IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 24 OF 2014

THE JUDICIAL AND LEGAL SERVICES COMMISSION **Appellant**

v

DEAN BOYCE **Respondent**

CIVIL APPEAL NO 24 OF 2014

THE JUDICIAL AND LEGAL SERVICES COMMISSION **Appellant**

v

BRITISH CARIBBEAN BANK LIMITED **First Respondent**
LORD MICHAEL ASHCROFT KCMG **Second Respondent**

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

T Young along with S Matute for the appellant.
G P Smith SC for Dean Boyce.
M Marin-Young SC for British Caribbean Bank Limited and Lord Ashcroft.

14 March 2016 and 16 June 2017.

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SIR MANUEL SOSA P

[1] Having read the judgment of my learned Sister, Hafiz Bertram JA, in draft, I have no hesitation in saying that I concur in the reasons for judgment given, and the orders proposed, in it.

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SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

Introduction

[2] On 14 March 2016, this Court heard the consolidated appeals against the judgment of Abel J dated 24 June, 25 June and 22 August 2014 granting the declarations sought by the respondents. The Court reserved its decision.

[3] There were two claims before the learned trial judge, namely: (i) Claim No. 83 of 2013 in which Dean Boyce ("Mr. Boyce") was the claimant and the Judicial Legal Services Commission ("the Commission") was the defendant and (ii) Claim No. 85 of 2013, in which British Caribbean Bank Limited ("the Bank") and Lord Michael Ashcroft, KCMG (Lord Ashcroft") were the claimants and the Commission was the defendant. By a Consent order dated 9 April 2014, it was ordered pursuant to Rule 56.11(2) (e) of the Supreme Court (Civil Procedure) Rules 2005, that the two claims be heard together.

[4] In claim no. 83, Mr. Boyce sought by a fixed dated claim form, dated 12 February 2013, the following relief:

> (1) A declaration that the decision of the Commission dated 14 November, 2012 declining to refer Mr. Boyce's request dated 17 July 2012, to refer the conduct of the Hon Justice of Appeal Awich ("Awich JA") to the Belize Advisory Council ("BAC") under section 102(3) of the Belize Constitution ("the Complaint"), is unlawful, void and of no effect;
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> (2) A declaration that Awich JA's conduct as a Supreme Court Judge, prior to his appointment as a Justice of Appeal, is relevant to the question of "*inability to perform the functions of office"* under section 102(2) of the Belize Constitution in the Commission's reconsideration of the complaint;
>
> (3) A declaration that the Solicitor General's continued participation in any of the Commission's decision regarding the complaint is unlawful on the grounds of apparent bias;
>
> (4) Such other orders as the court considered appropriate and cost.

[5] Mr. Boyce's claim was supported by affidavits sworn by him on 12 February 2013, 13 March 2013 and 20 June 2014.

[6] In claim no. 85 of 2013, the Bank and Lord Ashcroft as claimants, sought by a fixed date claim form dated 13 February 2013, the following relief:

> (1) A declaration that the decision of the Commission dated 14 November 2012, to dismiss the Bank and Lord Ashcroft's complaint against Awich JA made pursuant to section 102(3) of the Belize Constitution, is unlawful, void and of no effect;
>
> (2) A declaration that the Solicitor General's continued participation in any decision of the Commission regarding the complaint is unlawful on the grounds of apparent bias;
>
> (3) Such other relief as the court deems just and cost.

[7] The Managing Director of the Bank, Stewart Howard, filed two affidavits sworn on 13 February 2013 and 20 June 2014 in support of the claim for the administrative relief.

[8] The Commission in response to the claim filed affidavits in both claims sworn to by Justin Palacio. In claim no. 85, the affidavit is dated 18 March 2013. In claim no 83, the affidavit is dated 20 March 2013.

[9] The declaration sought in relation to the Solicitor General in both claims was not pursued by the claimants/respondents at the hearing before Abel J.

