IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 305 OF 2008

IN THE MATTER **of an application for Judicial Review**

AND

IN THE MATTER **of section 2 and section 3 of the Belize Constitution (Sixth Amendment) Bill, 2008**

AND

IN THE MATTER **of section 2(2)(a) of section 3(1) of the Referendum Act, Cap. 10 of the Laws of Belize, Revised Edition 2003**

BETWEEN:

ALBERTO VELLOS
DORLA DAWSON
YASIN SHOMAN
DARRELL CARTER **Claimants**

AND

PRIME MINISTER OF BELIZE
ATTORNEY GENERAL OF BELIZE **Defendants**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Lisa Shoman, with Mr. Anthony Sylvestre and Mr. Kevin Arthurs, for the claimants.
Ms. Lois Young S.C., with Ms. Pricilla Banner, Crown Counsel, for the defendants.

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JUDGMENT

The claimants in these proceedings, Mr. Alberto Vellos, Ms. Dorla Dawson, Mr. Yasin Shoman and Mr. Darrell Carter, are all Belizean

citizens and registered voters under the Representation of the People Act – Chapter 9 of the Laws of Belize, Revised Edition 2003.

The defendants are the Prime Minister and the Attorney General of Belize. The Prime Minister is the person responsible under section 3(2) of the Referendum Act – Chapter 10 of the Laws of Belize, Revised Edition 2003, for requesting the Governor General to issue a Writ of Referendum for the holding of a referendum when a specific law so provides or pursuant to a resolution of the National Assembly declaring that a certain issue or matter is of sufficient national importance that it should be submitted to the electors for their approval through a referendum.

The Attorney General, is by section 42 of the Belize Constitution, the Minister of the Government of Belize with the responsibility for the administration of the legal affairs in Belize in addition to being the representative of the state in civil proceedings by or against the State of Belize.

2. In these proceeding, the claimants are seeking by way of judicial review, declarations for what they claim is an omission or failure by the Prime Minister to request the Governor General to issue a Writ of Referendum contrary to section 3(1) of the Referendum Act in respect of proposed constitutional amendments contained in the Belize Constitution (Sixth Amendment) Bill 2008 (hereafter referred to as the Sixth Constitutional Amendment Bill or the Constitutional Amendment Bill for short). The claimants seek declarations that such failure is unlawful and or ultra vires sections 2(2)(a) and 3(1) of the Referendum Act. The claimants seek as well an order of mandamus to compel the Prime Minister to request the Governor General to issue a Writ of Referendum in respect of the proposed constitutional amendments.

The position of the Court and the claimants' case

3. I think it is necessary, before proceeding any further, to state the position and function of this court in these proceedings.

4. I am of the settled view that in accepting this case by giving permission to the claimants to seek judicial review of the matters they have complained of, this court, contrary to what has been contended for by the defendants, is not usurping in anyway the function of or trespassing on the exclusive preserve of the Legislature to make laws for the country. All that this court can say or do is that in consonance with the remit given by the Constitution of Belize to the Legislature to make laws for the peace, order and good governance of the country subject to the Constitution, the Legislature should itself pay heed and observe the primary law, the Constitution, in exercising its law-making powers and functions. It should be noted that the legislative powers of the Legislature are **not** unlimited. They are always subject to the Constitution: section 68 of the Constitution; and in the legal and constitutional scheme of things, it is the Constitution itself that is the paramount or supreme law to which all other laws must yield if they are in conflict or out of harmony with it. With the written Constitution of Belize, whose supremacy is expressly declared, the old Dicean concept of Parliamentary supremacy, such as Parliament can make a man into a woman and vice versa, no longer holds sway, if it ever did. Today in Belize, it is the written Constitution that reigns and before it, anything to the contrary, must yield.

5. It is this paramount consideration that impelled this court to grant permission to the claimants in the face of their claim that certain of their constitutional rights are in danger of being infringed. This, they claim, was being done without observance of the necessary **statutory** safeguards that exist for the protection and changing of those rights. More

fundamentally however, the claimants' case is not directed at the Legislature but rather at the Prime Minister and Attorney General, who are expressly cited as defendants and the relief sought against them is, in my view, in their **executive** capacity, albeit, both are members of the Legislature. The claimants' case clearly is not against the Legislature.

6. It is therefore in my view, the duty of this court to look at the statute under which the duty, the claimants say was not observed by the defendants, and see whether any express or implied right exists for persons in the position of the claimants to complain of the alleged unlawful act or omission – see Lord Frazer in the case of **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd (1982) AC 617** at p. 646.

7. Therefore, the interim injunction this court granted against presenting any bill related to the substance of the claim to the Governor General for signing into law, was simply to preserve the status quo until the claim is heard and determined. It was certainly not meant or intended to shackle the Legislature or anyone for that matter, now was it meant to interfere in the legislative process, as was so forcefully advanced by Ms. Lois Young S.C. for the defendants.

