

FINAL VERSION - LETTER TO THE PRESS

RE: THE PRIVY COUNCIL AND CCJ DEBATE – A DIFFERENT ANALYSIS

1. Over the past 4 months there has been a fairly intense debate, both here and in the wider Caribbean, on whether the Caribbean Court of Justice (“**CCJ**”) should replace the Privy Council (“**PC**”) as the apex Court of Appeal for Trinidad and Tobago and countries of the Caribbean.
2. Entry into the debate has not occurred before because of the desire not to be labelled as being pro or against any particular view. In these small islands which we inhabit individuals are too often labelled as having some ulterior motive for expressing an opinion. We often lose sight of careful analysis of the cold hard facts.
3. Accordingly, one is entering the debate not for the purpose of expressing personal views for or against the CCJ as the final Appellate Court for the Caribbean, but instead to articulate the arguments for and against which of the 2 Courts should be the final Appellate Court for the Commonwealth Caribbean.
4. The matters to be set out hereunder are informed not merely from the recent views and statements made in the public domain, but also from conversations over the past decade with attorneys-at-law and members of the public who have an interest in and expressed views on the subject. In addition, one has been afforded the opportunity to appear both before the PC and the CCJ, and in the case of the latter to have lead the legal team which initiated and brought into operation the original jurisdiction of the Court in litigation in 2008 (appearing on at least 20 occasions before that Court).
5. Having regard to the foregoing, it is not unreasonable to expect that some value could be added to the debate by what is set out hereunder.
6. The arguments for and against the 2 Courts are set out hereunder.

Arguments for the CCJ

Completing the Cycle of Independence

7. The argument which is made here is that the abolition of appeals to the PC and the replacement of that body by the CCJ will complete the cycle of independence of the countries of the Commonwealth Caribbean. The point is made with great force that having attained independence between 30 to 52 years in the case of most Commonwealth Caribbean countries, the time has now long past when we should have shed ourselves of our colonial past and the reliance upon Judges based in London to decide matters coming before our Courts.

8. The foregoing point has been forcefully expressed by a retired CCJ Judge, Mr. Justice Duke Pollard in his book entitled **“The Caribbean Court of Justice (Closing the Circle of Independence)”** where at **pages 126 and 127** he states as follows:

“The genesis of the jurisdiction of the Judicial Committee of the Privy Council is traceable to the inordinate degree of arrogance associated with the disposition of royal power in the middle ages.

...the Judicial Committee of the Privy Council was perceived as an indispensable attribute of empire and the judicial symbol of colonialism.”

9. It is to be expected that Caribbean people having attained political and governmental independence to move to the final stage of having their legal disputes adjudicated within the region by persons who are from the region and are aware of its peculiarities. The only caution that one can add in this regard is that the move to complete the circle of independence should not be influenced by any improper purpose which could undermine the trust and confidence which people will repose in the final Appellate Court.
10. In this context the historical reality and facts of what happened in the case of Guyana should be noted. It will be recalled that Guyana was the first country to abolish the PC in July 1971. It is my understanding that that event is often represented in lectures in the Law Faculty in Barbados as the first major development in completing the circle of independence in the judicial process in the Caribbean. However quite contrary to that assertion, it is within my personal knowledge that the legislation in Guyana was passed, not for the apparent purpose, but in order to benefit a supporter of the party in Government at that particular time.

Greater Access to Justice

11. The argument here is that the replacement of the PC by the CCJ as the final Appellate Court will provide citizens of the Commonwealth Caribbean countries with much greater access to justice. This means that they will be able to take their matters to the final Court of Appeal if they so wish at a much reduced cost. The argument is that appeals to the PC are extremely expensive and that factor operates as a deterrent to prosecuting an appeal before that body. If the appeals were to be prosecuted in Port-of-Spain at the headquarters of the CCJ, then it is more than likely that many more persons who may be aggrieved by Court of Appeal decisions in the Caribbean would be in a financial position to approach the CCJ.

Intellectual Capacity of the CCJ Judges and Conduct of Hearings

12. It can be stated quite emphatically that there is no question that the intellectual capacity of the Judges in the CCJ compares very favourably with Judges in any

jurisdiction in the world. The ability to analyse legal issues and write carefully crafted judgments with reasons is not a matter in dispute. The Caribbean has produced brilliant legal minds for decades.

13. In addition to the foregoing, the CCJ conducts its proceedings with the dignity and courtesy which is befitting a final Appellate Court. There is no manifestation of apparent bias, hostility or badgering of counsel by members of the Court. Such level of decorum would obviously cause attending clients to develop a level of trust and confidence about the impartiality of the proceedings. From personal experience and those of a number of my colleagues at both the Senior and Junior bar, some of the Judges in the local Courts would do well to emulate the conduct of the CCJ.