Factual background relevant to the appeal

The complaint

[10] On 17 July 2012, Mr. Boyce, Lord Ashcroft and the Director of the Bank altogether referred to as "the Respondents", wrote a joint letter dated 17 July 2012 to the Chairman of the Commission in relation to the appointment of Awich JA to the Court of Appeal. They referred to section 102(3) of the Belize Constitution and requested as follows:

> "We hereby submit to ... the Commission the question of whether Justice Awich should be removed from office for misbehaviour and/or inability. We therefore

request that the Commission consider(s) and recommend to the Belize Advisory Council, under section 102(3), that the question of removal of Justice Awich ought to be investigated. For the avoidance of doubt, we rely on the grounds "misbehaviour" and/or alternatively "inability" in section 102(3).

As described in further detail below, Lord Ashcroft and Dean Boyce have both been prejudiced as a consequence of Justice Awich's misbehaviour in cases before the Supreme Court. Further, we all have interest in appeals which are pending before the Court of Appeal on which Justice Awich could sit as judge..."

[11] At paragraph 1 of the letter the respondents set out the "*Background to the appointment of Justice Awich to the Court of Appeal."* I do not find it necessary to state the details, the crux of which is that the Prime Minister did not address the concerns of the Bar Association and the Leader of the Opposition that Justice Awich had a record of excessive delays in the delivery of judgments.

[12] At paragraph 2 of the said letter, under the heading of, "*Reasons for the request to remove Justice Awich, pursuant Section 102 of the Belize Constitution*", they gave two reasons as follows:

"2.1 The conduct of Justice Awich in the Supreme Court justifies his removal from office, pursuant to section 102 of the Belize Constitution for misbehaviour and/or inability to discharge the functions of his office. The conduct of Justice Awich which is described in this section of the letter predates his appointment as a Justice of Appeal. It is also conduct which the Prime Minister was, or should have been, aware of. It therefore should have been taken into account when determining whether to appoint Justice Awich as a justice of appeal. If it was, and was disregarded, it was wrongfully disregarded. If it was not taken into account, then it was wrong not to have done so.

2.2 For reasons set out in more details below, Justice Awich was not lawfully appointed as a Justice of Appeal, and there should now be an investigation by the Belize Advisory Council under section 102(4) sitting as a tribunal under section 54 of the Constitution. We here note section 54(9): "In the exercise of its functions,

the Council shall not be subject to the direction or control of any person or authority."

[13] Following the above, under the heading of 'Misbehaviour' the respondents gave the definition for the term "misbehaviour" and relied on the test in **Lawrence v Attorney General of Grenada [2007] UKPC 18.** They stated that Justice Awich fulfilled all of the conditions for the test or in the alternative some of the conditions of the test. The respondents referred to the delays in the delivery of judgments and named specific cases in which there were inordinate delays. The respondents also relied on the case of **Chief Justice of Gilbraltar, Re [2009] UKPC 43** and the **Bangalore Principles of Judicial Conduct**, in support of their complaint.

[14] In the conclusion of the complaint, the respondents said:

" 3.1 ...it is clear that Justice Awich should never have been appointed as a Justice of Appeal on account of his misbehaviour and further, in the alternative, for inability to discharge the function of his office, pursuant to section 102(2) of the Belize Constitution. The Honourable Prime Minister had (or ought to have had) all of the above information which had either been brought to his attention by the Bar Association, was in publicly available judgments and because the Government, represented by the Attorney General, was a party to the Dunkeld and BSDL cases. In the circumstances, the Honourable Prime Minister should not have advised the Governor General to appoint Justice Awich a Justice of Appeal and nor should the Governor General have made the appointment.

3.2 It is our belief that the evidence presented herein raises serious questions concerning the legitimacy of the Honourable Prime Minister's decision to recommend that Justice Awich be appointed to the Court of Appeal. We submit that the evidence is sufficient to warrant a referral by the Judicial and Legal Services Commission to the Belize Advisory Council for further investigation."

[15] On 24 September 2012, the Commission convened and the complaint was addressed. The Commission deferred the decision regarding the said complaint.

