

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 374 of 2023

**IN THE MATTER OF Section 12(5) of the Ombudsman Act, Chapter 5 of the Substantive
Laws of Belize, Revised Edition 2020**

AND

IN THE MATTER OF the jurisdiction of the Office of the Ombudsman to investigate

Before the Honourable Madam Justice Geneviève Chabot

Appearances

Emmanuel A. Ortiz, for the Applicant

RULING ON APPLICATION FOR A DECLARATION

1. The Ombudsman of Belize, the Hon. Major (Ret'd) H. Gilbert Swaso, applies to this Court for a declaration under subsection 12(5) of the *Ombudsman Act*¹ as to whether he has jurisdiction to investigate any act of corruption or wrongdoing of former Minister of the Government Erwin Contreras by his signing of the *Definitive Agreement by and between the Government of Belize and Portico Enterprises Ltd. (dba) The Port of Magical Belize* (the “*Definitive Agreement*”).
2. Subsection 12(5) of the *Ombudsman Act* provides as follows:

(5) If any question arises as to whether he has jurisdiction to investigate any case or class of cases under this Act, the Ombudsman may apply to the Supreme Court for a declaration determining that question.

¹ Cap. 5 of the Substantive Laws of Belize, Rev. Ed. 2020.

3. The Ombudsman asks this Court to opine on the following four questions:
- a. Whether a letter falls within the meaning of “complaint” under the *Ombudsman Act*;
 - b. Whether a former Minister may be investigated as an “authority” under section 2 of the *Ombudsman Act*;
 - c. Whether there is a reasonable cause to believe that the former Minister, in his capacity of Member or Officer of an authority, has been guilty of corruption or wrongdoing;
 - d. Whether any person or body of persons may have sustained injustice, injury or abuse as a result of the action taken by the former Minister.

Background

4. On May 31st, 2023, the Ombudsman received a letter dated May 30th, 2023 from Mr. Ted Peralta, CEO of the Port of Belize Ltd. (the “Letter”), alleging that former Minister of Government, Mr. Erwin Contreras, may be guilty of corruption or other wrongdoing by his signing of the *Definitive Agreement*. The Letter was accompanied by a copy of the *Definitive Agreement* and transcripts of public statements made by various high public officials.
5. In his Letter, Mr. Peralta recites the following circumstances which in his view meet the threshold of reasonable cause to believe that a corrupt act or wrongdoing has been committed:
- a. The former Prime Minister, Dean Barrow, under whom Minister Contreras served, has publicly and categorically denounced the signed *Definitive Agreement* as unlawful and stated that the Minister had no authority to sign that agreement.
 - b. The former Attorney General, Michael Peyrefitte, who was the Attorney General at the time the *Definitive Agreement* was signed, has publicly and categorically denounced the agreement as unlawful and stated that Minister Contreras has no authority to sign the *Definitive Agreement*.
 - c. Both the former Prime Minister and the former Attorney General have publicly stated that the *Definitive Agreement* did not come to Cabinet and was not approved by Cabinet.
 - d. The former chairperson of the Cabinet Sub-Committee on Investments, Mrs. Tracy Taegar-Panton, has publicly stated that the process for getting such an agreement

approved was for it to be first vetted and approved by that sub-committee and that the sub-committee never approved the *Definitive Agreement*.

- e. Both the former Prime Minister and the Attorney General have publicly stated that Minister Contreras clearly had no power or authority to purport to bind the government to some of the tax concessions and financial benefits in the *Definitive Agreement* and that not even the Minister of Finance (who was not a signatory to the agreement) could have signed such an agreement.
- f. Both the former Prime Minister and the Attorney General have called for the matter to be investigated.
- g. It is unprecedented that a former Prime Minister and Attorney General would call for their own former colleague and party member to be investigated.
- h. A perusal of the *Definitive Agreement* will reveal that it is so one-sided and unfair in favor of the Developer, so extreme and obscene in the extent of the financial and economic benefits granted to the Developer that no minister could have thought he had the power to unilaterally sign such an agreement without getting Cabinet approval or that of the Prime Minister or Minister of Finance, which strongly suggests wrongdoing was involved in the signing of that agreement.
- i. The *Definitive Agreement* remained secret for two and a half years which also suggests that there was some wrongdoing in its execution.
- j. Minister Contreras has remained silent throughout and has not given any account or made any attempt to explain or defend his action.

