

IN THE SUPREME COURT OF BELIZE, A.D. 2005

CLAIM NO. 338

BETWEEN:

JEFFREY J. PROSSER
BOBBY LUBANA
BELIZE TELECOM LIMITED
INNOVATIVE COMMUNICATION
CORPORATION
INNOVATIVE COMMUNICATION
CORPORATION, LLC Claimants

THE ATTORNEY GENERAL
THE MINISTER OF PUBLIC UTILITIES Defendants

BELIZE TELECOMMUNICATIONS
LIMITED
THIERMON LTD.
BELIZE BANK LIMITED Interested
Parties

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BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Roald Henriques Q.C., Mr. Hubert Elrington and Mr. Lionel Welch for the Claimants.

Mr. Elson Kaseke, Solicitor General for the Defendants.

Mr. Nigel Plemming Q.C. and Mr. Rodwell Williams S.C. for the First Interested Party.

Ms. Lois Young Barrow S.C. for the Second Interested Party.

Mr. E. Andrew Marshalleck for the Third Interested Party.

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JUDGMENT

Introduction

The backdrop to these proceedings is the management and control of Belize Telecommunications Ltd., its shareholdings in particular,

the Special Share created by its Articles of Association and the inspection of its affairs in the face of shifting control of the company. These issues have given rise to the constitutional challenges in this case. They concern amending legislation enacted in August 2005 relating to Public Utilities Commission Act – Chapter 223 of the Laws of Belize, Rev. Ed. 2000.

2. Section 68 of the Constitution of Belize grants to the National Assembly (the Parliament or Legislature of Belize) the power and the right to make laws for the peace, order and good government of Belize. But this grant as the section itself states, is expressly *“subject to the provisions of (the) Constitution”*.

And section 2 of the Constitution proclaims the supremacy of the Constitution itself as follows:

“This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency be void.”

3. On 13th August 2005, the Legislature of Belize enacted the Public Utilities Commission (Amendment) Act, 2005 – Act No. 30 of 2005. And pursuant to this Act, the Minister of Public Utilities on 27 August, made and issued two Statutory Instruments, namely Statutory Instruments Nos. 108 and 109 of 2005.

4. Against this legislation, including both the principal amending Act – Act No. 30 of 2005 and the Statutory Instruments Nos. 108 and 109, the claimants in the present proceedings have issued constitutional challenges.
5. It is helpful perhaps to set out both the challenged legislation including the Statutory Instruments and the claims challenging them.
6. *The Challenged Legislation, including the Statutory Instruments*

Act No. 5 of 2005

“1. *This Act may be cited as Public Utilities Commission (Amendment) Act, 2005 and shall be read as one with the Public Utilities Commission Act, which is hereunder referred to as the principal Act.*

2. *The principal Act is hereby amended by the insertion of the following new section immediately after section 22:*

22A-(1) It shall be the duty of the Minister after consultation with the Commission, Minister of Finance and the Governor of the Central Bank, to ensure that in relation to any public utility provider engaged in the provision of utility services to consumers, there is free movement of capital and open investment, and for this purpose the Minister shall have the power:

(a) to identify and inquire into any entrenched rights in the constitution of such public utility provider.

(b) unless satisfied that any entrenched rights identified under (a) above

- (i) *are justified by an overriding requirement of public policy or public security; and*
- (ii) *the use of that entrenched right is necessary in order to meet the objectives of that overriding requirement;*

to declare the entrenched rights to be unlawful and of no effect and to enquire into and confirm all matters relating to the constitution of a public utility provider arising out of such declaration, including but without limitation matters arising out of the Memorandum of Association, Articles of Association, byelaws, charter or other instrument.

3. *The principal Act is hereby amended by the insertion of the following new section immediately after section 23:*

“23A. Notwithstanding anything contained in the Companies Act, where an order to investigate the affairs of a company is sought in respect of a public utility provider, the order to appoint a competent inspector shall be made and the terms of such appointment shall be decided by the Minister acting on his own application after consultation with the Commission, or following an order of the Court to appoint an inspector under section 110(1) of the Companies Act, the appointment of the inspector shall be made and the terms of such appointment shall be decided by the Minister, and every appointment and the terms of every such appointment so made by the Minister shall be as valid and effectual as if made by the Court itself.”

“STATUTORY INSTRUMENT
NO. 109 OF 2005”

DECLARATION PURSUANT TO SECTION 22A OF
THE PUBLIC UTILITIES COMMISSION
(AMENDMENT) ACT (NO. 30 9F 2005).

WHEREAS, section 22A of the Public Utilities Commission (Amendment) Act (No. 30 of 2005) (“the Act”) provides, *inter alia* that it shall be the duty of the Minister of Public Utilities (“the Minister”) after consultation with the Public Utilities Commission (“the Commission”), the Minister of Finance and the Governor of the Central Bank, to ensure that in relation to any public utility provided engaged in the provision of utility services to consumers, there is free movement of capital and open investment.

AND WHEREAS, in the performance of the said duty, the Minister is given the power pursuant to section 22A of the Act to identify and inquire into any entrenched rights in the constitution of such public utility provider, and, unless satisfied that any entrenched rights identified by him are justified by an overriding requirement of public policy or public security, and the use of the entrenched rights is necessary in order to meet the objectives of that overriding requirement, to declare the entrenched rights to be unlawful and of no effect and to enquire into and confirm all matters relating to the constitution of the public utility provider arising out of such declaration, including without limitation matters arising out of the Memorandum of Association, Articles of Association, charter or other instrument of the public utility provider;

AND WHEREAS, in the performance of the duty imposed upon him by section 22A of the Act, the Minister consulted with the Commission, the Minister of Finance and the Governor of the Central Bank with a view to ensuring that, in relation to Belize Telecommunications Limited (“BTL”) there is free movement of capital and open investment and, for this purpose, the Minister identified the Special Rights Share (“the Special Share”) in BTL as an entrenched right and inquired into the rights conferred on the holder of the Special Share by the constitution of BTL.

AND WHEREAS, the Minister, after such consultation, is satisfied that the Special Share impeded the free movement of capital and open investment in BTL and that the existence of the Special Share and any rights flowing therefrom are not justified by an overriding requirement of public policy or public security and the use of those rights is not necessary in order to meet the objectives of any overriding requirement;

AND WHEREAS, the Minister duly considered the comments and views of the Commission, the Minister of Finance and the Governor of the Central Bank, and, in deciding on the matter, also noted that the Special Share is privately held and considered the judgments of the European Court of Justice (“ECJ”) in **Commission v France** (Case C – 483/99), **Commission v Belgium** (Case C-503/99), **Commission v Spain** (Case C-463/00), **Commission v UK** (Case C-98/01) and **Commission v Italy** (Case C-174-04) and noted the underlying legal principles in those cases;

AND WHEREAS, the Minister also considered the principles of free and fair competition developed in the context of the World Trade Organization and the Caribbean Community Treaty, including the Caribbean Single Market and Economy, to which Belize is a Party;

NOW THEREFORE, acting in the exercise of his statutory duty and powers, the Minister, after making the considerations and being guided as above stated and independently applying his mind thereto, hereby declares the Special Share in BTL an entrenched right which is unlawful and of no effect and, after enquiring into and confirming all matters relating to the constitution of B TL arising out of or connected with the above declaration, the Minister hereby further declares and confirms that, as a consequence of, and incidental to, his first declaration that the Special Share is unlawful;

- (a) the rights flowing from the Special Share, including without limitation the rights specified in Articles 2, 3, 8, 11, 36, 88, 90, 92, 94, 95, 113, 120, and 127 of BTL’s Articles of Association, are of no effect. A copy of the amended Memorandum and Articles of Association of the company in force and in effect from

the date of this order has been filed by the Minister with the Registrar of Companies.

- (b) the Directors appointed by the holder of the Special Share cease to be Directors of BTL as of the date of this Order, and as a result thereof, the Board of Directors of BTL is and shall be Rocky Reef Ventures Limited, Shire Holdings Limited, Mr. Ediberto Tesecum, Mr. Philip Zuniga, Seascope Holdings Limited, and Mr. Keith Arnold.*
- (c) the total issued share capital of BTL as of the date of this Order is 28,876,726 "C" shares and 8,000,000 "B" shares."*

**"STATUTORY INSTRUMENT
NO. 108 OF 2005**

**ORDER APPOINTING AN INSPECTOR TO
INVESTIGATE THE AFFAIRS OF THE BELIZE
TELECOMMUNICATIONS LIMITED**

WHEREAS, section 23A of the Public Utilities Commission Act ("the Act") as amended, provides that notwithstanding anything contained in the Companies Act, Chapter 250, where an order to investigate the affairs of a company is sought in respect of a public utility provider, the order making the appointment, and the terms of appointment, of the Inspector shall be decided upon and made by the Minister of Public Utilities, either acting on his own application after consultation with the Public Utilities Commission or following an order of the Supreme Court to appoint an inspector under section 110(1) of the said Companies Act;

AND WHEREAS, the Supreme Court ordered an Inspector to be appointed to investigate the affairs of the Belize Telecommunication Limited;

AND WHEREAS, no such Inspector has yet been appointed;

AND WHEREAS, the Minister, after consultation with the Public Utilities Commission, and after considering the Supreme Court order requiring an Inspector to be appointed to investigate the affairs of the Belize Telecommunications Limited, and noting that no Inspector has yet been appointed, has decided to make the appointment of an Inspector to investigate the affairs of the Belize Telecommunications Limited and to determine the terms of such appointment pursuant to section 23A of the Act.