8. I should also say that what was at issue even at the permission stage of these proceedings was not simply the validity of proposed legislation, but rather as the claimants urged, the failure of the defendants, qua **the executive**, to comply with legal requirements relating to changes to certain provisions of Part II of the Belize Constitution. It would therefore, in my view, have been a judicial dereliction of constitutional responsibility to have failed to intervene even at the pre-enactment stage of the proposed legislation. The substance of the claimants' case clearly concerns the legality of executive policy contained in the forms of bills.

This case, I should emphasize, is not aimed at or against the Legislature, but rather at the **executive** for the way it has embarked upon to engage the legislative process concerning the proposed legislation.

9. I am comforted in this conclusion by the statement of the learned authors of the 5th edition of **Judicial Review of Administrative Action (1995)** by De Smith, Woolf and Jowell, at p. 18, para. 1-032 in discussing the role of the Court in public law cases:

> *"In articulating the standards of proper administrative practice … the courts have a clearly defined and authoritative role. It is for them to adjudicate both upon the scope of a power and the manner of its exercise. This role may be confidently assumed by the courts. It is also a constitutional role under the democratic principle of separation of powers. Courts, like other institutions, including Parliament, are subject to institutional constraints and must take care not to trespass upon the decision making functions best suited to other branches of government. Public law cases are replete with instances where officials have been conferred very broad discretionary powers. Judicial review does permit the courts to intervene with the exercise of those powers on the grounds of the way the decision was reached. It also permits in some cases interference with the substance of the decision itself … Courts are [however] not institutionally suited to engage in the task of weighing utilitarian calculations of social, economic or political preference. These tasks are best suited to institutions in the political arena. Nevertheless, courts are able and indeed obliged to require the observance of those principles that govern lawful public decision-making. In so doing, they seek to reinforce representative government,*

not to oppose it – and to promote, not to undermine the inherent features of a democracy."

Brief Background to the case

10. It is common knowledge of which no doubt judicial notice can properly be taken, that on 7th February 2008, there was held a General Election in the country which resulted in a change of administration from one political party to the other that was hitherto the principal and the main opposition party. The results of the elections also gave a preponderance of the seats in the House of Representatives (part of the Legislature or Parliament of Belize, the other being the Senate, a wholly appointed body at the moment) to this political party and resulted in this political party forming the new administration gaining twenty-five of thirty one seats in the House of Representatives. This has resulted in a clear three fourths majority in its favour in the House.

11. At the very first business meeting of the House of Representatives on 25th April 2008, after the General Election, the Prime Minister tabled and introduced the Belize Constitution (Sixth Amendment) Bill, 2008 and the Referendum (Amendment) Bill, 2008 among other bills.

12. The Constitutional Amendment Bill received its first reading and was on the same day referred to the Constitutional and Foreign Affairs Committee and as it seeks to effect amendments to the Constitution it has, pursuant to section 69(5) of the Constitution, been held in abeyance, to await a period of 90 days before being brought back to the House for its second reading.

13. The Referendum (Amendment) Bill seeks, among other things, to repeal section 2(2)(a) of the extant Referendum Act which stipulates the holding

of a referendum on any amendment to Part II of the Constitution on the protection of Fundamental Rights and Freedoms. This Bill was passed by the House of Representatives on 14th May 2008 and by the Senate on 25th May 2008. It has however, not been presented to the Governor General for his assent, nor has it yet been gazetted as law.

14. This was as a result of the present proceedings which was launched on 9th May 2008 and the order of this court made on 15th May 2008.

15. In my view, it is significant to note that the bill to remove the requirement of a referendum to change any provisions of Part II of the Constitution was introduced into the House on the same day as the Constitutional (Sixth) Amendment Bill. That is, on 25th April 2008.

16. The claimants had however, filed their claim on 9th May 2008 before either the Referendum (Amendment) Bill 2008 could be passed or the Constitutional Amendment Bill could be brought back to the House. In fact, the latter bill could only be brought back after three months after its first introduction in the House: section 69 of the Constitution.

17. The heart of the claimants' case in these proceedings is that the attempt to amend sections 5 and 7 of the Constitution without first holding a referendum as required by section 2(2)(a) of the Referendum Act is unlawful.

18. In support of their case, the claimants filed affidavit evidence and Mr. Darrell carter, the fourth claimant, filed as well a second affidavit in addition to his first.

19. There was no evidence, whether oral testimony or by way of affidavit, filed or relied upon by the defendants on the substantive case.

The Core Issues in this case

20. I now turn to an examination of the core issues agitated by this case. These may be stated shortly as follows: Was the introduction of the Sixth Constitutional Amendment Bill 2008 by the Prime Minister into the House on 25th April 2008 at the same time as the Referendum (Amendment) Bill, 2008 unlawful in the sense of not complying with the Referendum Act?

21. Ms. Lisa Shoman the learned attorney for the claimants argued and submitted that the failure or omission by the Prime Minister to first seek a Writ of Referendum from the Governor General before introducing the Sixth Constitutional Amendment Bill into the House was contrary to section 2(2)(a) of the Referendum Act and this action by the Prime Minister was illegal, procedurally improper and constituted a denial of the legitimate expectation of the claimants to their statutory right to be consulted in a referendum on the proposed constitutional changes.