Decision of the Commission

[16] On 29 October 2012, the Commission reconvened and the complaint was considered. By a letter dated 14 November 2012, the Commission, through its Secretary, Justin Palacio, responded to the request by the respondents made under section 102 of the Belize Constitution in relation to Justice Awich. It states:

> "We refer to your letter dated 17 July 2012 addressed to the Chairman, Judicial and Legal Services Commission ... requesting that the question of whether Justice Samuel Awich, Justice of Appeal, should be removed from office for misbehaviour and/or inability be referred to the Belize Advisory Council (BAC) for investigation under section 102(3) of the Belize Constitution.
>
> The Commission carefully considered the Complaint after it was noted that the written response invited from Justice Awich did not seek the recusal of any member of the Commission nor did it raise any objection otherwise to the complaint being considered by the Commission. The view of the Commission is that: the Complaint was directed to matters relating to the performance of Justice Awich in his previous position of Justice of the Supreme Court and had no relation to his present office of Justice of Appeal rendering the Complaint misconceived and premature with respect to the office of Justice of Appeal; and the decision to appoint a Justice of Appeal resides with the Prime Minister and the Belize Constitution does not countenance the participation of the Commission or the Bar Association in that process.
>
> There was presented to and not carried by the Commission, a minority view that the strict categorization of the complaint omits to take into account the allegations of unmerited decision-making on the part of Justice Awich potentially linked to his elevation, thereby compromising the high standards expected of the Judiciary and his moral authority to sit as Justice of Appeal**.**

> The decision of the … Commission is that the question of removal from office of Justice of Appeal Awich as requested by the said letter of July 17, 2012 is not recommended for investigation by the Belize Advisory Council and the Complaint accordingly be dismissed."

[17] The claims brought by the respondents were as a result of the dismissal of the complaint and the reasons for such dismissal.

Order made by the trial judge

[18] The learned trial judge having heard the matter and considered the evidence made several findings some of which are reflected in the perfected order issued on 30 October 2014. He granted two declarations and made two orders. The Order states as follows:

> "….**AND UPON THE COURT** having found that Justice Awich's prior conduct as Supreme Court Judge was not insignificant and may have been relevant to the consideration by the Judicial and Legal Services Commission of whether or not to refer for investigation to the Belize Advisory Council the matter of his removal as a Court of Appeal Judge.
>
> **AND UPON THE COURT** having found that the Judicial and Legal Services Commission was wrong as a matter of principle to have found that the request for the removal of Justice Awich was "misplaced and misguided" (misconceived) and premature as his appointment to a new office of Justice of Appeal (from that of a Supreme Court Judge) was the commencement of a new situation; but that the Judicial and Legal Services Commission … (ought) to have engaged in a consideration of the relevance of Justice Awich's alleged misbehavior and/or inability as a Supreme Court Judge to his functioning as a Court of Appeal Judge.
>
> **AND UPON THE COURT** having found that the evidence put before the Judicial and Legal Services Commission was capable of amounting to and therefore could have amounted to misbehavior and/or inability to discharge the functions of the office related to the office of the Court of Appeal and therefore that the Judicial and Legal Services Commission did not properly

exercise its discretionary power with regards its consideration of the passing of complaints of (sic) the Belize Advisory Council.

THE COURT DOTH DECLARE THAT:-

(1) Mr. Justice of Appeal Awich's conduct as a Supreme Court Judge, prior to his appointment as Justice of Appeal is relevant to the consideration of the question of "inability to perform the functions of office" or "misbehavior" under section 102(2) of the Belize Constitution in the Judicial and Legal Services Commission's consideration of the Claimants' Complaint of the 17th July, 2012;

(2) The decision of the Judicial and Legal Services Commission dated 14th November, 2012 declining to refer the Claimants' complaint of the 17th July, 2012 of the conduct of the Hon. Justice of Appeal Awich to the Belize Advisory Council under section 102(3) of the Belize Constitution as set out on the Complaint, is unlawful, void and of no effect;

AND IT IS HEREBY ORDERED THAT:-

(3) The Claimants' Complaint of the 17th July, 2012 against Justice Awich is referred back to the Judicial and Legal Services Commission for it to reconsider its position in view of the above declarations and in accordance with the law and with a view to further conducting its enquiry and arriving at its own lawful determination.

