCJ”, Jamaica Observer, 3 January 2013, http://m.jamaicaobserver.com/mobile/news/Dominica-to-cut-ties-with-Privy-Council--join-CCJ_13309113.

² The Agreement can be found at http://www.caribbeancourtofjustice.org/wpcontent/uploads/2011/09/ccj_agreement.pdf.

The Court was inaugurated on 16th April, 2005.

The Jurisdictions of the Court

The CCJ has two jurisdictions, rather like two courts in one. It has an Original Jurisdiction. When the Court is sitting in its Original Jurisdiction it functions as an international court resolving disputes between Member States, or between individuals and Member States where there is an allegation of a breach of the Revised Treaty of Chaguaramas. Then there is the Appellate Jurisdiction, where the CCJ replaces the Privy Council as the final appellate court of the Commonwealth Caribbean Member States.

Allow me to speak first about the Original Jurisdiction.

Brief overview of the CCJ's Original Jurisdiction

All Member States which signed the CCJ Agreement, including Dominica, have acceded to the Original Jurisdiction of the Court. As the exclusive adjudicator of disputes arising from the Revised Treaty, the CCJ serves to protect the rights and enforce the responsibilities under the Treaty. This is of vital importance to the entire region and facilitates the Vision of the CARICOM Single Market. The Court's judgments ensure uniformity in the interpretation and application of Treaty provisions, and are therefore critical in enabling the legal certainty and predictability which encourage economic growth, social stability and the rule of law.³

Under the Original Jurisdiction, the CCJ has delivered thirteen judgments and there are two cases currently pending. The Court has already addressed a number of important issues arising out of the CARICOM Treaty. It has addressed issues relating to supporting the regional manufacturing

³ Extracted from a speech delivered by the Rt. Hon. Sir Dennis Byron, PCCJ, 'Strategic Integration – CARICOM and the Caribbean Court', at the 39th Conference of Caribbean Association of Banks Inc. on 15th Nov., 2012, in Jamaica.

sectors; by responding to complaints for cement manufacturer in Trinidad to compel the Guyanese government to impose the agreed tariffs on cement imports from the Dominican Republic; and to complaints from manufacturers of wheat products to compel the Suriname Government to impose tariffs on imports from the Netherlands. It has addressed the operating methods of the Competition Commission, a CARICOM institution established to ensure the benefits of free trade are not abused.⁴

Currently pending is the case brought by Jamaican national Shanique Myrie against the State of Barbados. Ms. Myrie is claiming that under the Revised Treaty, she has a right to free movement within CARICOM which was violated by Barbadian officials. That trial is scheduled for March and the Court will sit in Jamaica and then move to Barbados to hear witnesses and evidence in that case. And there is another pending case in which a company from Suriname has sued the State of Guyana over the imposition of an environmental levy. The Case Management Conference in that matter is scheduled for next week. These cases all demonstrate that the Court is fulfilling the vision of contributing to economic development and social stability through addressing matters that are of value to the entire region.

Appellate Jurisdiction of the Court

With regard to the Appellate Jurisdiction, three Member States have fully acceded: Guyana, Belize and Barbados.

In Dominica, there are two legal requirements according to the Constitution.⁵ The first requirement is for the Governments of Dominica and the UK Government to agree to abolish appeals to the

⁴ The judgments issued by the CCJ can all be found on its website: <http://www.caribbeancourtjustice.org/judgments-proceedings>.

⁵ See section 42 of the Constitution of the Commonwealth of Dominica.

Privy Council. The second requirement is that a Bill must be passed with the support of at least three quarters of all elected members of the House. This Bill would alter Section 106 of the Constitution which is the provision that currently allows appeals to the Privy Council.

Now, the British Government has already given numerous assurances that it will not stand in the way of Dominica's plans to join the CCJ and will agree to the abolition once it is requested. Therefore, the onus is on the members of the House to place a Bill on the parliamentary agenda so that Dominica can fulfil its promise to be a full member of the CCJ.

The decision taken by the Government of Dominica to join the CCJ is timely. And the CCJ stands ready and able to serve. I trust that it will not be long before other governments in the OECS follow this example of leadership without too much delay.

Although there is some concern that it is taking a long time for the Member States to join the final appellate jurisdiction, we must recall that it is not abnormal for new Courts to take some time for litigants to bring cases before it. The example that is often cited of that phenomenon is the European Court of Human Rights which only heard ten cases in its first ten years. In 2011, however, that Court had almost 140,000 cases pending before it.⁶ The CCJ on the other hand has already delivered over 60 judgments in its Appellate Jurisdiction alone. I would therefore regard the decision by Dominica as continuing a trend that is favourable and encouraging.