NOW THEREFORE, the Minister of Public Utilities, acting pursuant to section 23A of the Act and all other powers thereunto him enabling, do hereby appoint **MR. GEORGE SWIFT** to be the Inspector into the affairs of the Belize Telecommunications Limited only in so far as such affairs have occurred since March 31, 2004; being the closing date of the last audited accounts of Belize Telecommunications Limited to be approved by share holders of that company at an annual general meeting of Belize Telecommunications Limited (the "Company").

The Inspector shall specifically investigate and inquire into the following:

- (a) any lease agreement or agreements entered into by the Company during the said period;
- (b) the buyout of assets of International Telecommunications Company ("Intelco") which is now in receivership, by the Company, including the assumption of Intelco's debt with the Social Security Board by the Company in the amount of US\$9,806,546;
- (c) the use of the Company's assets as security for any purpose during the said period;
- (d) the payment of management and/or licence fees by the Company during the said period;
- (e) the payment of dividends by the Company during the said period, to some but not all of the Company's shareholders.

The Minister, pursuant to this appointment, draws the attention of the Inspector to certain matters notified to the Minister, including those matters set out in the Opinion dated 11 July, 2005 from Michael Young S.C. to the Company, namely:

- (i) the execution of a promissory note by the Company dated 31 August 2004 for the sum of US\$7 million plus interest payable to the Alliance Bank on demand in connection with the proposed acquisition of Intelco assets by Belize Telecom Limited (“BT”);*
- (ii) the invoice to the Company containing an “interim statement” of US\$150,000 for professional services of Mayer Brown Rowe from a proposed US\$85,000 bond offering by the Company;*
- (iii) invoices to the Company from Weston Corporate Finance Inc. pursuant to a mandate letter dated 30 December 2004 in relation to the acquisition of Intelco assets;*
- (iv) an invoice to the then Chairman of the Company (Jeffrey Prosser) from RBTT Merchant Bank of Trinidad and Tobago (“RBTT”) for US\$525,176.70 in relation to an “arrangement fee” for a Fixed Rate Bridge Loan to Belize Telecom;*
- (v) invoices to the Company from Mr. Herbert Sampson in relation to work relating to Intelco;*
- (vi) an invoice o “23/5” for BZ\$10,000 from Youngs Law Firm addressed to the Company relating to the issue of “the acquisition of the Intelco Note and Security Interests” held by RBTT and issues in relation thereto;*
- (vii) an invoice of “24/5” for BZ\$15,000 from Youngs Law Firm addressed to Belize Telecom for services rendered in securing a loan of approximately US\$26 million from RBTT to Belize Telecom in relation to*

the acquisition of the Intelco Note and security interests, which invoice was paid by the Company;

- (viii) any other expenses paid by the Company in relation to Intelco during the said period prior to 31 December 2004, such as (a) lease rentals to Mr. Oscar Sabido for BZ\$9,000 per month (b) phone calls (c) New World Network charges; and (d) insurance charges;*
- (ix) any other extraordinary expenses incurred by the company during the said period at the instance of or in relation to Innovative Communication Company (“ICC”) or Belize Telecommunications Limited (“BT”) or any of their affiliates or subsidiaries.*

The Minister further draw the Inspector’s attention to the background to, and the passing of a resolution by, the Board of the Company on 31 December 2004 (the “Resolution”) in relation to an issuance of authorized share capital and the proposed sale of those shares to Belize Telecom and to the existence of information relating to the Resolution, and requires the Inspector to investigate thereon, including investigating the following:

- the purpose of the Resolution;*
- an explanation of the assessment of the value of the promissory note referred to therein or of Intelco’s assets;*
- an explanation of why any purchase of Intelco’s assets was not direct from the receiver and was instead by way of security interest in those assets;*
- the rationale for selling the Company shares at approximately 17% of their market value at BZ\$1.00;*

- *an explanation of how it was in the best interests of the Company when the proposed sale enabled Mr. Jeffrey Prosser to acquire 54% shareholding at a cost of approximately one-sixth of the market value of the shares concerned;*
- *an explanation of why it was in the Company's best interest that it takes over RBTT's exposure to Intelco who were in financial difficulties;*
- *an explanation of whether the proposed sale constituted only part of a wider series of transactions designed to facilitate and provide a means for Mr. Jeffrey Prosser and/or Belize Telecom to acquire the assets of Intelco.*

The remuneration of the Inspector shall be determined by the Minister, after consultation with the Public Utilities Commission and the Inspector, in accordance with the scope of work to be performed, and shall be disclosed to the public by further Order.”

7. Against this legislation the Claimants have taken issue and seek from the Court the following:

“1. A Declaration that section 23A of the Public Utilities Commission Act, Chapter 223 of the Laws of Belize [introduced by the Public Utilities Commission (Amendment) Act No. 30 of 2005] is in violation of the principle of separation of powers, repugnant to, ultra vires of, and inconsistent with the Belize Constitution and is therefore unlawful and void.

2. A Declaration that the Order made by the Minister of Public Utilities dated the 26th of August 2005 comprised in Statutory Instrument No. 108 of 2005 purporting to order an inspection into Belize Telecommunications Limited is in violation of the principle of separation of powers, repugnant to, ultra vires of and inconsistent with the Belize Constitution and is therefore unlawful and void.
3. A Declaration that the Order made by the Minister of Public Utilities dated the 26th of August 2005 comprised in Statutory Instrument No. 108 of 2005 purporting to order an inspection into Belize Telecommunications Limited is a violation of the Claimants' constitutional rights enshrined in section 3(a) and 6(1) of the Belize Constitution and is therefore unlawful and void;
4. An Order that the inspection cease.
5. An Order that a new Inspector be appointed by the Court.
6. An Order that the Inspection cover the period April 2001 to 8th February 2005.
7. A Declaration that section 22A of the Public Utilities Commission Act, Chapter 223 of the Laws of Belize [introduced by the Public Utilities Commission (Amendment)

Act 2005] is repugnant to, ultra vires of, and inconsistent with the Belize Constitution and is therefore unlawful and void.

8. A Declaration that the declaration and confirmation made by the Minister of Public Utilities dated the 26th of August 2005 comprised in Statutory Instrument No. 109 of 2005 purporting to declare:

- (a) that Belize Telecom Limited's Special Rights Redeemable Preference Share ("Special Share") in Belize Telecommunications Limited ("BTL") is unlawful and of no effect
- (b) that the rights flowing from the Special Share (including the rights specified in Articles 2, 3, 8, 11, 36, 88, 90, 92, 94, 95, 113, 120 and 127 of BTL's Articles of Association) are of no effect
- (c) that the Directors appointed by the holder of the Special share cease to be Directors of BTL
- (d) that the Board of Directors of BTL is and shall be Rocky Reef Ventures Limited, Share Holdings Limited, Mr. Ediberto Tesecum, Mr. Philip Zuniga, Seascape Holdings Limited and Keith Arnold
- (e) that the total issued share capital of BTL as of the date of the Order is 28,876,726 "C" shares and 8,000,000 "B" shares

is inconsistent with the basic principle of separation of powers implicit in and underpinning the Belize Constitution and is therefore unlawful and void;

9. A Declaration that the declaration and confirmation made by the Minister of Public Utilities dated the 26th of August, 2005 comprised in Stautory (*sic*) Instrument No. 109 of 2005 is a

violation of the Claimants' constitutional rights enshrined in sections 3(a) and 6(1) of the Belize Constitution and is therefore unlawful and void.

10. A Declaration that the declaration and confirmation made by the Minister of Public Utilities dated the 26th of August, 2005 comprised in Statutory (*sic*) Instrument No. 109 of 2005 is a violation of the Claimants' constitutional rights enshrined in sections 3(d) and 17(2) of the Belize Constitution and is therefore unlawful and void.
11. A Declaration that any steps taken in pursuance of or in consequence of the said purported declaration and confirmation by the Minister of Public Utilities are unlawful including in particular the convening of the Annual General Meeting of BTL for the 30th of September 2005.
12. An Injunction to restrain the Government of Belize and its Ministers and agents or any person or entity acting on its behalf from continuing to act in pursuance of the said purported declaration and confirmation.
14. A Declaration that section 22A of the Public Utilities Commission Act, Chapter 223 of the Laws of Belize [introduced by the Public Utilities Commission (Amendment)

Act 2005] is repugnant to, ultra vires and inconsistent with the Belize Constitution in that it contravenes sections 3(d) and 17(1) of the Constitution and is therefore unlawful and void.