(4) Costs are reserved with liberty of the parties to apply."

The Appeal

[19] By notice of appeal dated 11 September 2014, the appellant (Commission) appealed the entire decision of the trial judge. The grounds of appeal are:

(1) the trial judge erred in law and misdirected himself in holding that the conduct of Awich JA as a Supreme Court Judge, prior to his appointment as a Justice of Appeal, was relevant, in the circumstances of the case, to the question of his removal from office as a Justice of Appeal under section 102(2) of the Belize Constitution for inability to discharge the functions of his office or for misbehavior

(see paragraph 174 and 177 of the judgment). In so holding, the learned trial judge –

(a) wrongly relied upon, and failed to distinguish, the case of **Therrien v Canada (Minister of Justice) and Another** [2001] 5 LRC 575, where the legal provisions and the facts involved were entirely different;

(b) failed to appreciate that the complaint of the respondents amounted to a disguised attempt to impugn the appointment of Awich JA as a Justice of Appeal, a process in which the Commission has no role to play under section 101 of the Constitution;

(c) failed to take account of, or give due weight to, the fact known to him that the Prime Minister had already taken the same complaints against Awich JA into account before advising the Governor General to appoint Awich JA as a Justice of Appeal under section 101 of the Constitution;

(d) failed to appreciate the difference between the role of a Supreme Court Judge and that of Justice of Appeal in that in the Court of Appeal, Justice Awich would be among a panel of three judges, and the time for delivery of judgments would be determined by the President, who would also be responsible for the conduct of the Court while hearing the appeals.

(2) the judge wrongly held that the evidence put before the Commission was capable of amounting to and could have amounted to misbehavior or inability to perform the functions of the office related to the office of the Court of Appeal (para 170 of the judgment).

(3) the judge erred in law and misdirected himself in holding that the decision of the Commission declining to refer the respondents request of the conduct of Awich JA to the BAC under section 102(3) of the Constitution was unlawful, void and of no effect. (para 178 of the judgment)

(4) the decision of the learned trial judge was so aberrant that no reasonable judge acting judicially could have reached such a conclusion.

Relief Sought

[20] The relief sought is as follows:

(1) the decision of the trial judge dated 22 August 2014 be set aside in its entirety;

(2) a declaration that the complaints against Awich JA as a Supreme Court judge were not relevant to the consideration of his removal from office as a Justice of Appeal under section 102(2) and (3) of the Constitution;

(3) A declaration that the decision of the Commission declining to refer the respondents request of the conduct of Awich JA to the BAC under section 102(3) of the Constitution was lawful and valid; and

(4) Costs.

The relevant provisions of the Belize Constitution

[21] **Section 101** of the **Belize Constitution, Chapter 4** provides for the appointment of Justices of Appeal. Section 101(1) and (2) provides:

> "101 (1) The Justices of Appeal shall be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister given after consultation with the Leader of the Opposition, for such period as may be specified in the instrument of appointment.
>
> (2) A person shall not be qualified to be appointed as a Justice of Appeal unless either-
>
> (a) he holds or has held office as judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court; or
>
> (b) he is qualified to practise as an attorney-at-law in a court in Belize or as an advocate in a court in any other part of the Commonwealth having unlimited jurisdiction in either civil or criminal causes or matters and has been so qualified for not less than fifteen years;

[22] Section 102 subsections 2 through 7 provides for the procedure for the removal of a Justice of the Court of Appeal from office for inability to discharge the functions of his office or for misbehaviour. **Section 102 (2) – (7)** provides:

> "(2) A Justice of Appeal may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.
>
> (3) A Justice of the Court of Appeal may be removed from office if the question of his removal from office for inability to perform the functions of his office or for misbehaviour has been referred to the Judicial and Legal Services Commission in writing and the Judicial and Legal Services Commission, after considering the matter, recommends in writing to the Belize Advisory Council that the question of removal ought to be investigated.
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> (4) For the purpose of investigating the question of the removal of a Justice of the Court of Appeal referred to it under subsection (3), the Belize Advisory Council shall:-
>
> (a) sit as a tribunal in the manner provided in section 54 of this Constitution; and
>
> (b) enquire into the matter and report on the facts thereof to the Governor-General and advise the Governor-General whether the Justice of the Court of Appeal should be removed from office in accordance with this section.
>
> (5) If the question of removing a Justice of Appeal from office has been referred to the Belize Advisory Council under the preceding subsection, the Governor-General may suspend the Justice from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General and shall in any case cease to have effect if the Belize Advisory Council advises the Governor-General that the Justice should not be removed from office.
>
> (6) If the Belize Advisory Council advises the Governor-General that the Justice of the Court of Appeal ought to be or not to be removed from office, the Governor-General shall notify the Justice in writing accordingly.

(7) The power to remove a Justice of the Court of Appeal from office for inability to perform the functions of his office or for misbehaviour vest in the Governor-General, acting in accordance with this section."

Discussion

Findings of the trial judge on statements in the Complaint

[23] The complaint by the respondents was referred to the Commission in writing in accordance with section 102(3) of the Belize Constitution. The Commission after considering the complaint, made a decision to dismiss it on a preliminary point and did not recommend to the BAC that the removal of Awich JA ought to be investigated. The Commission has a discretionary power under section 102(3) to either dismiss a complaint or recommend to the BAC that the question of removal ought to be investigated, and is not merely a conduit for removal of Court of Appeal Judges. The reasons given for the decision by the Commission to dismiss the complaint are two fold, that is:

(1) The complaint was misconceived and premature with respect to the office of Justice of Appeal as the complaint was in relation to Awich JA's performance as a Supreme Court Judge and had no relation to his present office as a Court of Appeal Judge;

(2) The decision to appoint an Appeal Court Judge resides with the Prime Minister and the Belize Constitution does not countenance the participation of the Commission or the Bar Association in that process.

[24] The respondents sought a declaration that the decision was unlawful and a further declaration that the conduct of Awich JA, as a Supreme Court Judge, prior to his appointment as a Justice of Appeal, is relevant to the question of "*inability to perform the functions of office"* under section 102(2) of the Belize Constitution. The declarations sought were in relation only to the issue of prior conduct and whether that should be considered. The Commission had not decided whether the reasons given in the complaint amounted to misbehaviour or amounted to inability to perform the functions of office as a Court of Appeal Judge. The Commission dismissed the complaint on the preliminary issue of past conduct not relevant to present office of Court of Appeal judge. The trial judge, in my view, wrongfully usurped the functions of the Commission and made

findings on the reasons given in the complaint for misbehaviour and inability to discharge the functions of the office of Court of Appeal Judge. This is clearly set out in his findings at paragraphs 170 and 171 as follows:

> "[170] I also find, and it follows from what I have just said, that the evidence put before the JLSC (Commission) was capable of amounting to and therefore could have amounted to misbehaviour. Likewise the question of inability to discharge the functions of the office related to the office of the Court of Appeal.
>
> [171] I have therefore concluded, based on my above findings that the JLSC (Commission) did not properly exercise its discretionary power with regards its consideration of the passing of complaints to the BAC."

[25] The learned trial judge having made the findings on the reasons given by the respondents in the complaint went further and made an order referring the complaint back to the Commission for reconsideration as shown in the perfected order which states:

> **"AND IT IS HEREBY ORDERED THAT:-**
>
> The Claimants' Complaint … is referred back to the … Commission for it to reconsider its position in view of the above declarations and in accordance with the law and with a view to further conducting its enquiry and arriving at its own lawful determination." (see para 18 above for the perfected order).