Arguments against the CCJ

14. Those who oppose the CCJ and advocate the retention of the PC have a different view.

The Importance of Trust and Confidence

15. The question of **trust and confidence** is at the very heart of the skepticism emanating from those who are lukewarm to or opposed to the CCJ. It is felt that in the small societies in which we operate that some Judges may be reluctant to offend the politicians who hold the reins of the Government of the day.
16. There is a significant body of opinion with the view that in a case involving a challenge to the abuse of power by Ministers of Government or powerful Government officials that the only way they can be assured of justice at the end of the day is by going to London and having the PC deal with the case. In other words Courts in the Caribbean are unwilling to “offend” by striking down the conduct of those who hold high offices and wield political power.
17. Those who support the retention of the PC point to a number of recent examples in the last 10 years where they feel that justice was not served by the decisions of local and regional judges, and that the only way they could have had their rights vindicated was by going to the PC.
18. The following examples over the last 10 years are cited in support of those who favour the retention of the PC:
 - (i) The **St. Kitts Election** case in February 2015 where the PC intervened to overturn the decisions of the local Judges. The case involved an attempt by a sitting Prime Minister of 20 years in office seeking to change the boundaries of constituencies shortly before the election in a manner which the opposition believed would favour his re-election.
 - (ii) The case of the former **Prime Minister of St. Vincent and the Grenadines, Sir James Mitchell**, where the PC intervened to reverse the local Judges

who did not protect him against the findings of a Commission of Enquiry in denying him natural justice. This was a case where a Prime Minister set up a Commission of Enquiry which made findings of fraud and dishonesty against a former Prime Minister without the latter having been given the opportunity to properly defend himself.

- (iii) The **Antigua Power Company** case where the PC intervened to declare that the Prime Minister had no power to direct the Commissioner of Police what to do when the local Judges had declined so to do.
 - (iv) The **Toussaint** case in St. Vincent where the PC overturned the Court of Appeal and allowed into evidence a statement of the Prime Minister in Parliament which supported a citizen claim for constitutional relief that the Government had unlawfully expropriated his property.
19. The foregoing cases represent a non-exhaustive list of cases where citizens of the Caribbean, powerful and not powerful, have felt that they were denied justice in the local and regional Courts and only had their rights vindicated by going to the PC. The foregoing cases are records of examples of the reluctance of Judges in the Caribbean to offend sitting Prime Ministers and strike down abuse of power. Those who support the retention of the PC are concerned whether the CCJ will act differently.

CCJ has made a Mandatory Order against the Government of Guyana

20. In 2009 in the case of **TCL v. Government of Guyana**, the CCJ granted a mandatory order against the Government of Guyana directing it to implement the Common External Tariff ("**CET**") which it had arbitrarily lifted without lawful authority. The Government of Guyana, after threats of contempt proceedings, grudgingly complied with the order of the Court but nonetheless issued strident statements of defiance and contemptuous criticism of the CCJ's decision with impunity through the President and the Attorney General of the day.
21. Further, serious threats as to the physical safety of those who dared to prosecute the proceedings were made, and the Government of Guyana has refused to pay the costs of the proceedings assessed by the Court. So much for respect for the rule of law when a Court orders a Caribbean Government to do something which it is not in favour of doing!

Another Aspect of Trust and Confidence: Knowledge of Local Conditions, the Parties and the Attorneys

22. Another fundamental issue relating to trust and confidence, when one is comparing the CCJ and the PC, relates to the judicial knowledge of local conditions, the parties and the lawyers involved in any particular case. It is commonly said that one negative about retention of the PC is that the Judges in London are too far removed from the local circumstances and local conditions and have little or no knowledge of same.

23. However for those who advocate the retention of the PC, it is indeed that lack of knowledge which they find attractive. Simply put, people who can afford to go to the Privy Council go there because they feel that the Judges in London are quite unlikely to know them, have little or no prior knowledge of their attorneys, and will not approach their cases with any preconceived biases or desire to retaliate for real or imaginary grievances in the past. Such a fear cannot be dismissed. To do so would be putting on blinkers, and as the late Ewart Thorne Q.C. used to say, **“blinkers are for horses and not humans”**.
24. The simple reality and hard cold facts are that local and regional judges in small societies such as ours, from their knowledge of the parties and the attorneys involved, can approach a particular case with predetermination, bias and hostility towards any particular party involved and the attorney, whether because of previous clashes, professionally or otherwise. It is that messy scenario which many people ignore, but which is a cold hard fact of professional life commonly attested to by my colleagues, both at the senior and junior bar, on a number of occasions. Furthermore, it is an experience not unknown to me personally.

Conclusion

25. The foregoing represents a summary of the arguments for and against the CCJ. It is hoped that public opinion is in a better position to judge, having been presented with the 2 opposing views.
26. At the end of the day it is anticipated that the debate as to the pros and cons of acceding to the CCJ will continue. Having regard to the unique and complex nature of the ever-changing political and social landscape in Trinidad and Tobago, it would not be surprising if that debate is still going in 2020.

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