⁶ See <http://www.guardian.co.uk/politics/reality-check-with-polly-curtis/2012/jan/25/european-court-of-humanrights>.

Access to Justice

In the countries in which the CCJ is already the final court, it has been actively facilitating access to justice for the ordinary person.

There is now tremendous relief for litigants in terms of expense and in the complexity of lodging an appeal. Increasing numbers of people from all walks of life are able to obtain quality justice at the highest level. An interesting illustration is the case of *Ross v Sinclair* from Guyana where the CCJ granted an elderly woman leave to appeal as a poor person.⁷ The CCJ further facilitated access to justice by conducting the hearings via audio and video conferencing which spared the parties the burden of travel to Trinidad.

We can look at the case of Barbados for statistical evidence of improved access to justice. In the last five years before Barbados abolished appeals to the Privy Council, a total of eight appeals went from Barbados up to the Privy Council. However, in the seven years since Barbados joined the appellate jurisdiction of the CCJ, there have been twenty-five appeals already. In other words, there has been an increase of almost 120 per cent in the number of Barbadian citizens gaining the benefit of a second or final appeal.

Access to justice is further enhanced by the use of the latest technology at the CCJ. There are audio and video conferencing facilities that the Court uses regularly to conduct hearings so that litigants and their Counsel are spared the financial burden of travel to Trinidad. Additionally, the CCJ uploads the audio and the video recordings of its hearings of appeals within a matter of hours on its website, providing transparency and access to our proceedings to the public at large.

⁷ [2009] CCJ 11 (AJ).

So the CCJ has been facilitating access to justice for many people, especially in its Appellate Jurisdiction. A comparison of statistics from Jamaica and Barbados may help to show this.

Between 2008 and 2011, the Jamaican Court of Appeal issued an average of 105 judgments per year⁸. However, between those same years, roughly 6 judgments⁹ on average were delivered in Jamaican cases by the Privy Council. On the other hand, the Barbados Court of Appeal issued just under 16 judgments¹⁰ per year on average between 2008 and 2011. The Caribbean Court of Justice, however, issued 4 judgments¹¹ per year in Barbadian cases on average. These figures suggest that over 25% of litigants in Barbados are now able to appeal to the CCJ, whereas only 5.5% of the parties from Jamaica have the benefit of a second or final appeal.

Completing the circle for Dominica

The need for an indigenous final appellate Court is not new but, rather, has been growing for over a hundred years. In fact, the beginning of the discussion can be traced back to the year 1901 when the Jamaica Gleaner newspaper published an editorial arguing that the Privy Council was out of step with the times and that serious consideration should be given to establishing a final court for the Caribbean region.¹² So even back then, there was a mounting feeling that the region deserves to be served by a Court with an appreciation for Caribbean values, history, and culture.

⁸ To be precise, 104.5 judgments per year.

⁹ To be precise, 5.75 judgments per year.

¹⁰ To be precise, 15.5 judgments per year.

¹¹ To be precise, 4.25 judgments per year.

¹² Duke E. E. Pollard, "The Caribbean Court of Justice: An Innovation in Judicial Institution Building", 2007.

Let us fast forward to today. The majority of the 45 jurisdictions delinked from the Privy Council since 1901. The remaining territories include thirteen independent nations and other jurisdictions which are really protectorates of Britain. Of these thirteen independent countries, nine are members of the Commonwealth Caribbean (OECS + Jamaica + TT + Bahamas).

Surely, the time has come to complete the circle of Independence by abolishing appeals to the Privy Council and enhancing access to justice for all Dominicans through the CCJ.

One of Dominica's own luminaries, the Right Honourable Telford Georges actually regarded it as "*a compromise of sovereignty*" for us to remain wedded "*to a court which is part of the former colonial hierarchy*". Dr. Kenny Anthony, Prime Minister of St. Lucia, put it this way: "*...the Court has always been about the need for all the peoples of CARICOM, to assert their confidence in their integrity, their civilization, and in themselves. No self-respecting nation should allow its sovereignty to be at large.*"

While we consider the full realisation of Dominica's independence, I understand that the issue of the Court's own independence has been widely discussed.