22. Ms. Lois Young S.C. the learned attorney for the defendants on the other hand argued forcefully that the claimants were not entitled to any of the declarations they seek nor to a grant of mandamus directed at the Prime Minister to seek a Writ of Referendum in respect of the proposed constitutional changes. She also urged that the claimants' case was misconceived, since the Legislature had held (at the time of hearing this claim) the first, second and third readings on the Referendum (Amendment) Bill and that all these were acts of the Legislature signaling its clear intent to amend the Referendum Act. She further argued that the claimants' case was political and therefore non-justiciable.

23. Ms. Young S.C. also submitted that in any event, section 2(2)(a) of the Referendum Act was unlawful and unconstitutional in that it purports to put an additional fetter on the legislative powers to change the Constitution as

provided for under section 69 of the Constitution. This was so she argued, because subsections (3) and (5) of section 69 already contain provisions regarding any changes to Schedule 2 of the Constitution relating to the protection of Fundamental Rights and Freedoms. Therefore, she further argued, the Referendum Act being an ordinary act had to be passed in the manner prescribed in subsections (3) and (5) in order to be valid.

The Relevant provisions of the Referendum Act

24. The claimants rely on the provisions of the Referendum Act as the basis of their case in these proceedings. This Act was first enacted in 1999 and it became operational on the 21st of September of that year pursuant to S.I. No. 31 of 1999 made by the Prime Minister. The Act introduced for the first time the institution of the referendum into the governance and public affairs of the country.

25. Section 2 in particular, provides as follows:

> *"2.-(1) Without prejudice to any law which provides for a referendum to be held on any specific issue, the National Assembly may by resolution passed in that behalf declare that a certain issue or matter is of sufficient importance that it should be submitted to the electors for their approval through a referendum.*
>
> *(2) Notwithstanding subsection (1) above, a referendum shall be held on the following issues:-*
>
> *(a) any amendment to Chapter II of the Constitution which derogates from the fundamental rights and freedoms guaranteed therein; and* (Emphasis added)
>
> *(b) any proposed settlement with Guatemala for resolving the Belize/Guatemala dispute."*

26. Section 3 of the Act provides for the mechanism for a referendum and so far as relevant provides in terms:

> *"3.-(1) Within thirty days of the passing of the resolution by the National Assembly pursuant to section 2 above (or where a law provides for the holding of a referendum on a specific issue, within thirty days of a request made to that effect by the Prime Minister), the Governor-General shall issue a Writ of Referendum in a form similar to the Writ of Election in the Fifth Schedule to the Representation of the People Act, with such modifications and adaptations as are necessary to satisfy the provisions of this Act, to the returning officers of the electoral divisions of Belize, or of the particular district or area thereof, as the case may be.* (Emphasis added)
>
> *(2) The day named in the Writ for the holding of a referendum shall not be less than thirty days after the issue of the Writ.*
>
> *(3) The Writ of Referendum shall specify whether the referendum shall be held in the whole or in any specific district or area of Belize."*

Section 4 provides for the persons qualified to vote in a referendum depending on whether the referendum is to be held in the whole of Belize or in a particular area of the country defined in the Writ of Referendum. And section 6 of the Act provides for the application of the provisions of the Representation of the People Act.

27. It is therefore manifest that as registered voters, all the claimants have an undoubted interest in the substance of these proceedings.

The Referendum (Amendment) Bill 2008

28. One of the principal changes sought to be effected by this bill is to remove the express requirement for a referendum on any amendment to Chapter II of the Constitution which derogates from the fundamental rights and freedoms guaranteed therein as provided for in section 2(2)(a) of the

Referendum Act. The bill seeks to effect some other changes to the Act by itemizing in its Clause 2 the circumstances in which a referendum shall be held. But none of these include derogating amendments to Chapter II of the Constitution. The bill however provides for the presentation of a petition to the Governor General signed by at least ten percent of registered voters in Belize (or twenty five percent of registered electors in a district or area for local referendum) praying that in their opinion certain issue or matter is of sufficient importance that it should be submitted to a referendum. The bill also provides for the validity of referendum by specifying the percentage of registered voters that must take part in the referendum exercise – at least sixty percent and for the issue to be decided by a simple majority of the votes cast.

29. The bill, like the Referendum Act, retains the provision for the National Assembly to pass a resolution declaring that a certain issue or matter is of sufficient national importance to be submitted to a referendum. It also retains, like the Act, the provision for a referendum on any proposed settlement of the Belize/Guatemala dispute.

30. It may be arguable that the bill is an improvement on the Referendum Act in certain respect. But what is unarguable is that it excludes the express provision in section 2(2)(a) of the Referendum Act, stipulating a referendum for any amendment to Chapter II of the Constitution which derogates from the fundamental rights and freedoms guaranteed therein. This, I cannot help but note, as an ironic sting in the bill in so far as it preserves the right of the people of Belize to be consulted in a referendum about the settlement of the Guatemalan dispute but seeks at the same time to abolish the people's right to a referendum on changes to the Constitution that derogate from their fundamental rights and freedom. I can only wonder which is more valuable – the settlement of the Guatemalan dispute or the fundamental rights and freedoms of the

Belizean people. No doubt both are important. But it would be a sad commentary to say that the law allows the people of Belize a say in settling the Guatemalan dispute but denies them a say in so vital a matter as the derogation of their fundamental rights and freedoms. This may sound like telling the people that they may have a say in keeping their country safe from foreign pretensions but they will not have a say in whether their rights and freedoms are abridged or abrogated.