Analysis

Whether the Letter falls within the meaning of “complaint” under the Ombudsman Act

6. Yes. Subsection 14(1) of the *Ombudsman Act* provides that “any person or body of persons, whether incorporated or not” can make a complaint, provided the complainant claims to have sustained an injustice or abuse, or that an authority has been guilty of corruption or other wrongdoing. Subsection 14(1) provides as follows:

14.-(1) A complaint to the Ombudsman may be made by any person or body of persons, whether incorporated or not, who claims to have sustained such injustice or abuse as is mentioned in section 12 (1), or who claims that an authority or an officer or member of an authority has been guilty of corruption or other wrongdoing, but such complaint shall not be made by—

(a) an authority; or

(b) a body or authority constituted for the purposes of the public service.

[...]

7. The Letter is signed by Mr. Peralta, CEO of the Port of Belize. It appears that the Letter is written on behalf of the Port of Belize as a body corporate, as it is written using the first person plural pronoun (“we”). The Port of Belize is not an authority, and is not constituted for the purposes of the public service. The Port of Belize does not fall within the exclusions at paragraphs 14(1)(a) or (b) of the *Ombudsman Act*.
8. The Port of Belize claims that an authority has been guilty of corruption or other wrongdoing. The Letter, in part, states as follows:

We hereby request that you investigate the circumstances of the signing of the *Definitive Agreement by and between the Government of Belize and Portico Enterprises Ltd (dba) The Port of Magical Belize* which was signed by former Minister Erwin Contreras purporting to bind the government to obligations unprecedented in their extremity. We request that you do so as there are objectively reasonable grounds to believe that, in signing the definitive agreement, Minister Contreras committed either a corrupt act or an act of wrongdoing [emphasis added]

9. The *Ombudsman Act* does not prescribe the form a complaint must take. The only requirement is that the complaint be made in writing pursuant to subsection 14(3). The Letter is in writing.
10. It appears, therefore, that the Letter constitutes a “complaint” under section 14 of the *Ombudsman Act*. The complaint is made in writing by a body corporate alleging that an authority has been guilty of corruption or other wrongdoing.
11. This Court will note that, notwithstanding the Letter, the Ombudsman has the discretion to undertake an investigation on his own initiative. While a complaint may trigger an investigation, the existence of a complaint is not essential to the Ombudsman’s exercising his power to investigate. Section 13 of the *Ombudsman Act* provides as follows:

13. An investigation pursuant to section 12 of this Act may be undertaken by the Ombudsman on his own initiative or on a complaint made to him pursuant to section 14 of this Act.

Whether a former Minister may be investigated as an “authority” under section 2 of the Ombudsman Act

12. Yes. Subsection 2(1) of the *Ombudsman Act* defines “authority” as follows:

“authority” means—

(a) a Ministry, department or agency of Government;

(b) the Belize Police Department;

(c) a City Council or a Town Council; or

(d) other statutory body or authority,

and includes any company registered under the Companies Act, being a company in which the Government or an agency of Government holds not less than fifty-one per centum of the ordinary shares, which is declared by resolution of each House of the National Assembly to be an authority for the purposes of this Act.

13. While subsection 2(1) of the *Ombudsman Act* refers to the “Ministry, department or agency of Government”, subsection 2(2) specifies that any reference to “Ministry, department or agency of Government” includes a reference to the Minister of that “Ministry, department or agency of Government”:

(2) The references in this Act to a Ministry, department or agency of Government include references to the Minister, Minister of State, members or officers of that Ministry, department or agency.

14. The *Ombudsman Act* does not specify whether a *former* Minister, such as Mr. Contreras, is included in the definition of “Ministry, department or agency of Government”. In this Court’s view, there is nothing in the *Ombudsman Act* to prevent the investigation of a former Minister.

15. The *Ombudsman Act* specifically provides where an investigation is prohibited. The proviso in subsection 12(1) states that “the Ombudsman shall not investigate any matter or action which arose or was taken more than 10 years before the commencement of this Act”. This is the only time limitation provided for in the *Ombudsman Act*. That time limitation applies to the “matter” or “action” being investigated, not the persons or legal entities involved in the matter or action.

16. Furthermore, the *Ombudsman Act* provides for the type of matters or actions which cannot be investigated by the Ombudsman. These are listed in subsection 12(3) as follows:

12 (3) Subject to the provisions of sub-section (4) of this section, the Ombudsman shall not investigate—

(a) any such action aforesaid in respect of which the complainant has already sought a remedy by way of proceedings in any court or in any tribunal constituted by or under any law; or

(b) any such action or matters as are described in Schedule III; or

(c) the exercise of the powers conferred on the Governor- General by section 52 of the Constitution, (which relates to the prerogative of mercy).