15. Damages for the loss suffered by the Claimants.
16. That the Defendant pay the Costs of this claim.
17. Further or Other Relief.”

The claimants and their standing to bring the challenge

8. The Defendants to the challenge are the Attorney General of Belize who is the constitutionally designated defendant in civil claims against the government (section 45(5) of the Belize Constitution) and the second defendant, the Minister of Public Utilities. He is given power by the challenged legislation to make certain declarations and orders which the claimants in the present proceedings seek to impugn.
9. By leave of the Court, the first to third interested parties were allowed to join the proceedings. The first Interested Party, the Belize Telecommunications Ltd. (BTL for short) is a public company in which there are several shareholders, including the Government of Belize. It is the principal provider of telecommunications services

in the country. The second Interested Party, Thiermon Ltd., is also a shareholder in BTL and avers that it bought shares in BTL on the strength of the amending legislation which is the subject of the challenge. The third Interested Party, the Belize Bank Ltd., avers as well, that it provided loans to purchase shares in BTL on the strength of the amending legislation.

10. The Special Share in BTL and the inspection of its affairs are the substance of the challenges by the Claimants.
11. The Defendants and the Interested Parties however, *in limine*, mounted a trenchant attack on the standing of the Claimants to bring the challenge. The central thrust of this attack is that as this is a constitutional challenge, the claimants are, in the view of the Defendants and the Interested Parties, outwith the protection or purview of the Constitution of Belize. Therefore, they argue, the Claimants cannot truly and substantively complain of unconstitutional interference with their property rights, if any, in the Special Share in BTL. This Special Share is itself, the subject section 22A of the amending legislation and Statutory Instrument No. 109 of 2005 (more on this Special Share anon).
12. Therefore, the argument runs, the Belize Constitution only confers protection to *“everyone in Belize ...”* and as the Claimants are not

Belizeans and or are not resident or present in Belize, they are therefore outside the protection of the Constitution.

13. I must confess to some disquiet by this line of argument and say that on the evidence, I am unpersuaded by it. This, of course, is not to say that the protection of the Constitution encompasses as well persons and things outside of the borders of Belize, or that its protective writ extends beyond Belize's border. But in my view, the shield provided by Part II of the Belize Constitution on the Protection of Fundamental Rights and Freedoms, especially sections 3(d) and 17 relating to the protection of property, should avail anyone who can positively claim or show an interest in property in Belize.

I take it as unarguable that Belize as a country espouses and subscribes to the United Nations Universal Declaration of Human Rights, 1948. This seminal document affirms in its Article 6 that:

“Everyone has the right to recognition everywhere as a person before the laws”. (emphasis added)

And Article 17 of the Declaration provides:

“17(1) Everyone has the right to own property alone as well as in association with others

(2) No one shall be arbitrarily deprived of his property”.

(emphasis added)

The Declaration historically informed the Belize Constitution whose provisions in its Part II are clearly infused with the Declaration’s principles.

This Court must, in my view, take cognizance of the provisions of the Declaration in keeping with Belize’s espousal of the principles stated therein. In this respect I cannot but be mindful of the provisions of Article 30 of the Declaration. This states in terms:

“Nothing in this Declaration may be interpreted as implying for any State, a group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the right and freedoms set forth herein”.

14. From the evidence, however, I am satisfied that the Claimants, in one form or the other, have sufficient interest in the Special Share (the subject-matter of the challenge relating to section 22A and Statutory Instrument No. 109 of 2005) that is deserving of consideration by this Court in the light of their challenge.

15. From his affidavit dated 6th October 2005 and filed on 11th October 2005, Mr. Jeffrey Prosser, the first Claimant deposes as to his links with the 3rd, 4th and 5th Claimants and their relationship with, in particular, Belize Telecom Ltd. (BT for short, and not to be confused with the First Interested Party BTL from which it is distinct and separate). Mr. Prosser also deposes as to how the Special Share and other shares in BTL came to be acquired by his group, that is, the 3rd, 4th and 5th Claimants. For that is what they really are – Prosser Group of Companies. He also deposes, in particular, as to the Special Share being held by BT and ICC and of his presidency of BT and a director and non-executive chairman of BTL. (See in particular paras. 1, 2, 3, 4, 7, 10, 13 of Mr. Prosser’s affidavit).
16. Also, from the affidavit of Mr. Bobby Lubana, the 2nd Claimant, dated 6th October 2005 and filed on 11th October, 2005 I find as well that there is enough nexus or interest between him and the Special Share through his directorship of BT that warrants this Court’s consideration of his claim as to the effect of the amending legislation on the Special Share.

Directorship in a company is undoubtedly today an interest that falls within the protection afforded to property by the Constitution – see Lawrence and others v Attorney General of St. Christopher &

Nevis (1982) OECS Law Rep. Vol. 1 at p. 550 and Attorney General v Lawrence (1983) 31 WIR 176.

17. Evidently, both Messrs. Prosser and Lubana are non-Belizeans and are not resident in Belize. In fact, they deposed to their respective affidavits in West Palm Beach in the State of Florida in the U.S.A. I am satisfied, however, that this fact notwithstanding, they have put evidence before me that speaks to and attests to their interest in the Special Share with its attendant rights in BTL, that entitles their challenge, in addition to that of the other non-human claimants, to be considered by this Court. What all the claimants have in common from the evidence in the context of the challenge is an undoubted interest in BT, the 3rd Claimant, and the latter's link to the Special Share and the relationship through its shareholding in BTL, the first Interested Party,

Also, the Solicitor General impressively argued for the Defendants that in any event, the non-BT claimants are not necessary or proper parties to this challenge. I do not, on the other hand, from what I have just said, however, share this view. This is because of their interests and the largely declaratory nature of the reliefs sought.

18. From the evidence in this case, I can only conclude that the claimants are more than mere meddlesome busybodies or officious by-standers. They have demonstrated sufficient interest in the

subject-matter of the challenged legislation to be deserving of ventilating their claim before this Court. This is all the more so when it is realized that the sections of the Constitution they invoke to ventilate their claim are intended to secure the protection of the law and property. The claimants have come to this Court for relief by way of the several declarations they seek. Section 20 of the Belize Constitution enjoins this Court to grant appropriate relief to *“any person who alleges that any of the provisions of sections 3 to 19 inclusive ... has been, is being, or is likely to be contravened in relation to him.”* Of course, this is not an open-ended invitation to the meddlesome busybodies of this world or the engaging interloper. To bring oneself within section 20, or have standing for the purposes of this section, a person must have sufficient interest in the thing or property in question, in the case of an allegation of improper deprivation, as in the instant case before me.

See Attorney General of The Gambia v Njie (1961) A.C. 617, 1961 2 WLR 845; R v Liverpool Taxi Owners' Association (1972) 2 All E.R. 589.

19. Moreover, in my view, in a public law challenge such as the present case, that involves the Constitution, the Court should be very slow or chary in denying standing to persons claiming a breach of its

provisions, especially those relating to the protection of Fundamental Rights and Freedoms.

20. Finally, on the standing of the claimants, I conclude from the evidence the position as follows: All the complainants became involved in BTL, the first Interested Party, as a result of the acquisition of some of its shares, including the Special Share, following the Share Purchase Agreement of March 2004 between ICC and the Government of Belize. Following this, BT was incorporated under the Laws of Belize and the shares, including the Special Share, were transferred to it. Mr. Prosser had signed for ICC in March 2004 on the Share Purchase Agreement. He became president of BT and a BT appointed Director and non-executive Chairman of BTL. (This was as a result of BT's shareholding in BTL which at one time including its holding of the Special Share represented 84% of BTL's issued shares). Mr. Bobby Lubana was also a Director on the Board of BTL representing BT. Innovative Communication Corporation, LLC, though a foreign company is said to be the principal shareholder of ICC of which BT is a Belizean subsidiary.

From all this a picture of overlapping and interlocking relationship and interests between all the claimants emerges. The focus of all this is their interests in BTL and its shares. I am therefore

persuaded that the claimants have standing to press their challenge before this Court.

On the Claimants as a group, I decided as well not to exclude any of them guided by the considerations in Order 8 rule 5 of the Supreme Court (Civil Procedure) Rules 2005. These provide that the general rule is that a claim will not fail because a person was added as a party to the proceedings who should not have been added, or that a person who should have been made a party to the claim was not made a party to the claim. However, where a claimant seeks a remedy to which some other person is jointly entitled, then all persons jointly entitled to the remedy must be parties to the proceedings unless the Court orders otherwise. Therefore, given the interlocking interests of the Claimants in these proceedings concerning the Special Share in BTL, I decided advisedly not to have any of them struck off as claimants.

21. It is for all these reasons that the arguments and submissions of the Defendants and the Interested Parties that the Claimants lack standing to press their claims on the Court did not find favour with me.
22. Also, an allied argument deployed to cut the ground from under the feet of the claimants relates to the ownership of the Special Share,

the subject-matter of section 22A and Statutory Instrument No. 109 of 2005 of the challenged legislation.