The Constitution (Sixth Amendment) Bill 2008

31. In these proceedings the claimants have singled out two clauses of the Constitutional Amendment Bill, which they say, if enacted, without a referendum first being held on them, would be inconsistent with and ultra vires of sections 2(2)(a) and 3(1) of the Referendum Act. They have taken aim in particular, at clauses 2 and 3 of the Constitutional Amendment Bill.

32. The claimants do not however, quarrel with any of the other clauses of the Constitutional Amendment Bill which contain other amendments to various sections of the Belize Constitution.

33. Clause 2 proposes to amend section 5 of the Belize Constitution to extend the period of detention of persons. It provides as follows:

> *"2. Section 5 of the Constitution is herebv* (sic) *amended as follows:-*
>
> *(i) in subsection (1), by adding the following new paragraphs immediately after paragraph ():-*
>
> *"(k) under a law which makes reasonable provisions for the protection of children from engaging in criminal activities or other anti-social behaviour; or*

(l) under any law relating to the detention of persons who are suspected on reasonable grounds of being involved in the commission of, or being likely to commit, a serious crime;"

by inserting the following as new subsection (5A) immediately after subsection (5):-

"(5A) Subsections (2) and (3) of this section shall not apply to a person who is detained under a law referred to in paragraphs (k) and (l) of subsection (1) of this section:

Provided that no person shall be detained under a detention order made under a law referred to in paragraph (1) of subsection (1) of this section for a period longer that (sic) *seven days, but the initial detention order may be extended for a further period not exceeding one month by a Judge of the Supreme Court in Chambers on an ex parte application made in that behalf.";*

by addition the following as new subsection (8) after subsection (7):

"(8) For the purposes of this section, ***'serious crime'*** *means murder, armed robbery, the offence of belonging to a criminal gang, and terrorism."*

34. The full gravity of this clause will be better appreciated if I set out the provisions of subsections (2) and (3) of section 5 of the Constitution which the bill seek to disapply in case of persons detained under its sub-clauses (k) and (l). Subsections (2) and (3) of section 5 read as follows:

"(2) Any person who is arrested or detained shall be entitled –

(a) to be informed promptly, and in any case no later than forty-eight hours after such arrest or detention, in a

language he understands, of the reasons for his arrest or detention;

(b) to communicate without delay and in private with a legal practitioner of his choice and, in the case of a minor, with his parents or guardian, and to have adequate opportunity to give instructions to a legal practitioner of his choice;

(c) to be informed immediately upon his arrest of his rights under paragraph (b) of this subsection; and

(d) to the remedy by way of habeas corpus for determining the validity of his detention.

(3) Any person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law;

and who is not released, shall be brought before a court without undue delay and in any case not later than seventy-two hours after such arrest or detention."

35. Clause 3 of the Constitutional Amendment Bill proposes to exempt petroleum, minerals and other substances from the protection against deprivation of property as provided in section 17 of the Constitution. Clause 3 of the Bill provides as follows:

"3. Section 17 of the Constitution is hereby amended by adding the following as subsections (3) and (4) after subsection 2:

(3) Subsection (1) of this section does not apply to petroleum, minerals and accompanying substances, in

whatever physical state, located on or under the territory of Belize (whether under public, private or community ownership) or the exclusive economic zone of Belize, the entire property in and control over which are exclusively vested, and shall be deemed always to have been so vested, in the Government of Belize.

Provided that the Government may by a contract for the prospecting and production of petroleum or minerals enable a contractor to acquire property in, title to, or control over any petroleum or minerals found in Belize, and in every such case, the provisions of subsection (1) of this section shall apply to all petroleum or minerals which may come into the possession or control of a contractor by virtue of such contract.

(4) For the purpose of subsection (3) above, the terms "petroleum" and "minerals" shall have the meanings as are or may be ascribed to them by any law."

36. Again, to appreciate the gravity of clause 3 of the bill it is, I think, helpful to set out the provisions of subsection (1) of section 17 of the Constitution which the proposed new sub-clause (3) of clause 3 of the bill seeks to disapply in relation to petroleum, minerals and accompanying substances located on or under the territory of Belize, whether under public, private or community ownership. Section 17(1) of the Constitution reads as follows:

"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 –

(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."

37. These two clauses of the Constitutional Amendment Bill, it is to be noted, clearly engage sections 5 and 17 of the Belize Constitution. These relate respectively, to the **protection of the right to personal liberty** and **protection from deprivation of property** and are included in Part II of the Constitution providing for the protection of Fundamental Rights and Freedom. They unarguably derogate from these two sections of the Constitution as they presently stand.