[26] The order was made based on the findings of the trial judge after considering facts in the complaint. At paragraph 174 of his judgment he said:

> "In view of my findings I am therefore prepared to make a declaration that Mr. Justice Awich's conduct as a Supreme Court Judge, prior to his appointment as a Justice of Appeal, is relevant to the question of "inability to perform the functions of office" or "misbehaviour" under section 102(2) of the Belize Constitution in relation to the JLSC's consideration of the

complaint, and ought to be entertained by the JLSC and reconsidered by them.

[27] The trial judge it seems, was unsure as to the relief that he should grant to the respondents. At paragraph 173 of his judgment, he said that he was not making any findings as to the seriousness of the matters complained of by the respondents. Further, he said that the appropriate course of action would be for him "*to make the appropriate declaration and leave it to the JLSC to reconsider its position in view of the declarations and in accordance with the law that this court has found which this court makes with a view to further conducting it's enquiry and arriving at its own lawful determination."* As shown above, it was quite the opposite that occurred as the Commission was ordered to reconsider its position and at paragraph 177 under the heading of 'disposition', the judge made a declaration. The respondents sought declaratory relief pursuant to Part 56(1) (c) of the CPR. The judge should have concerned himself only with declaratory relief which proclaim the existence of a legal relationship and not grant an order to enforce against the Commission.

[28] The judge discussed making declarations but in the perfected order, the Commission was ordered to reconsider its position in view of the declarations and in accordance with the law. It is obvious that the Commission was being ordered to reconsider the matter based on the findings of the trial judge. In my opinion, the judge erred in so doing as the Commission cannot be directed by the court in its decision making. The power of the Commission to consider the removal is given by section 102(3) of the Constitution and it had made its decision on a preliminary point and not on the reasons given in the complaint. Further, it is my view that it would have been proper for the judge to consider only the issue of the relevance of the 'prior conduct' per *se* as a Supreme Court Judge and not get into the realm of the reasons given in the complaint. The judge below as shown at paragraphs 142 to 153 of his judgment discussed the fact that the Commission based its decision only on a preliminary issue. However, instead of addressing only this preliminary issue, he additionally considered the facts as laid out in the complaint. At paragraph 154 of his judgment he said:

> "I now turn to the question whether on the facts of the present case and the determination by the JLSC in relation to Justice Awich's conduct prior to his appointment to the Court of Appeal was irrelevant and therefore whether any consideration of the complaint was premature and therefore inappropriate."

[29] The judge below then wrongly considered the facts in the complaint and made findings on those facts. Thereafter, he ordered the Commission to consider the complaint based on the declarations and the law. In my opinion, he erred since he had no jurisdiction to consider the facts in the complaint and make findings. This error made by the trial judge is sufficient to set aside his decision in its entirety. But, I would discuss the case of **Therrien v Canada (Minister of Justice) and Another [2001] 5 LRC 575 (Re Therrien**), which was applied by the trial judge to the instant case and forms the basis of a ground of appeal.

[30] As a result of my view that the trial judge erred when he considered facts in the complaint, I do not consider that it is necessary to address any issue in relation to the facts itself or to address the test for misbehaviour and what is meant by the term 'consideration' which was addressed by the trial judge.

The point on the relevance of prior conduct as a Supreme Court Judge

[31] In ground 1(a) the appellant stated that the trial judge wrongly relied upon and failed to distinguish Re **Therrien**, **where** the legal provisions and the facts involved were entirely different from the instant case. Further, the regime under which a judge is appointed in the Canadian jurisdiction differs from the jurisdiction of Belize.

[32] The trial judge determined the issue of prior conduct on the principles in **Re Therrien** and the facts stated in the complaint. At paragraph 155 of his judgment he said:

> "The case of **Therrien v Canada (Minister of Justice) and Anor** is, in my view, good and clear authority for the proposition that even though the judicial conduct complained of occurred before the judicial appointment in

question (to the Court of Appeal), as a matter of principle, there is nevertheless jurisdiction to investigate a judge's conduct prior to his appointment as a judge. This, it seems to me, in any event, to be the correct conclusion; but in the application of this principle the question of relevance will have to be determined on the facts of each case."