The ownership of the Special Share

The Special Share which has featured so prominently in these proceedings was created by the Articles of Association of BTL, the first Interested Party in 1987 when it was transformed from a statutory corporation (the Belize Telecommunications Authority) to a public company limited by shares, BTL. Although of nominal monetary value only, the holder of the Special Share is, by the Articles of Association of BTL, invested with certain rights and privileges relating to the governance of the company. These include the right to appoint two directors of BTL, to be known as “Government Appointed Directors” – Article 88(A); the amendment of certain Articles of Association of the company could only be effected with the written consent of the Special Shareholder – Article 11(B); and the entitlement of the Special Shareholder to receive notice of, and to attend and speak at any General Meeting or any meeting of any class of shareholders of the company, but without the right to vote – Article 11(c); also the right of the Special Shareholder to appoint a non-executive Chairman of the company if Special Shareholder held not less than 37.5% of the ‘C’ issued share capital of BTL – Article 88(C).

23. It is therefore undoubted that the Special Share is of quite some importance in the corporate culture and governance of BTL.
24. The Special Share itself is defined by the Articles of Association as “*The one special share redeemable preference share of BZ\$1.00*” and its holder as “*The registered holder for the time being of the Special Share.*” (emphasis added)
25. I am in no doubt that when BTL was incorporated in 1987 it was intended that the Special Share should be held by the Government of Belize, representing, as I have had occasion to remark before, that this was in fulfillment of the expectation that “*the Special Share would represent the public interest, the national patrimony if you will, in BTL.*” See paras. 60 to 66 of this Court’s decision in Claim No. 116 of 2005 – **Gilbert Smith v Belize Telecommunication Ltd. and the Attorney General.**
26. Indeed, the Special Share was held by the Government of Belize up until March 2004. In that year by a Share Purchase Agreement between the Government of Belize and ICC, the Special Share was transferred together with some other Government of Belize’s shares in BTL, to ICC/BT – see paras. 10, 11, 12 and 13 of Mr.

Prosser's affidavit, and paras. 18 and 19 of Mr. Keith Arnold's affidavit.

27. However, it was vigorously contended for the Defendants and the Interested Parties that I should first, in these proceedings, determine the issue of the ownership of the Special Share before, if at all, I need address the constitutional viability of section 22A of the challenged legislation. This is so, because, it was argued, the Special Share was as of the date of the legislation no longer the property of the claimants, as a result of their failure to pay for it. This failure, it was claimed, caused the recession of the contract by which the claimants came to acquire the Special Share. Therefore, the argument ran, the claimants were no longer holding it with "the approval of the Government of Belize."
28. The Claimants for their part countered that their constitutional challenge should proceed as they had acquired the Special Share and continue to own it.
29. The rival contentions caused me some anxiety: for if, as the Defendants and the first Interested Party contended, the Claimants do not any more own the Special Share, then of course, there would hardly be any substance to their challenge to section 22A; but if, as the Claimants contended, they acquired the Special Share and it is still their lawful property, the Court is duty bound to

address their constitutional challenge to the legislation, which they argued had impermissibly and unconstitutionally interfered with their property and interest in the Special Share.

30. After listening carefully to the attorneys for the parties on this point, the learned Solicitor General and Mr. Plemming Q.C. for the Defendants and Interested Parties respectively and Mr. Roald Henriques Q.C. for the Claimants, and after some anxious consideration and due reflection by me, I decided, advisedly, to proceed to judgment on the Claimants' challenge. This I do mindful of the fact that there is in fact a separate claim by the Defendants as Claimants – Claim No. 422 of 2005, in which the issue as to the actual ownership of the Special Share has been joined and full frontally raised against the present Claimants as Defendants.

31. There was no application to consolidate Claim No. 422 with the present claim. The Claimants in the present claim have raised important constitutional issues of such public importance, which I do not think should be deflected by claims in the private law field, however important these may be. This is so, because if I were to make an *a priori* determination of the question of the ownership of the Special Share in favour of the Defendants in the present proceedings, this would have the effect of foreclosing consideration of the claimants' challenge to section 22A and make Claim No.

422 itself otiose. Therefore proceeding to judgment in the present claim would not or should not, prejudice the Defendants' Claim in Claim No. 422. I therefore proceed to judgment in the instant case without prejudice to the claims in Claim No. 422 of 2005.

32. Moreover, I do not feel that on the state of play between the parties, there was compelling and sufficient evidence before me to make a clear and categorical determination on the issue of the ownership of the Special Share. There is, of course, the first affidavit of Mr. Keith Arnold filed on 11th November 2005 where, in particular, in paragraphs 19, 20, 21, 22 and 23 and Exhibits KA 11 and 12 he avers to the non-payment for the Special Share and the demand by Government of Belize for its return. All this however, in my view, would be more relevant, cogent and possibly of probative weight and significance, in the Defendants' Claim No. 422 of 2005 for the recession of the contract by which the present Claimants came to possess the Special Share.
33. Mr. Plemming Q.C. on behalf of the first Interested Party, that is, the company BTL, also sought to undermine the standing of the Claimants, in particular BT, to bring this challenge. This is because in his view, even if BT had acquired by transfer to it in March 2004 the Special Share from the Government of Belize, it was no longer by the date of the challenged legislation "*acting on the written authority*

of the Government of Belize” as provided for in Article 11 of BTL’s original Articles of Association. That is to say, BT (the claimants) no longer had the written authority to continue to act by the mere possession of the Special Share.

The simple and short answer to this, in my view, is that what Article 11 required was that the transfer of the Special Share shall be *“only to a Minister of the Government of Belize or any person acting on the written authority of the Government of Belize.”* This provision therefore only addresses the issue of transfer not the continued possession of the Special Share. I believe therefore, that once the transfer of the Special Share has been effected (which, to comply with the Article must be on the written authority of the Government of Belize) its continued possession falls to be considered and determined by the terms, if any, of the transfer. On the evidence, the Special Share moved (or was transferred) from the Government of Belize to BT/ICC (the Claimants) on the basis of the Share Purchase Agreement of March 2004 with the Government of Belize. It is, therefore, reasonable and eminently sensible to conclude that that transfer was on the written authority of the Government of Belize as stated in the Share Purchase Agreement. Article 11 does not therefore, speak to the continued possession of the Special

Share, it only addressed its transfer. The Minister of Finance and Mr. Prosser signed off on this written agreement respectively for the Government of Belize and ICC.

It is for all these reasons that I do not think that the question of the ownership of the Special Share need detain the determination of the Claimants' challenge to the constitutionality of section 22A and Statutory Instrument No. 109 of 2005 which they complain materially affects the Special Share.

Are section 22A and Statutory Instrument No. 109 compliant with the Belize Constitution?

34. In these proceedings, the Claimants have sought to impugn Act No. 30 of 2005 and the Statutory Instruments issued by the Minister of Public Utilities pursuant to the Act. I have set out above at paragraph 6 the text of the primary legislation and the subsidiary legislation.
35. Without doubt, the Legislature by section 68 of the Belize Constitution is the supreme law maker. But this, as the section itself affirms in its opening sentence is "*subject to the Constitution ...*" *A fortiori* therefore, any and every law that the Legislature makes must, if and when challenged, pass the litmus test of compatibility with the Constitution. And this point is magisterially affirmed by

section 2 of the Constitution itself. Therefore, notwithstanding this wide grant of law-making power, there is always present a continuing audit on it to ensure that any exercise of this power is compliant with the Constitution. The task of the Court when confronted with a piece of legislation that is alleged to infringe the Constitution, whether this task be one of interpretation or construction, is in my view, to ensure that, so far as possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Chapter II of the Constitution on the Protection of Fundamental Human Rights. In such an exercise, the starting point for the Court is to assume the validity of every legislation. This presumption of constitutionality puts the onus to prove otherwise on the challenger. This case is no different.

36. In these proceedings, the Claimants have taken issue with Act No. 30 of 2005 and the two subsidiary legislation issued pursuant to it.

First, the Claimants have complained that section 22A of the Act and Statutory Instrument No. 109 of 2005 made pursuant to it are incompatible with the Constitution in that the section confers judicial powers on the Minister of Public Utilities contrary to the principle of separation of powers implicit in the Constitution; and that in exercising this power by issuing Statutory Instrument No. 109 of

2005, the Minister usurped judicial powers and secondly, impermissibly deprived them of their property (Special Share), which the Minister determined to be an entrenched right. This, the Claimants therefore complain denied them the protection of the law as provided for in section 6 of the Belize Constitution.

First, the Separation of Powers Principle

37. There is nowhere expressly stated in the Constitution of Belize that the legislative, executive and judicial powers of the state are separate. But, it is, I think equally not in doubt that by the scheme of the Constitution, arranging as it does in different Parts, The Executive (Part V), The Legislature (Part VI) and The Judiciary (Part VII) that the functions of these institutions of state are intended and meant to be separate. Indeed, I take it to be common ground between the parties in this case that the principle of separation of powers to be found in Constitutions said to be patterned after the Westminster model, is a feature of the Belize Constitution. Animating and underscoring this principle is that judicial functions or powers are distinct and separate and are the exclusive preserve of the judiciary – R v Liyanage v The Queen (1967) 1 A.C. 259; Moses Hinds & Other v The Queen (1977) A.C. 195.