The Introduction into the House of the Sixth Constitutional (Amendment) Bill 2008 and the Referendum (Amendment) Bill 2008

38. From the evidence, it is not in doubt that these two bills were first introduced in the House on 25th April 2008, the first business session of the House after the General Election of 7th February 2008 (see paras. 3, 4 and 24 of the first affidavit of Mr. Vellos, the first claimant). This was therefore, for the purposes of section 2(2)(a) of the Referendum Act, the material time in the view of the claimants. Mr. Carter, the fourth claimant however, in his second affidavit avers that on 10th April 2008, the Prime Minister gave an interview in which he mentioned the pending proposals

to alter sections 5 and 17 of the Constitution. Ms. Shoman therefore argued that the referendum requirement had been engaged since that time. I am however unable for reasons I shall explain later in this judgment to accept that the material time in this case was either 10th April or 25th April when the Sixth Constitutional Amendment Bill was first introduced in the House. At the material time, whatever that turns out to be, the Referendum Act, unamended, was subsisting and represented the law. This is a crucial point in this case as I shall try to explain later.

Determination

39. In order to determine the issues raised in this case, I think I must have regard to the process of law-making and the power to change the Belize Constitution, in particular, its provisions relating to the Protection of Fundamental Rights and Freedoms in its Part II.

Law-making and the power to change the Constitution

40. It is a fact that in Belize, like most other Commonwealth Caribbean countries patterned after the Westminster model of governance with representative democracy, the law-making powers are vested in the Legislature. In Belize, section 68 of the Constitution expressly so provides: *"Subject to the provisions of this Constitution, the National Assembly may make laws for the peace, order and good governance of Belize."* It is of the essence of Legislatures to make laws.

41. However, in these countries, including Belize, the **executive** in the form of the government of the day, is the undoubted engine for the promotion of legislation. This is almost invariably done by a proposal adopted in cabinet which is then taken, in the form of a bill, to the Legislature. There, because of the support the government enjoys through its majority in the

Legislature, the legislative proposals or bills, almost invariably get enacted.

I advisedly use the qualifier "almost invariably" because, it is conceivable, that legislative proposals may emanate from the other side of the House or the proposals or bills may run into stiff dissent which could thwart their adoption. But these are very rare occurrences.

42. However, in my view, section 2(2)(a) of the Referendum Act was intended to protect against the amending powers by a cyclical majority that is inherent in section 69(3) of the Constitution. For by this provision any political party with the necessary three-quarters majority in the House, can repeal, modify or amend **any** of the provisions of the Constitution relating to the Protection of Fundamental Rights and Freedoms. This leaves these rights and freedoms to the vagaries of a General Election and any resultant three-quarters majority a political party may be able to garner, tempered only by the lapse of ninety days between the first introduction of a bill to effect such alteration and the second reading of that bill in the House, no fundamental right or freedom it would seem, would be immune from alteration or derogation.

43. It is to be noted that section 69(3) of the Constitution requires a three-quarters majority of the House to effect any alteration of section 69 itself as well as the provisions of the Constitution specified in its Schedule 2. Schedule 2 of the Constitution covers Chapter II (on the Protection of Fundamental Rights and Freedoms); sections 55 to 60 (inclusive) dealing with the Legislature; sections 84 and 85 dealing with the prorogation and dissolution of the Legislature; and sections 88 to 93 (inclusive) dealing with the Elections and Boundaries Commission, electoral divisions, conduct of voting and elections; Chapter VII dealing with the Judiciary; sections 52(2) and 54 dealing with the prerogative of mercy and the Belize

Advisory Council; sections 108(7) and (8) dealing with the removal of the DPP and sections 109(6) and (7) dealing with the removal of the Auditor General; section 111 dealing with appeals in disciplinary cases concerning public officers; and sections 105 and 106 dealing with public services commissions and the appointment of public officers.

In addition to the votes of three-quarters of the members of the House, an interval of not less than ninety days between the introduction of a Bill proposing changes to any of these, Schedule 2 provisions must take place and the beginning of proceedings in the House on the second reading of such a Bill.

44. Therefore, in the face of a three-quarters majority in the House, coupled with an interval of ninety days between the first introduction of the bill, and its second reading, no provision of the Second Schedule of the Constitution is safe from alteration.

45. I find that the provisions of section 2(2)(a) of the Referendum Act were intended and designed to ameliorate a possibly perilous state of affairs, at least in so far as Part II of the Constitution on the Protection of Fundamental Rights and Freedoms is concerned. This section mandates that for **any** amendment to Chapter II of the Constitution which derogates from the fundamental rights and freedoms it guarantees, there must be a referendum at which the **people** of Belize would have an opportunity to pronounce themselves.

46. Subsection (2)(b) of section 2 confers the same right to have a referendum on any proposed settlement with Guatemala for resolving the Belize/Guatemala dispute.

47. Ms. Young S.C. for the defendants however somewhat implausibly, argued that section 2(2)(a) of the Referendum Act is unconstitutional as it attempts to alter section 69(3) of the Constitution by fettering the Legislature from altering its Part II by requiring a referendum for this purpose.