The Independence of the Judges of the CCJ

In some quarters, it seems almost fashionable to suspect that politicians exercise control and authority over the Judges and influence their decision making in given cases. However, we should encourage an awareness of the CCJ's institutional arrangements as it would become clear that these safeguards completely shield the Court and the Judges from any political interference. The CCJ is fully independent in the best of traditions. The Judges are appointed after a competitive selection

process that is free from political control and interference. In fact, the British Academy funded a research project in 2008 which found that the selection process of Judges of the CCJ should be used as an international model for identifying judicial candidates.¹³ The main feature of the selection process is an independent and nonpartisan body called the Regional Judicial and Legal Services Commission (“the Commission”. The Commission comprises eleven persons.¹⁴ The President of the CCJ is Chairman. There are two *ex officio* officers, the chairman of a Judicial Service Commission and Public Service Commission of a Contracting Member State selected on a predetermined rotating basis for three years each, two persons from civil society nominated jointly by the Secretary General of CARICOM and the Director General of the OECS; two persons nominated jointly by OCCBA and the OECS Bar Associations, two persons nominated jointly by the Regional Law Schools, and two persons nominated jointly by the Bar Associations / Law Societies of the Contracting Parties. It is also interesting to note that no nominations are made by individuals or individual bodies. Nominations are jointly made. I would think that our communities would be assured of the fact that the Commission is constituted in a sensible manner that is not influenced by politicians.

The Commission selects and appoints all Judges and the administrators and staff of the Court. With regard to the President, the Commission selects an individual and recommends that person to the Heads of Government who then appoints that person by at least a 75 percent vote. This means that the appointment of a President cannot be vetoed by one or two Heads. If the Heads of Government do reject a nominee, they cannot substitute their own. They may only appoint

¹³ Kate Malleson, “Promoting Judicial Independence in the international Courts: Lessons from the Caribbean”, (July 2009) Volume 58 (3) *International and Comparative Law Quarterly*.

¹⁴ See Article V of the Agreement Establishing the CCJ, at http://www.caribbeancourtjustice.org/wpcontent/uploads/2011/09/ccj_agreement.pdf.

someone who is recommended by the Regional Judicial and Legal Service Commission. These provisions ensure that the selection process is uncontaminated by political interference.

Provisions of the Agreement properly address the security of tenure of Judges. Removal of Judges from office requires an affirmative recommendation of a tribunal established by the Commission for the purpose. Again, no politicians are involved in this.

In addition, if a Member State wishes to withdraw from the CCJ, it now requires the lapse of five years from the decision to withdraw until it can take effect. Therefore the risk of such a step being taken is minimal, and would not have any impact of the decision-making process of any Judge. In addition, the remuneration is fixed and cannot be reduced to the detriment of incumbent Judges. The Judges are governed by a Code of Judicial Conduct, which can be perused via the Court's website¹⁵.

The Financial Arrangements

The financial arrangements for the management of the court are completely independent of the CARICOM governments. Prior to the establishment of the CCJ, actuaries calculated that the income from a capital sum of US\$100 million could run the Court in perpetuity. The governments have contributed their shares of this \$100 million into the Court's Trust Fund and the Court is now being run from the proceeds of that sum. Therefore, since Dominica has already fully paid its share for both jurisdictions of the Court, the Government's decision to join the Appellate

¹⁵ See <http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/11/ccj-code-of-conduct.pdf>.

Jurisdiction will not cost the country another penny. Upon fully joining the CCJ, Dominicans will finally be able to take advantage of the full benefit of their financial investment.

The Trust Fund is independently administered by a Board of Trustees consisting of (a) The Secretary-General of the Caribbean Community; (b) The Vice-Chancellor of the University of the West Indies; (c) The President of the Insurance Association of the Caribbean; (d) The Chairman of the Association of Indigenous Banks of the Caribbean; (e) The President of the Caribbean Institute of Chartered Accountants; (f) The President of the Organization of Commonwealth Caribbean Bar Associations; (g) The Chairman of the Conference of Heads of the Judiciary of Member States of the Caribbean Community; (h) The President of the Caribbean Association of Industry and Commerce; and (i) The President of the Caribbean Congress of Labour or their nominees.¹⁶ Again, I suggest that this is a very high powered and professional body that is totally removed from politics.

These are strong, innovative and transparent measures that insulate the CCJ from political interference and guarantee the Court's financial viability for the foreseeable future.

Conclusion

Given the opportunity to maximise its full potential, there can be no doubt that the CCJ will acquit itself as a sterling institution that can serve the people of Dominica with excellence. Since World War II, several of the countries that have abolished the Privy Council now have their own final courts of appeal which have garnered reputations as top class institutions. I am confident that in

¹⁶ See Article VI of the Revised Agreement Establishing the Trust Fund at http://www.caribbeancourtjustice.org/wp-content/uploads/2011/11/ccj_rev_trustfund.pdf.

time the CCJ's growing international reputation as a high quality Court will continue to be enriched and I believe the Court will surpass all expectations.

I must again express my deep gratitude to the Association of Industry and Commerce for inviting me to be the Guest Speaker today. Thank you all for listening.