38. What however separates the protagonists on this point is whether the powers given to the Minister by the amending legislation (whose texts I have reproduced at paragraph 6 above) are judicial or non-judicial, that is administrative or executive. It is contended by Mr. Henriques Q.C. for the Claimants that the powers are clearly judicial and therefore not lawful. On the other hand, it is contended for the Defendants and the first Interested Party in particular by both the Solicitor General and Mr. Plemming Q.C. that the powers are non-judicial and merely administrative and therefore permissible and lawful.
39. Quite what may or may not be an exercise of judicial power, may be a matter of debate and not always easy to determine. In my view, however, for a body or entity properly to exercise judicial power, it must as a minimum meet the following: i) be set up by law; ii) be independent and impartial; iii) be capable of making a determinative or conclusive finding on the rights and obligations of parties and iv) do so only after a hearing of the parties claiming the rights or asserting or opposing the obligation. Section 6 of the Constitution of Belize which secures the equal protection of the law to all persons states the position as follows regarding civil claims or matters:

“6(7): Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such court or other authority, the case shall be given a fair hearing within a reasonable time”

40. Therefore, in my considered view from the facts of this case and the language of the legislative texts that are sought to be impugned by the Claimants, even if the Legislature could have intended by the provisions of section 22A to have conferred on the Minister of Public Utilities the power to declare entrenched rights in public utility providing companies to be unlawful and of no effect (the Special Share in this case), this section does not on its face and in effect meet the prescriptions of section 6(7) of the Belize Constitution.

The Minister could be an authority prescribed by law, but could he, in the context of this case, be said to be “independent and impartial” as section 6(7) of the Constitution requires for the purposes of determining the status of the Special Share in BTL? The Minister, it must be remembered, is part of the executive and a member of the Government of Belize, which, in March of 2004, sold the Special Share to the Claimants (ICC/BT). He is now given

power by the challenged legislation to declare the self-same Special Share unlawful and of no effect. And he has in S.I. No. 109 of 2005 proceeded to do just that! Even if section 6(7) could be said to be procedural, the exercise by the Minister of the powers purportedly conferred on him by the inserted section. Section 22A singularly failed to observe it.

41. Also, from the evidence (see in particular paragraphs 42, 43, 44, 45 and 46 of Mr. Prosser's affidavit; and paragraphs 19, 20, 21, 22 and 23 of Mr. Arnold's affidavit), there is a subsisting dispute between the Claimants and the Government of Belize over the ownership of the Special Share. In fact, in the course of the argument by the learned Solicitor General for the Defendants and Mr. Plemming Q.C. for the first Interested Party, I was repeatedly referred to Claim No. 422 of 2005 in which the Defendants here, that is Government of Belize, are claiming a right to recession of the March 2004 Agreement by which the present Claimants came into possession of the Special Share. They also urged me to determine, as a threshold issue, the question of the ownership of this Special Share.

42. In the circumstances, therefore, in the light of the evidence and the facts of this case, I am ineluctably led to conclude that section 22A of Act No. 30 of 2005 is an egregious and clear case of the

conflation of executive, legislative and judicial powers in one person, namely the Minister of Public Utilities, who in addition to being a member of the executive is, of course, also a member of the legislature. This conflation of powers or functions, I find, transgresses the principle of separation of power, which informed the constitutional development of Belize and now forms an important and indispensable pillar of the Constitution of Belize – see Liyanage v The Queen (1967) A.C. pp. 287, 288, 289; Astaphan & Co. Ltd. v The Comptroller of Customs and Attorney General of Dominica Civil Appeal No. 8 of 1994 (OECS, CA). The power conferred on the Minister by section 22A to look into the constitution of any public utility provider and determine, if the entrenched rights (the Special Share in the instant case) provided for therein are an impediment to the free movement of capital and open investment and to declare such entrenched rights, in this case the Special Share, unlawful and of no effect, is, I find, an impermissible legislative transfer of judicial power on to a member of the executive which is decidedly at odds with the scheme and intendment of the Constitution. As I have already said, in the light of the subsisting disputes between the Claimants and the Government of Belize concerning the ownership of the Special Share, the exercise of the section 22A power by the Minister in S.I. No. 109 of 2005, to declare the Special Share unlawful and of no

effect, sounds more like a judicial pronouncement and has the effect of one, contrary to the stipulations of section 6(7) of the Constitution and the separation of powers.

43. Judicial power cannot, I think, consistent with the Constitution, be legislatively transferred to the executive. Can the declaration of unlawfulness of the Special Share by the Minister and the pronouncement by him of its consequent ineffectiveness (“of no effect” in the words of section 22A and its Statutory Instrument) be anything other than an exercise of judicial power?

Mr. Plemming Q.C. for the first Interested Party argued forcefully for the validity of section 22A and he tried in a step by step analysis to show that the section was no more than a simple and ordinary exercise of the law-making power of the Legislature. He, however, properly conceded or acknowledged that this exercise is always subject to the Constitution. Now, by the provisions of the Constitution, the determination of rights and obligations of persons is marked out as the province of the Courts. These rights and obligations may sometimes include rights incident to or associated with the ownership of property, which would include shares in a company. Therefore for the Legislature to grant a Minister, a member of the Executive, the power to look into a company’s shareholding (as provided for in its Articles of Association) and to

declare any of the shares of that company to be unlawful and of no effect, is, in my respectful view, crossing the line into the domain that is properly that of the judiciary. This is all the more glaring when as in this case, the company is a private company and no provision for recourse by way of appeal or compensation is afforded to the holders of the shares affected. This is more than a matter of the language of implementation of the intention of Parliament as Mr. Plemming Q.C. somewhat plausibly argued – it is a matter of substance which I find is at odds with the Constitution’s stipulations in section 6(7).

Surely, a declaration of unlawfulness and of invalidity is intrinsic to the nature of judicial power. In my view, to grant this power to a non-judicial entity however well-meaning and high-minded the intention, is a clear case of transgressing or breaching the dividing wall posited by the separation of powers principle. Yes, the Minister was not given adjudicatory powers by section 22A as Mr. Plemming Q.C. correctly argued, but his determination, declaration and confirmation on the Special Share, are scarcely distinguishable from a judicial pronouncement and effect.

The effect of section 22A and Statutory Instrument No. 109 on the Articles of Association of BTL

44. Also, ostensibly section 22A was enacted to ensure that the Articles of Association of public utility providers promote “free movement of capital” and “open investment”. Laudable as this may be, “free movement of capital” and “open investment” are nowhere defined. But the Court cannot help but wonder how the self-same Special Share which was sold by the Government of Belize itself a short while ago (in March 2004) to the Claimants, is now being excoriated and consigned to illegality and nothingness by section 22A and its statutory instrument.
45. Moreover, it should be remembered that BTL is a company limited by shares in which not only the Government of Belize has shares but also other private persons and entities. As such its governance, including the holding and transmission of its shares, is a matter preeminently for its Articles of Association. Section 14(2) of the Companies Act – Chapter 250 of the Laws of Belize, Rev. Ed. 2000, states the binding effect of a company’s Articles of Association not only as between the members of the company but also as well between them severally and the company itself – see Woods v Odessa Waterworks Co. (1889) 42 Ch. D 636, especially at 642; and Welton v Saffery (1897) A.C. 299 at 315. Section 22A therefore, in my view, simply overlooks this legal fact

that the Articles of Association of a company is a contract between its shareholders and between them and the Company. The Minister of Public Utilities, in exercise of the powers purportedly conferred on him by section 22A, not only declared the Special Share unlawful and of no effect, but proceeded as well to declaring the rights flowing from the holding of this Special Share as provided in BTL's Articles of Association (some of which I had set out earlier at paragraph 22, but which are expressly set out in Statutory Instrument No. 109) as of no effect. He also declaimed that "*(b) the Directors appointed by the holder of the Special Share cease to be Directors of BTL from the date of this Order*" (26th August 2005); he also proceeded to pronounce on the issued share capital of BTL and he filed an amended Memorandum and Articles of Association of the company with the Registrar of Companies different from those which were in existence for BTL before 26th August 2005, thereby writing out of existence the Special Share which had existed since the formation of BTL in 1987.

46. For all these reasons, I find section 22A to be outwith the Constitution in so far as it purports to grant the Minister power to declare as unlawful and of no effect entrenched rights in the constitutions of public utility providers, and in the instant case, the Special Share in BTL. It is a singular case of the exercise of judicial power by a non-judicial entity. The powers it purports to

confer on the Minister go well beyond executive or administrative powers; and as exercised by the Minister in S.I. No. 109, it represents a judicial pronouncement in the affairs of a private company contrary to its Articles of Association as well as the Constitution of Belize.