48. I am however, unpersuaded by Ms. Young's reasoning and argument for the simple reason that there is a presumption of constitutionality or legality in favour of legislation and I have nothing from the defendants by way of any evidence that the Referendum Act was not passed as Ms. Young would want me to find: see **The Attorney General v The Antigua Times Ltd (1979) 21 WIR**. In the circumstances, I can only conclude that it is a valid and subsisting law. The contrary has not been proved. Moreover, I agree with Ms. Shoman that when section 2(2)(a) is combined with section 3 of the Act, it is the Prime Minister who is addressed: he should seek from the Governor General a writ of referendum and the Governor General shall within thirty days of the Prime Minister's request issue a Writ of Referendum, on amendment, by way of derogation, of any of the provision of Part II of the Constitution.

49. I have set out above at paras. 33 and 35 above, the provisions of the Sixth Constitutional Amendment Bill. It is unarguable, I think, that in point of fact and law, if enacted, they would effect a derogation from the extant sections 5 and 17 of the Belize Constitution.

50. I am however, not satisfied that the requirement of a referendum pursuant to section 2(2)(a) is a fetter on the Legislature or unconstitutional or that the claimants' case is misconceived or political and therefore non-justiciable as has been argued for the defendants.

51. I remain unconvinced that section 2(2)(a) of the Referendum Act is a fetter on the Legislature or an amendment to section 69(3) of the Constitution. What section 2(2)(a) requires is that a referendum shall be held on any amendment to Chapter II of the Constitution that derogates from the fundamental rights and freedom guaranteed therein. It directs that the Prime Minister shall make a request for a writ of referendum and that the Governor General shall, within thirty days of such a request, issue the writ. This, in my view, is clearly a matter that is **outside** of the legislative process that is contemplated and provided for in section 69(3) of the Constitution. A closer reading of section 2 of the Referendum Act would disclose that it envisages **three** instances when a referendum can be held:

i) When the National Assembly passes a resolution declaring that a certain issue or matter is of sufficient national importance that should be submitted to the electorate for their approval through a referendum: section 2(1)

ii) When any amendment to Chapter II of the Constitution derogates from the fundamental rights and freedoms guaranteed in that chapter: section 2(2)(a); and

iii) On any proposed settlement of the dispute with Guatemala: section 2(2)(b).

Section 3 of the Act then stipulates that in any of these instances (which are specified in section 2), within thirty days of a request made by the Prime Minister, the Governor General shall issue a writ of referendum.

52. I find therefore, that although section 2(2)(a) speaks of *"any amendment to Chapter II which derogates from the fundamental rights and freedoms …".* It is only logical, reasonable and commonsensical to hold that the section is meant to operate and can only come into operation **after** the vote in the House approving any amendment. In fact this is the scheme in most Commonwealth countries that provide for consultation of the electorate by referendum on amendment to certain constitutional provisions: see, for example, section 49(3) and (4) of the Jamaican Constitution discussed in Privy Council Appeal No. 41 of 2004 in the case of **Independent Jamaican Council for Human Rights (1998) Ltd v The Hon. Syminga Marshall-Burnett and The Attorney General of Jamaica** at pp. 7-8; and section 108(3), (4) and (6) of the Constitution of Sierra Leone 1991 – Act No. 6 of 1991.

53. In Belize, it is after an interval of ninety days after its first introduction in the House and with the support of the votes of not less than three-quarters of all the members of the House on its final reading can a bill effecting any amendment to section 69 itself and any of the provisions of Schedule 2 of the Constitution be lawfully regarded as altering or amending any of these provisions. This, I find, is the material time when the referendum requirement statutorily provided for in section 2(2)(a) of the Referendum Act, comes into play. It is the final vote in the House that determines whether or not the proposals in the bill will qualify as an amendment. It is on this amendment that the Prime Minister is required to request a writ of referendum from the Governor General who shall issue it within thirty days of the request. I am therefore unable to accept the contention of the claimants that it is prior to the legislative process such as the introduction and first reading of the bill, that would engage the referendum requirement. This is for the simple reason that until after the first reading, following by an interval of not less than ninety days before the second reading and on the final vote, of not less than three-quarters of all the

members of the House in support of the bill, would it become an amendment. Until then, it is only a proposal or a bill whose future may well be uncertain. But once the legislative process is over, if successful, the bill becomes an amendment. It is to this amendment that section 2(2)(a) of the Referendum Act is addressed.