[33] Learned senior counsel, Mr. Smith and Mrs. Marin-Young submitted that the complaint against Awich JA "did in fact occur while he was a Justice of the Supreme Court" and not while he was a Justice of the Court of Appeal, the post which he held at the time of the complaint. They submitted that there are several reasons which made it compelling and persuasive that prior conduct is relevant to the question of fitness to hold office. The respondents gave six reasons namely:

(a) The nature of the judicial office is exactly the same and the core function of a judge is to adjudicate independently and impartially whether at the Supreme Court or Court of Appeal;

(b) The exact test is used for the removal from both offices;

(c) The same or similar considerations are relevant to the assessment of "misbehaviour" and the "ability to perform the functions of office" for both offices. Further, the same legal litmus tests is applicable to "misbehaviour" and "inability" for both offices;

(d) Counsel gave an example of a judge accepting bribes whilst holding office as a Supreme Court judge which he submitted would merit investigation even if the complaint was never brought during the period he held that office;

(e) the more scandalous or egregious the behaviour the easier it is to make the point that prior conduct can be relevant;

(f) the evidentiary basis of the complaint disclosed that it went to the core function of adjudication and the public perception of confidence in the administration of justice and therefore, relevant to the fact that the judge had been recently appointed to the Court of Appeal.

[34] I agree with Mr. Smith and Mrs. Marin-Young in relation to the test for removal of a judge from Supreme Court or the Court of Appeal. As shown above, Abel J had no jurisdiction to make a finding on the evidence before the Commission. This is a matter for the Commission itself and I will refrain from making any finding on the facts of the complaint. I am concerned only with the issue of prior conduct. I must say however, in fairness to the judge, that the examples given are not the sort of misconduct which was before the Commission. The judge in question had no previous convictions which was unknown whilst he held office as a Supreme Court Judge. The complaint dealt strictly with his work itself, inclusive of excessive delays in handing down of judgments.

[35] Learned senior counsel, Mr. Smith and Mrs. Marin-Young both argued that the principles in **Re Therrien** is applicable to the instant case. The reason being is that the Courts of Justice Act did not distinguish between the period before or after the appointment, but authorised the Conseil to "receive and examine any complaint lodged against a Judge ...". Mrs Marin-Young submitted that the appellant has focused too narrowly in distinguishing the facts of **Re Therrien** by looking at the prior conduct (criminal conviction) of Mr. Therrien, the former judge as opposed to conduct *qua* prior conduct. She submitted that the appellant has missed the very purposeful approach to interpretation that the Supreme Court of Canada gave the word "misbehaviour" and the broader role played by the Conseil in maintaining the integrity of the judiciary.

[36] In my view, the case of **Re Therrien** is distinguishable from the instant case as shown by the facts and the reason for the removal of the former judge. The facts of the case is that sometime in 1970 when Richard Therrien, ('the appellant') was a minor and a first year law student, he was charged with illegally and unlawfully giving assistance to four members of an association declared to be unlawful by the Public Order Regulations 1970 of Canada. He pleaded guilty and was sentenced to imprisonment for one year. The appellant continued his legal studies after serving his sentence and received his licence. His name was entered on the roll in 1976 and from that date to 1996 he practiced law in a competent and dignified manner. He won the respect of members of the bench and his colleagues.

[37] The appellant was granted a pardon in 1987 by the Governor in Council which vacated the conviction and removed any disqualification to which the person so convicted is subject by virtue of any Act of Parliament of Canada.

[38] The appellant submitted his candidacy between 1989 and 1996 in five selection procedures for judicial appointments. He was interviewed on four occasions by the committee for the selection of persons qualified for appointment as judges, and on each occasion the committee members raised the issue of his trouble with the law. On two of the occasions, he revealed his previous conviction and stated that he had been pardoned. His candidacy for the first two appointments was unsuccessful and his criminal record was a determining factor although he was granted a pardon.