The effect of section 22A and Statutory Instrument No. 109 on the Special Share

47. The Claimants have complained as well in these proceedings that the declaration and confirmation made by the Minister of Public Utilities pursuant to section 22A of the amending legislation denied them the equal protection of the law and resulted in their being deprived of the Special Share contrary to sections 3(d) and 17 of the Belize Constitution.
48. It was however contended for the defendants and the first Interested Party, BTL, that on the facts of this case, there was no deprivation or taking of any of the claimants' property properly within the contemplation of the Constitution. [This argument was allied to the denial by the Defendants and the first Interested Party of the Claimants' ownership of the Special Share, which I have already addressed above at paragraphs 22 to 33].
49. The learned Solicitor General argued plausibly that all the challenged legislation did was to enable the Minister in his

declaration and confirmation to extinguish the Special Share, and that as it was not given to or acquired by or conferred on anyone else, there was no taking or deprivation of the Claimants thereof which is protected by the Constitution.

50. Mr. Plemming Q.C. also argued that no reliance could be placed on section 3(d) of the Constitution as this is not a free-standing provision and that there is no stand-alone right to protection from deprivation of property which is not in section 17 of the Constitution.

51. Section 3(d) of the Constitution provides:

“3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

(a) ...

(b) ...

(c) ...

(d) protection from arbitrary deprivation of property.”

And section 17 as far as is material states:

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

- (a) *prescribed 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.”*

52. In the event therefore, Mr. Plemming Q.C. argued, that there was neither compulsory acquisition nor compulsory taking of the Special Share and as there is no free-standing right to protection from arbitrary deprivation of property, and that the extinction or limitation of property rights does not amount to acquisition. Therefore, he submitted, neither section 22A nor Statutory Instrument No. 109 of 2005 contravenes section 17(1) of the Constitution because all they did was to give the Minister power to declare and he actually declared the Special Share as unlawful and of no effect: they do not provide for the transfer of, the benefit and use of the Special Share to the Government of Belize or to any other person. Mr. Plemming Q.C. therefore, submitted that on the facts of the instant

case, the extinction of the rights attaching to the Special Share, did not in law, amount to deprivation of property in the constitutional sense, though he accepted, as did the Solicitor General, that there was extinction of the rights attaching to the Special Share. They both sought to rely on the Privy Council decision in Government of Malaysia v Selangor Pilot Association (1978) A.C. 337, that “acquisition” was to be given a different meaning from “deprivation”. In that case as a result of a law passed to make it an offence for pilots other than those employed by the port authority to provide pilotage services in the port, the Selangor Pilot Association claimed that the law was unconstitutional and of no effect because it breached Article 13 of the Constitution of Malaysia as it did not provide for compensation for loss of their goodwill. The Privy Council held that there was no breach of Article 13 because the rights of licensed pilots to provide pilotage were not rights of property and that the goodwill claimed by the Association had not been acquired by the port authority. Mr. Plemming Q.C. also relied as well on some Australian cases that the extinction of rights was not acquisition or taking of those rights contrary to the constitutional prohibition regarding property – Commonwealth of Australia v State of Tasmania (1983) 43 A.L.R. 625; Mutual Polls & Staff Pty Ltd v Commonwealth of Australia (1994) 119 A.L.R. 577.

53. With respect to the Australian cases relied upon by Mr. Plemming Q.C. supra, I do not think they are on all fours with the instant case. In those cases the High Court of Australia had to consider and decide the meaning and effect of the word “acquisition” appearing in paragraph (xxxi) of section 51 of the Constitution of Australia. The thrust of the Court’s reasoning in those cases is, in my view, that the extinction or limitation of property rights did not amount to acquisition and that not every compulsory divesting of property is an acquisition,

In the case of the Constitution of Belize, however, there is an express guarantee for the individual from arbitrary deprivation of property in section 3(d), leaving aside for the moment as to whether this section is free-standing or not; and section 17(1) expressly prohibits compulsory taking or acquisition except as provided for under paragraphs (a) and (b) thereof.

The mode and manner of what may be arbitrary deprivation of property are not defined. Each case would therefore, I think, be a matter for appreciation on an objective basis on the facts of the particular case. Does the treatment of an individual’s property result, in fact, in his being arbitrarily deprived of it? Yes, not every compulsory divesting of property is an acquisition, nor does the extinction or limitation of property rights amount to acquisition (as

the High Court of Australia, with respect, correctly noted in the cases Mr. Plemming Q.C. relied upon from that jurisdiction). But it can consistent with logic, be equally posited that the limitation or extinction of property rights can, depending on the circumstances and facts of a particular case, in fact, amount to arbitrary deprivation thereof.

Moreover, although on the facts their Lordships did not in the Selangor Pilot Association case supra find there was compulsory acquiring of any property or rights of the Association by a law that made it a criminal offence for pilots other than those employed by the port, to provide pilotage services to the port, they did recognize correctly, with respect, that *“Deprivation may take many forms ... Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provisions...”*

54. In the instant case the gravamen of the Claimants' complaint against section 22A and Statutory Instrument No, 109 and their effect on the Special Share is not that it was acquired either by the Government of Belize or any other person, but rather that it was negated and extinguished by the Minister declaring it unlawful and of no effect, thereby arbitrarily depriving them of it.

55. It was further argued that no reliance could be placed on section 3(d) of the Constitution to ground a claim of arbitrary deprivation of property. This section, it was argued, was not free-standing and separately enforceable: it was therefore, submitted that all the Constitution's protection of property is contained in section 17 which is limited to compulsory acquisition or taking without compensation. Reference was made to the opinion of the Privy Council in Olivier v Buttigieg (1967) 1 A.C. Speaking for myself, I do not with respect, understand their Lordships in that case to be saying that Constitutions such as Belize's in its section 3, which begins with the word "Whereas ..." that that section is not free-standing and therefore not separately enforceable apart from the specific rights subsequently provided for in ensuing sections of the Constitution. Indeed, Lord Morris of Borth-y-Gest delivering the judgment of the Board said this at pp 128-129:

"It is to be noted that the section begins with the word "Whereas". Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement ... The section appears to

proceed by way of explanation of the scheme of the succeeding sections

... The succeeding sections show the promised scheme was followed.”

That judgment was concerned with among other things, whether protection against discrimination on grounds of “race, place of origin, political opinion, colour, creed or sex” was limited in section 1 of the Constitution of Malta (which was in issue) only to human or natural persons, a similar provision as in section 3 of the Constitution of Belize. Their Lordships found to the contrary and held that the prohibition against discrimination extended to cover corporations as well.

I do not however feel that I need to decide in this case whether the protection of the various rights mentioned in section 3 of the Constitution is distinct, and separately enforceable apart from the protection given by the succeeding sections to the various fundamental human rights stated therein, that is, in sections 4 – 19. There are decisions from the Commonwealth that say a similar section is enforceable on its own – **Dow v Attorney General (1992) LRC (Const.), 623.**

I am of the view however that there is a necessary nexus between the several fundamental human rights mentioned in section 3 and those rights individually mentioned and protected by the

succeeding sections of Part II of the Constitution. Section 3 can therefore be regarded as a link to the rights that are provided for by the subsequent sections and represents in the words of Lord Morris in Olivier supra “a declaration of entitlement” to be given “such declaratory force as it independently possesses ...”

56. Therefore, in my view, what is prescribed in the Constitution with regards to property rights is to proscribe their deprivation, without more. This necessarily would prohibit the compulsory acquisition or taking without compensation as expressly stated in section 17(1) in which case it becomes arbitrary deprivation in fact. To be sure, there is a distinction between deprivation and compulsory acquisition or taking. The latter, that is, compulsory acquisition or taking is today in most countries regulated by law. This fact is recognized and provided for in section 17(1) of the Belize Constitution stipulating for compensation in cases of compulsory acquisition or taking. But deprivation on the other hand, is protean and can take many and any form. Its singular feature is that it puts the property in question or its use or access to it beyond the reach of its owner; it renders its valueless to him or her. In short, it deprives him or her of its use. The act resulting in this can itself take many and any forms, and can be as varied as human ingenuity can fashion.

57. There may be some attraction in the argument plausibly advanced by both the learned Solicitor General and Mr. Plemming Q.C., that in this case there was no taking or acquisition of the Special Share. This is so, they argued, because it was as a result of the Minister's determination and declaration regarding it, not transferred to or become vested in any other person, including the Government of Belize. It simply ceased to exist or was extinguished. I however, respectfully think that it would defy common sense and logic and do violence to language to say that by the Minister's action, the Claimants were not deprived of the Special Share. I am of the considered view that the protection afforded to property by the provisions of the Constitution is to ensure that its owner is not deprived of it improperly or arbitrarily. The Constitution certainly does not prohibit compulsory acquisition or taking of property; but it stipulates that it must be done in accordance with a law that provides for reasonable compensation and the right of any person claiming an interest or right over property to come to Court to establish his interest or right (if any), to determine whether the taking or acquisition was for a public purpose; to determine the amount of compensation the person may be entitled to; and to enforce his rights to such compensation – section 17(1).