54. I find, as well, that on a closer reading of section 2(2)(a) of the Referendum Act, it does not, contrary to Ms. Young SC's arguments and submissions, purport or effect an alteration of section 69(3) of the Constitution, as the word "alteration" is explained in subsection (8) of section 69. I find nothing in section 2(2)(a) of the Referendum Act that could be said to **revoke**, **modify**, whether by omitting or amending, or inserting additional provisions in section 69(3) or suspending its operation at all. There is nothing, I find, in section 2(2)(a) of the Act, that could be said to alter section 69(3) of the Constitution whether expressly or by implication. This section provides:

> *"(3) A Bill to alter this section, Schedule 2 to this Constitution or any of the provisions of the Constitution specified in that Schedule shall not be regarded as being passed by the House of Representatives unless on its final reading in the House the Bill is supported by the votes of not less than three-quarters of all members of the House."*

I find on analysis that there are several stages necessary to amend any of the provisions of Chapter II of the Constitution, pursuant to section 69, namely:

i) The passage of a bill to alter any of the provisions of this Chapter, which bill must be supported by the

votes of not less than three-quarters of all the members of the House on its final reading. This, of course, is exclusively a legislative process and entirely for the House to determine: section 69(3)

ii) An interval of ninety days between the first introduction of the said bill in the House and the beginning of proceedings on it in the House for its second reading: section 69(5). This again, is a legislative process, but with a temporal element.

iii) A Certificate from the Speaker signed by him stating that the provisions of subsections (2), (3) and (4) of section 69 have been complied with.

55. Subsection (2) is no longer material and subsection (4) is directed at bills intended to alter sections of the Constitution outside of subsection (3) or of the scope of any of the provisions specified in Schedule 2 of the Constitution. These non-subsection (3) or non-Schedule 2 provisions require only votes of not less than two-thirds of all members of the House. They are not however, material to these proceedings. But all these are a part of the legislative process necessary for amending them.

56. It is therefore, in my view, the position that section 2(2)(a) of the Referendum Act **does not alter or interfere with the operation of section 69(3) of the Constitution**. All it requires is that on any amendment to the provisions of Part II of the Constitution, the Prime Minister shall make a request to the Governor General who shall within thirty days issue a writ of referendum for that amendment. This, to my mind, would mean that the **legislative process**, the preserve of the Legislature, would have been completed before a request for a

referendum is submitted to the Governor General by the Prime Minister. This, in my view, is the material time when the referendum requirement kicks in – well after the legislative process.

57. I therefore find nothing in section 2(2)(a) of the Referendum Act that could be said to be a fetter on the Legislature. I find instead that the section is directed to the executive in the person of the Prime Minister.

58. The issue in these proceedings, in my view, is not whether the Legislature of Belize had the power to enact both or either of the two bills brought before it on the same day, but rather the legal consequences of enacting either or both bills and whether the procedure of introducing and giving both bills their first reading on the 25th April 2008, was in conformity with the extant law (the Referendum Act). I find that in introducing the two bills on the same day, there was a clear attempt to remove from consideration or to deny an opportunity to the electorate of Belize to have a say on the proposed changes to sections 5 and 17 of the Belize Constitution. This I find was unavailing because the relevant law provides for a referendum on any relevant amendment. And the claimants and indeed, the electorate, had a legitimate expectation that in conformity with the relevant law at the time a referendum on the amendments would be held.

59. I am of the considered view that it does not make one whit of a difference that the statutory requirement of a referendum on such proposed constitutional changes may be repealed or abolished. This in fact is what has purportedly been done by the subsequent passing of the Referendum (Amendment) Bill. But the one ineluctable fact is that at the material time of the introduction of the Sixth Constitutional Amendment Bill on 25th April 2008, there was extant and in force the Referendum Act, which clearly stipulates the holding of a referendum on precisely some of the measures contained, in particular, in clauses 2 and 3 of the bill. In the absence of a

clear indication in an amendment enactment, the substantive rights of the parties to any civil legal proceedings fall to be determined by the law as it existed when the action commenced – **Re Royce (1985) Ch. 22** at p. 29; and Francis Bennion, **Statutory Interpretation** 3rd Ed. at p. 210. Indeed, there is some force in Ms. Shoman's argument for the claimants that pursuant to section 28(1)(c) of the Interpretation Act – Chapter 1 of the Laws of Belize, Revised Edition 2003, any repeal of section 2(2)(a) of the Referendum Act, as proposed in the bill, would not be prejudicial to their case by reason of the fact that section 2(2)(a) was in force and effect when the present proceedings commenced on 9th May 2008.

60. I therefore find and hold that the failure or omission to engage the referendum requirement on the proposals in the Sixth Constitutional Amendment Bill, touching and concerning some of the provisions in Part II of the Belize Constitution (in this instance, sections 5 and 17) would not in the circumstances of this case, be in conformity with the relevant law at the time. There is no evidence from the defendant that a referendum on the changes would be held or is intended.

61. In the light of my analysis in paras. 49 to 54 above, on the legislative processes involved in altering Part II of the Constitution which include sections 5 and 17 of the Constitution, as contained in Clauses 2 and 3 of the Sixth Constitutional Amendment Bill 2008, being completed, there should be submitted to a referendum these amendments for the electorate of Belize to have their say. I come to this conclusion by reason of the fact that on 25th April 2008, when these amendments were first introduced and by 9th May 2008, when these proceedings were commenced, the relevant and applicable law provided for a referendum. This I find is so despite the would-be or imminent repeal of section 2(2)(a) of the Referendum Act.