17. None of these matters, or the matters listed in Schedule III, are relevant to the complaint against Mr. Contreras.

18. Mr. Contreras may be investigated as an “authority” under the *Ombudsman Act* because no statutory exclusion applies to this matter. Mr. Contreras was a Minister, and therefore an “authority”, when he signed the *Definitive Agreement*. The *Definitive Agreement* was purportedly made on October 1st, 2020. The matter would not be time barred under subsection 12(1) of the *Ombudsman Act*.

Whether there is a reasonable cause to believe that the former Minister, in his capacity of Member or Officer of an authority has been guilty of corruption or wrongdoing

19. The *Ombudsman Act* grants the Ombudsman with wide discretion to investigate any matter or action. That discretion is referred to as “absolute” in subsection 15(1):

15.-(1) The Ombudsman may, in his absolute discretion, determine whether to undertake or continue an investigation under this Act [...]

20. That the Ombudsman has wide discretion is also confirmed by section 33 of the *Ombudsman Act*, which removes the Office of the Ombudsman from the control of “any person or authority” and from the supervisory jurisdiction of the courts:

33. In the discharge of his functions, the Ombudsman shall not be subject to the direction or control of any other person or authority and no proceedings of the Ombudsman shall be called in question in any court of law by way of certiorari or any other means.

21. While the *Ombudsman Act* grants the Ombudsman with wide discretion to investigate matters or actions, there is a tension in the *Act* between the “absolute discretion” conferred on the Ombudsman and the requirement under subsection 12(1) that the Ombudsman have

a “reasonable cause to believe” that one of the two criteria under this subsection is met before launching an investigation. Subsection 12(1) provides as follows:

12.-(1) Subject to the provisions of this Act, where the Ombudsman has reasonable cause to believe that,

- (a) an authority or an officer or member of an authority has been guilty of corruption or other wrongdoing; or
- (b) any person or body of persons has or may have sustained injustice, injury or abuse as a result of any action taken by an authority or an officer or a member of such authority, arising out of or connected with the exercise of the administrative functions of that authority (whether before or after the commencement of this Act), the Ombudsman may investigate the action so taken

22. This Court interprets the *Ombudsman Act* as constraining the exercise of the Ombudsman’s absolute discretion to situations where the Ombudsman has a “reasonable cause to believe” that one of the statutory criteria is met. Where the Ombudsman has a reasonable cause to believe that at least one of the two criteria in subsection 12(1) is met, the Ombudsman has the “absolute discretion” to decide whether to investigate the matter or action, and that decision is not subject to any control or supervision.
23. The phrase “reasonable cause to believe” has been interpreted by the House of Lords in *Liversidge v Anderson*.² In a dissenting speech which has since been accepted as the accurate position in law,³ Lord Atkin explained that a “reasonable cause” for a belief exists where the belief is supported by some objective fact or a state of facts:

"Reasonable cause" for an action or a belief is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right. If its meaning is the subject of dispute as to legal rights, then ordinarily the reasonableness of the cause, and even the existence of any cause is in our law to be determined by the judge and not by the tribunal of fact if the functions deciding law and fact are divided. Thus having established, as I hope, that the plain and natural meaning of the words "has reasonable cause" imports the existence of a fact or state of facts and not the mere belief by the person challenged that the fact or state of facts existed, I proceed to show that this meaning of the words has been accepted in innumerable legal decisions for many generations, that "reasonable cause" for a belief when the subject of legal dispute

² [1942] AC 206.

³ See for instance *I.R.C. v Rossminster Ltd*, [1980] AC 952.

has been always treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal [emphasis added].⁴

24. The Letter sets out some facts which may support a reasonable cause to believe that Mr. Contreras has been guilty of corruption or wrongdoing. These facts include public statements suggesting that Mr. Contreras acted without lawful authority made by high public officials with direct knowledge of the matter.
25. Given the wide discretion given to the Ombudsman, it would not be proper for this Court to declare whether the Ombudsman does have a reasonable cause to believe that Mr. Contreras has been guilty of corruption or wrongdoing. It is for the Ombudsman, in his wisdom and discretion, to determine whether *he* is satisfied that those facts are sufficient to give him a reasonable cause to believe that Mr. Contreras may have been guilty of corruption or wrongdoing. It is also for the Ombudsman to decide, on those facts, whether he should exercise his discretion to investigate the matter. Considering the facts stated above, the Ombudsman would have the jurisdiction to investigate the matter under subsection 12(1) of the *Ombudsman Act* if he believes that he has a reasonable cause to do so.