Significantly, the Constitution does not also ban each and every taking of property or interests in property. Subsection (2) of section

17 in paras. (a) – (m) lists thirteen instances where a law can provide for the taking of possession of any property or the acquisition of any interest in or right over property, resulting in deprivation of the owner thereof, without offending the protection afforded to that property by the Constitution. The Defendants and in the Interested Parties understandably, did not try to justify section 22A of Act No. 30 of 2005 or Statutory Declaration No. 109 of 2005, under any of the heads listed in subsection (2) of section 17. The seeming attraction in the arguments and submissions of both the learned Solicitor General and Mr. Plemming Q.C. therefore, loses their appeal, when it is realized that the Constitution's protection of property encompasses more than its compulsory acquisition or taking. It does not mean and cannot mean that other acts of deprivation of property other than by compulsory acquisition or taking or those provided for in section 17(2), are allowed or do not offend the Constitution's protection of property. The constitutional protection afforded to property is, I believe, to ensure that its owner is not dispossessed or deprived of it, whether by compulsory acquisition or taking or other forms or acts of deprivation without compensation save as provided for in subsection (2) of section 17. This protection I find is generic: it is protection from deprivation of property. This is so whether the deprivation results in the property becoming vested in or acquired

by another or not. It is not the vesting of the property in another or its acquisition by that other that is prohibited by the Constitution; it is the arbitrary deprivation of the property or interest in it. It is therefore no less a deprivation to argue that the property has not been acquired by or vested in another. The deprivation is arbitrary and therefore impermissible if it is without compensation and cannot be justified under any of the paragraphs of subsection (2) of section 17.

58. I am fortified in this conclusion by the need to give a generous and purposive interpretation of the provisions of the Constitution regarding fundamental human rights: Minister of Home Affairs v Fisher (1980) A.C. 317 at 328; and Attorney General of The Gambia v Momodu Jobo (1984) A.C. 689 at 700. This is why I said earlier that I do not think it necessary to decide whether or not the rights mentioned in section 3 of the Constitution are distinctly and separately enforceable apart from the rights enumerated in ensuing sections of the Constitution in Part II. I find however, that there is an animating link between section 3 and the several fundamental human rights set out in the sections following it. I adopted in this regard, with respect, the statement of White J. in the Supreme Court of the United States in South Dakota v North Carolina 192 US 268 (1904) 48 L. Ed. at 465:

“I take it to be elementary rule of constitutional interpretation that no one provision of the Constitution is to be segregated from all others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view to be so interpreted as to effectuate the great purpose of the instrument.”

In my view, therefore, the great purpose of both section 3 and the ensuing sections of the Constitution on the protection of fundamental human rights in Part II is a declaration of entitlement to the rights and freedoms mentioned and their protection and enforcement. It therefore does not, at the end of the day, make any difference whether section 3(d) of the Constitution is free-standing and separately enforceable. This is so because though the effect of section 22A of Act No. 30 of 2005 and S.I. No. 109, the determination and declaration of the Minister of Public Utilities, may not, as correctly argued by both the Solicitor General and Mr. Plemming Q.C., be compulsory acquisition or taking of the Special Share, but only its extinguishment or nullification, but can it equally seriously be argued that this was not an act of arbitrary deprivation in the circumstances of this case?

59. I am therefore of the considered view that the compulsory acquisition of taking of property without compensation prohibited in section 17(1) of the Constitution is but a species of the genus of

arbitrary deprivation of property proscribed in section 3(d). There is therefore in my view, a connection between the two sections but not a complete overlap.

60. It is for all these reasons that I find and hold that the determination and declaration of the Minister pursuant to section 22A of Act No. 30 of 2005 and as stated in Statutory Instrument No. 109 arbitrarily deprived the Claimants of the Special Share in BTL contrary to the Constitution of Belize.
61. To conclude on section 22A, I find that the powers conferred on the Minister regarding entrenched rights in the constitution of Public Utility providers (the Special Share in the instant case) are, by any consideration, more than ministerial. This, I think, should be evident from a plain reading of the section itself. It is also evident that in fact the declaration and determination of the Minister pursuant to section 22A as pronounced and promulgated by Statutory Instrument No. 109 regarding the Special Share of BTL, are more than ministerial. They clearly assumed and effected a judicial determination thereby making both section 22A and Statutory Instrument No. 109 non-compliant with the Constitution of Belize in so far they determine the Special Share to be unlawful and of no effect.

62. As if for good measure but certainly confirming that the Minister in issuing Statutory Instrument No. 109 declaring the Special Share unlawful and of no effect, was not acting administratively but judicially, he expressly stated in the fifth preambular paragraph of the Statutory Instrument that among other things, he had considered the judgments of the European Court of Justice in several competition cases he mentioned and that he had noted the underlying legal principles in those cases. This I can only conclude as a gratuitous advertence to a legal regime on competition in a jurisdiction that has nothing to do with the circumstances and laws of Belize.
63. For the avoidance of doubt, I should make it clear that it is the power conferred by section 22A on the Minister to declare entrenched rights to be unlawful and of no effect and as exercised by him in Statutory Instrument No. 109, that I find and hold to be incompatible with the Constitution. I draw support as well from the principle against doubtful penalization, for this conclusion – see **Binion Statutory Interpretation 3rd ed. (1997)** at p. 637 and in particular at p. 653.

Are section 23A and Statutory Instrument No. 108 of 2005 compliant with the Constitution?

64. The other substantive issue raised by the complainants in this case is that section 23A of Act No. 30 of 2005 breaches the separation of powers principle and impermissibly confers on the Minister of Public Utilities judicial powers in relation to the inspection of companies; and that by Statutory Instrument No. 108 the Minister unlawfully interfered with a decision of the Court regarding its Order relating to the appointment of an inspector and the inspection of the affairs of BTL, the first Interested Party.
65. I have already set out the texts of both section 23A and Statutory Instrument No. 108 (see paragraph 6 above). Section 110 of the Companies Act – Chapter 250 of the Laws of Belize, Rev. Ed. 2000, provides for the inspection of companies generally and it states:

“110.-(1) The court may appoint one or more competent inspectors to investigate the affairs of any company and to report thereon in such manner as the court directs -

(a) in the case of a banking company having a share capital, on the application of members holding not less than one-third of the shares issued;

(b) in the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued;

(c) *in the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.*

(2) *The application shall be supported by such evidence as the court may require for the purpose of showing that the applicants have good reason for, and are not actuated by malicious motives in requiring the investigation, and the court may, before appointing an inspector, require the applicants to give security for payment of the costs of the inquiry.*

(3) *It shall be the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.*

(4) *An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.*

(5) *If an officer or agent refuses to produce any book or document which under this section it is his duty to produce, or to answer any question relating to the affairs of the company, he shall be liable to a fine not exceeding twenty-five dollars in respect of each offence.*

(6) *On the conclusion of the investigation, the inspectors shall report their opinion to the court, and a copy of the report shall be forwarded by the Registrar of the court to the registered office of the company, and a further copy shall, at the request of the applicants for the investigations, be delivered to them.*

(7) *The report shall be written or printed, as the court may direct.*

(8) *All expenses of and incidental to the investigation shall be defrayed by the applicants, unless the court directs them to be paid by the company, which the court is hereby authorised to do.”*

66. In 2005 in Action No. 116, some shareholders of BTL petitioned the Court to order an inspection of its affairs in relation to certain issues. After hearing arguments and submissions by the attorneys for the petitioners and BTL and careful perusal of the affidavit evidence, the Court gave a decision on 3rd March 2005 granting the petition. The terms of the inspection were set out in the Order of the Court. However, no inspector was named or appointed in the Order, as the Court had invited the parties to submit a list of possible inspectors. Evidently, the parties could not agree on an inspector; but one of them wrote to the Court suggesting the name of a possible inspector. Therefore, even though the Court had granted the petition for inspection and had set out the terms of the inspection, an inspector consequent on the petition was yet to be appointed.

67. In the meanwhile, section 23A was enacted in August 2005, and pursuant to it, the Minister of Public Utilities issued Statutory Instrument No. 108 (the texts of these two instruments are set out above at paragraph 6).

68. By Statutory Instrument No. 108 of 2005, the Minister appointed a Mr. George Swift to be the Inspector into the affairs of BTL. But

with a limitation on the period of inspection of *“the affairs of BTL only in so far as such affairs have occurred since March 31, 2004 ...”*.

This period, it must be noted, is materially different from the period specified in the Order of the Court granting the petition for the inspection of the affairs of BTL. However, apart from this divergence in the period of inspection, it must be said that the specific issues stated in the Order of the Court to be the subject of the inspection are also stated in paragraphs (a) – (e) of Statutory Instrument No. 108 as issues the inspector should specifically investigate and inquire into. Certain other matters are also drawn to the Inspector’s attention in addition to requesting him to investigate some other matters as well.

69. The Claimants have, in these proceedings, taken issue with both section 23A and Statutory Instrument No. 108. They contend that by these instruments, the Minister of Public Utilities exercised or shared judicial power by appointing an inspector into the affairs of BTL and fixing the time frame for the inspection, contrary to an Order of the Court granting a petition for the appointment of an inspector into BTL’s affairs.