62. I remain convinced that in granting leave to the claimants in this case and in issuing the interim injunction barring the presentation of the Referendum (Amendment) Bill 2008, to the Governor General for his signature, this Court was not and has never intended and will never intend to interfere in the legislative process. I draw some comfort and guidance in this respect from the words of Lord Nicholls of Birkenhead in Privy Council Appeal No. 70 of 1998, in the case of **The Bahamas District of the Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon Symonette MP, Speaker of the House of Assembly and 7 others** combined with Privy Council Appeal No. 6 of 1999 in the case of **Ormond Hilton Poitier and 14 Others v The Methodist Church of the Bahamas and 2 others**. In that case Lord Nicholls speaking for the rest of the Board, recognized that the prematurity argument raised by the defendants gave rise to questions concerning the relationship of the courts and Parliament, went on to state that *"Their Lordships consider that … so far as possible, the courts … should avoid interfering in the legislative process. The primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void. This may be coupled with any necessary, consequential relief. However, the qualifying words 'so far as possible' are important. There is no place for absolute and rigid rules. Exceptionally there may be a case where the protection intended to be afforded by the Constitution cannot be provided by the Courts unless they intervene at an earlier stage. For instance, the consequences of the offending provision may be immediate and irreversible and give rise to substantial damage or prejudice. If such an exceptional case should arise, the need to give full effect to the Constitution might require the courts to intervene before the Bill is enacted. In such a case parliamentary privilege must yield to the courts' duty to give the Constitution the overriding primacy which is its due.*

Their Lordships consider that this approach also leads ineluctably to the conclusion that the Courts have jurisdiction to entertain a claim that the provisions in a Bill, if enacted, would contravene the Constitution and that the Courts should grant immediate declaratory or other relief. The Courts have power to enquire into such a claim and consider whether any relief is called for."

63. In the context of the present proceedings before me, although I agree with Ms. Young S.C. for the defendants when, she correctly submitted, that there is no constitutional right in Belize to a referendum, the inescapable fact is that at the material time when the derogating provisions of clauses 2 and 3 in the Sixth Constitutional Amendment Bill were introduced in the House, there was extant section 2(2)(a) of the Referendum Act, which stipulated a statutory requirement for a referendum in circumstances especially contained in the said derogating clauses.

Yes, it is true that this statutory requirement of a referendum would be abolished with the enactment of the Referendum (Amendment) Bill 2008; but again, the inescapable and ineluctably fact is that before this event, the claimants had seized the Court of their claim on 9th May 2008. In this regard the Interpretation Act provides as follows:

> *"(28(1) Where any Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not*
>
> *(a) …*
>
> *(b) affect the previous operation of any enactment so repealed, or anything duly*

done or suffered under any enactment so repealed, or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed, or

(d) …

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation, liability, penalty, forfeiture or punishment."

(Emphasis added).

64. As I have already noted at para. 13 of this judgment, the Referendum (Amendment) Bill has already been passed by both the House and the Senate on the 14th May 2008 and 25th May 2008 respectively, but it has yet to receive the Governor General's signature and gazetted as law. But before the passing of the bill by the House and the Senate, the claimants had, on 9th May 2008, commenced the present proceedings. I can find no contrary intention in the bill to displace section 28(1) of the Interpretation Act.

Conclusion

65. In these proceedings, the claimants are seeking declarations from this court to say that the Prime Minister is acting in violation of, in a manner repugnant to, ultra vires of and inconsistent with sections 2(2)(a) and 3(1) of the Referendum Act by his failure to request the Governor General to issue a Writ of Referendum in respect of proposed amendments to sections 5 and 17 of the Belize Constitution relating, respectively, to the protection of the right to personal liberty and the protection from

deprivation of property, by way of clauses 2 and 3 of the Belize Constitution (Sixth Amendment) Bill 2008. They seek as well an order of mandamus directing the Prime Minister to request the Governor General to issue a Writ of Referendum pursuant to section 3(1) of the Referendum Act.

66. I find and hold that there is much to commend in the claimants' case; but I find myself unable, from my analysis and conclusions on the law in this case, to grant the declarations in the form they seek.

Consequently however, I declare that **on the conclusion** of the legislative processes on clauses 2 and 3 of the Sixth Constitutional Amendment Bill 2008, these clauses of the said bill should be put to a referendum for the electorate to have their say.

67. It is gratifying to note that the Referendum (Amendment) Bill 2008 which has already been passed by both the House and Senate, contains helpful provisions relating to the mechanics of such a referendum. I accordingly, hereby discharge the interim injunction granted on 15th May prohibiting the presentation of this Bill to the Governor General for his signature: see in this regard the Privy Council decision in the case of **Attorney General of New South Wales v Trethowan (1932) A.C. 526**. (This case concerned injunctions granted against presentation of an amending Act for signature into law, without a referendum as the relevant provisions of the Constitution required).

68. In the circumstances, I do not therefore, consider it necessary to order a mandamus requiring the Prime Minister to request a Writ of Referendum of the Governor General. Suffice it, however to say, that in the light of the declaration in para. 66 of this judgment, this court is confident that a writ of

referendum will ensue regarding clauses 2 and 3 of the Sixth Constitutional Amendment 2008 after the final vote on it in the House.

A. O. CONTEH
Chief Justice

DATED: 28th July 2008.