Whether any person or body of persons may have sustained injustice, injury or abuse as a result of the action taken by the former Minister

26. The Court will first note that under subsection 12(1) of the *Ombudsman Act*, the Ombudsman may investigate the matter against Mr. Contreras if he has a reasonable cause to believe that either (a) Mr. Contreras has been guilty of corruption or other wrongdoing, **or** (b) any person or body of persons has or may have sustained injustice, injury or abuse as a result of the action of Mr. Contreras. These criteria are not cumulative. The Ombudsman may investigate a matter or action if either, or both, of these criteria are met.
27. Subsection 12(1) of the *Ombudsman Act* must be read together with subsection 14(1). Subsection 14(1), in part, states that “a complaint to the Ombudsman may be made by any person or body of persons, whether incorporated or not, who claims to have sustained such injustice or abuse as is mentioned in section 12(1)”. For a complaint to trigger an investigation under paragraph 12(1)(b), the complaint must claim that a person or body of persons has or may have sustained injustice, injury or abuse. There is no such claim in Mr. Peralta’s Letter, which is solely focused on the allegations of corruption or wrongdoing against Mr. Contreras. The Letter itself therefore does not give the Ombudsman jurisdiction to investigate the matter against Mr. Contreras on the basis of any alleged injustice, injury or abuse.

⁴ *Ibid* at 227-228.

28. However, the Court reiterates that section 13 of the *Ombudsman Act* grants the Ombudsman with the discretion to undertake an investigation of his own initiative. If the Ombudsman considers that he has a reasonable cause to believe that any person or body of persons has or may have sustained injustice, injury, or abuse as a result of the actions of Mr. Contreras, the Ombudsman may investigate those actions. As noted above, the Ombudsman's belief would have to be supported by some objective fact or a state of facts.
29. The threshold to make a finding of injustice, injury, or abuse is low. While the *Ombudsman Act* does not define "injustice" or "injury", subsection 12(2) of the *Ombudsman Act* defines "abuse" as including misbehavior as benign as discourtesy:

12(2) The expression "abuse" as used in sub-section(1) above shall include any act of discourtesy or refusal to act and any act motivated by discrimination based on religion, language, race, sex, colour or creed.

30. Of note, is that the definition of "abuse" in subsection 12(2) is not exhaustive, as evidenced by the use of the word "include". "Abuse" under the *Ombudsman Act* therefore includes more than what is specifically listed.
31. As noted by Stephen Thomson in his article "Ombudsmen as Court",⁵ addressing maladministration, including unlawful acts or conduct, is quintessential ombudsman jurisdiction:

Most typically, an ombudsman will consider a complaint in relation to maladministration—quintessentially ombudsman jurisdiction — which may include a failure to comply with legal obligations, but which also includes a range of other considerations, such as bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude and arbitrariness. Thus, the HO determines a complaint by reference to what is, in its opinion, fair in all the circumstances of the case, with maladministration including failure to comply with relevant legal obligations. Maladministration will often include unlawful acts or conduct, but it will never be entirely confined to legal considerations. Ombudsmen may also call policy into question, an area into which courts are reluctant to tread by reason of the separation of powers.⁶

32. The alleged unlawful actions of Mr. Contreras in signing the *Definitive Agreement* without authority may constitute acts of maladministration. The Ombudsman may consider that he has a reasonable cause to believe that the alleged unlawfulness of Mr. Contreras' actions, as supported by the declarations of the high public officials noted above, injures the public interest. The Ombudsman may also consider that he has a reasonable cause to believe that

⁵ *Oxford Journal of Legal Studies*, 2022 42 (76).

⁶ *Ibid* at 92-93.

Mr. Contreras has abused his Office by signing the *Definitive Agreement* without authority. In light of the declarations of the high public officials as noted above, and the wide discretion conferred on the Ombudsman by the *Ombudsman Act*, this Court is of the view that the Ombudsman would have the jurisdiction to investigate the actions of Mr. Contreras as having caused injustice, injury, or abuse to the public under paragraph 12(1)(b) of the *Ombudsman Act*.

IT IS HEREBY DECLARED THAT

- (1) The Ombudsman has the jurisdiction to investigate any alleged act of corruption or wrongdoing of former Minister of the Government Erwin Contreras by his signing of the *Definitive Agreement by and between the Government of Belize and Portico Enterprises Ltd. (dba) The Port of Magical Belize*.

Dated August 4th, 2023

Geneviève Chabot
Justice of the High Court