70. In granting the petition, the Court had specifically ordered the investigation of BTL's affairs should cover “the period April 2001 through to the 8th February 2005.”
71. I had earlier mentioned the presumption of validity in favour of legislation. In my view the constitutional validity of both section 23A and Statutory Instrument No. 108 can be sustained as Parliament can, in exercise of its law-making powers (as granted by section 68 of the Belize Constitution) confer on the Minister power to appoint an inspector of companies. And in exercising that power, the Minister is not acting judicially but ministerially or administratively. Indeed, in other countries with more advanced company law, for example, the United Kingdom, the power to appoint inspectors is conferred on both the Court and the Secretary of State for Trade. This, of course, is not to say that the process is outside the purview of the Courts.
72. I am therefore of the considered view that section 23A is valid and cannot be properly impugned by the Claimants.
73. However, was the Minister legitimately or properly exercising the power granted him by section 23A in making Statutory Instrument No. 108 of 2005? In my view, in truncating the period of inspection already contained in an extant and subsisting order of

the Court in relation to the same matters, the Minister thereby purported to set aside that Order. The Court-ordered period of inspection can only be altered or annulled by another Order of the Court.

74. Section 23A as enacted has, in my view, only a prospective effect in its operation. Parliament did not intend it to be retroactive. Before its enactment in August 2005, there was already in existence an Order of the court granting a petition to order an inspection of the affairs of BTL. In granting the petition the Court not only set out the terms of the inspection but also specified the period to be covered by the inspection. There is, as I have said, convergence between the terms of inspection as ordered by the Court and those set in paragraph (a) to (e) of Statutory Instrument No. 108. But the period stated in the Court Order is different from that stated in Statutory Instrument No. 108. As I do not think section 23A was intended to be retroactive, Statutory Instrument No. 108 which was made pursuant to it cannot therefore be retroactive. This therefore leaves in place the period of inspection ordered by the Court. Section 23A and the Statutory Instrument No. 108 made pursuant to it, do not, absent a clear statement by the Legislature to the contrary, have retrospective effect – see Yew Bon Tew v Kenderaan Bas Mara (1983) 1 A.C. 553 at 558 and

L'Office Cherifien Des Phosphates v Yamashita-Shinnihon Steamship Co. Ltd. (1994) 1 A.C. 486: adding a new section or sections to an existing statute does not mean that all parts of the composite Act are to be treated as having come into force simultaneously with the original Act. This simply means that the period of inspection stated in Statutory Instrument No. 108 made pursuant to the newly inserted section 23A did not replace the period the Court had ordered – **Binion, Statutory Interpretation** *op. cit.* at pp. 238 - 241.

75. I am therefore of the settled view that if the Legislature had intended, by the insertion of the new section 23A, to grant the Minister power to make orders that would affect pre-existing matters relating to the inspection of a company's affairs, including the antecedent Court Order specifying the period to be covered by the inspection, it would have clearly said so. It is no use arguing that Statutory Instrument No. 108 can and did do so, as it represents the exercise by the Minister of the new power granted him by the inserted section 23A. There is nothing in the text of section 23A that warrants this contention: I cannot read it as having a retrospective effect, to displace the period of inspection the Court had ordered. I adopt, with respect, the statement of Staughton L.J.

in this respect in Secretary of State for Social Security v Turnicliffe (1991) 2 All ER 712, at p. 714:

“... The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended”.

The Court ordered period was the result of a contested petition. It would, in my view, be simply unfair to now truncate it, as the Minister purports to do in Statutory Instrument No. 108, leaving only a limited period to be covered for inspection. See also Wilson v First County Trust Ltd. (No. 2) (2003) UKHL 816, (2204) 1 AC where Staughton LJ’s statement was described as “*well ident(ifying)*” the underlying rationale in determining the retrospective effect of legislation on past or pre-existing events, per Lord Nicholls at p. 831.

76. Therefore, although the newly inserted section 23A can pass constitutional muster as a whole, parts of Statutory Instrument No.

108 made pursuant to it cannot, I think, do so in the light of what I have just said, as they are at odds with the Court Order. However, through the principle of excision by which offending parts of legislation can be removed if what is left can be said to represent the intention of the legislature the rest of the Statutory Instrument can, I think, be left undisturbed – see Attorney General for Ontario v Attorney General for Canada (1947) A.C. 127; Attorney General of The Gambia v Momodu Jobo (1984) A.C. 689.

Therefore in line with the authority of San Jose Farmers case Vol. 3 BzL.R. 1, I am prepared to read Statutory Instrument No. 108 as not limiting the period of inspection of BTL's affairs to less than that ordered by the Court. Consequently, with the excision of the phrase in the fifth preambular paragraph starting with NOW, THEREFORE "... only in so far as such affairs have occurred since March 21, 2004 ..." and substituting instead "... *covering the period April 2001 through to the 8th February 2005*" the S.I. can withstand scrutiny and pass legal muster that it is not an exercise of judicial power by the Minister.

Conclusion

77. In the light of the foregoing I find and hold that section 22A of the Public Utilities Commission (Amendment) Act 2005 in so far as it confers power on the Minister of Public Utilities to declare entrenched rights in public utility providers to be unlawful and of no effect and Statutory Instrument No. 109 of 2005 made pursuant to the said section, to be incompatible with the Constitution of Belize.

78. From the structure and provisions of the Public Utilities Commission Act, it would appear that the role of the Commission is to regulate the operations and activities of public utility services providers and to balance these with the interest of the consumers or users of any public utility service. This I believe is the whole rationale of the Public Utility Commission Act. Provisions are made in the Act relating to the rates to be charged by public utility providers; complaints to the Commission, proceedings before the Commission, review and appeal and the general functions of the Commission.

But somehow by some unfathomable consideration, at least to me, the Minister is now being inserted by the provisions of Act. No. 30 of 2005 (the challenged and inserted sections 22A and 23A) in addition to the Commission which is declared by the principal Act to

be autonomous, into the scheme of an act devoted to the Public Utilities Commission.

Admittedly, the Commission is to be consulted by the Minister in exercising his new powers under both sections. But in my view, the powers granted the Minister are not really regulatory. And they stand out as odd in a part of an Act meant to give the independent Commission regulatory powers over public utility providers. But, of course, the wisdom or lack of it, in inserting the Minister in a part of the Act meant to provide for the regulation of public utility providers, is a matter entirely for Parliament.

But I find these powers, in so far as entrenched rights in the constructive documents of public utility providers are concerned, to be an impermissible combination of legislative/executive with judicial powers. This, as I have pointed out above, the Legislature cannot do. And the way the Minister has exercised these powers, as evinced in Statutory Instrument No. 109, is inconsistent with certain provisions of the Constitution's protection of property from arbitrary deprivation of property and with the constitutional principle of separation of powers.

In the context of this case and as exercised by the Minister in Statutory Instrument No, 109, these powers are hardly distinguishable from expropriation of the Special Share claimed by

the claimants. Absent any compensation or other redress for the claimants, these powers I find, are insupportable in law.

79. I also find and hold that Statutory Instrument No. 108 of 2005, made pursuant to section 23A of the Public Utilities Commission (Amendment) Act 2005, in so far as it provides for an inspection of the affairs of BTL only as from 31 March 2004 to be at variance with a valid and subsisting Order of the Court which had ordered the inspection of BTL's affairs to cover the period from April 2001 through to 8th February 2005.

Accordingly, I hold and declare that the declaration and determination of the Minister of Public Utilities pursuant to section 22A as set out in Statutory Instrument No. 109:

- i) in respect of the Special Share in BTL are hereby set aside;
- ii) the Directors of BTL appointed by the holder of the Special Share continue as directors of BTL for so long as the Claimants hold the Special Share, therefore their purported removal from BTL's board is improper and invalid;
- iii) the Memorandum and Articles of Association of BTL filed by the Minister of Public Utilities and purportedly

in force and effect from 26th August 2005 are hereby set aside and the Memorandum and Articles of Association of BTL before that date remain in force and effect;

- iv) the convening of the Annual General Meeting of BTL for 30th September 2005 without notice or invitation to Messrs. Jeffrey Prosser and Bobby Lubana representing the Special Shareholder was unlawful;
- v) in respect of Statutory Instrument No. 108 of 2005, I declare and hold that the period of inspection of the affairs of BTL ordered by the Court in March 2005 and covering the period April 2001 through to 8th February 2005 remains in force and effect.

80. Finally, I listened with great care and attention to Ms. Lois Young Barrow S.C. and Mr. Andrew Marshalleck, the learned attorneys for the second and third Interested Parties respectively. They both adopted the arguments and submissions of the learned Solicitor General for the Defendants and Mr. Plemming Q.C. for the first Interested Party. They urged on me to uphold the challenged legislation. They stressed in particular that their clients purchased shares in BTL and lent money to buy shares on the strength of the amending legislation. I can only express sympathy for their

predicament, if any, but in the light of my findings on the impugned legislation, there is no reason to accede to their request.

I will now hear counsel as to costs.

A. O. CONTEH
Chief Justice

DATED: 19th September, 2006.