[39] On a third interview for a judicial appointment, the appellant did not disclose his criminal record or the fact that he had been pardoned when he was asked the question, *"Have you ever been in trouble with the law ....?"* The appellant felt justified in doing so because he was granted a pardon. On that occasion the committee made a favourable recommendation and, after running checks with the necessary authorities and confirming that the appellant's record was clear, the Minister of Justice recommended that the appellant be appointed as a judge of the Court of Quebec.

[40] In October 1996 the Associate Chief Judge of the Court of Québec and chairman of the selection committee that had recommended the appellant for appointment learned that he had been in trouble with the law in 1970. The Chairman advised the Minister of the situation and stated that the appellant had failed to disclose that information to the selection committee. The Minister lodged a complaint with the Quebec Conseil de la magistrature (the Conseil), requesting that the Conseil determine whether the appellant was capable of fulfilling the role of a judge with dignity, honour and impartiality. The Conseil duly established a committee of inquiry to consider the matter. A majority of that committee found that the complaint was justified and recommended that procedures for the removal of the appellant be initiated in accordance with section 279(b) and section 95 of the Courts of Justice Act, (the CJA).

[41] The Conseil recommended that the Minister initiate the process to remove the appellant by making a request to the Court of Appeal in accordance with section 95 of the CJA, which was made accordingly. At the same time, the appellant filed an application for judicial review in the Superior Court, seeking to have the inquiry report of the committee of the Conseil, the recommendation, and the order of the Conseil suspending him, to be declared void and of no effect, and seeking to have the request to the Court of Appeal dismissed.

[42] At the same time, the appellant also filed a motion for declaratory judgment challenging the constitutionality of section 95 of the CJA. In response to the application and motion, the Minister filed two motions to dismiss, in which he claimed that the Court of Appeal had jurisdiction to dispose of the issues in conducting an inquiry under section 95 of the CJA. The Quebec Superior Court dismissed the motions to dismiss. The Minister appealed against those decisions and the Appeal Court allowed the appeals of the Minister and dismissed the application for judicial review and motion for declaratory judgment filed by the appellant. In 1998 the Court of Appeal submitted a report to the Minister, following its inquiry, in which it recommended that the government revoke the appellant's commission.

[43] Mr. Therrien challenged the decision on several grounds, one of which is relevant to this appeal, that is, the jurisdiction of the Conseil and its committee to investigate his conduct, since the complaint was based on facts prior to his appointment as judge. (At the outset, the appellant had made this challenge and the committee found that it had jurisdiction to review the past conduct of a judge where the conduct could affect his capacity to perform his judicial functions, and to determine whether it undermines public confidence in the incumbent of the office). On appeal, Gonthier J addressed this issue as to whether the Conseil had jurisdiction to investigate the appellant's past conduct that occurred before his appointment as a judge at paragraphs 53 to 58 of his judgment. Gonthier J said:

> "[53] The appellant argues that the Conseil de la magistrature has no jurisdiction to review his conduct, since the ethical breach occurred before he was appointed. He is accordingly of the opinion that the misconduct that is the source of the

proceedings against him falls under the exclusive jurisdiction of the discipline committee of the Barreau du Québec. I am unable to accept this reasoning, for several reasons.

[54] The Courts of Justice Act imposes two conditions in order for the Conseil to have jurisdiction. First, it must have jurisdiction over the person who is the subject of the complaint. Section 256(c) of the CJA states that the functions of the Conseil are 'to receive and examine any complaint lodged against a judge to whom Chapter III of this Part applies'. Section 260 of the CJA then provides that '[t]his chapter [referring to chapter III] applies to a judge appointed under this act'. In the case at bar, Judge Therrien's notice of appointment confirms that he was appointed as a judge of the Court of Québec pursuant to s 86 of the CJA. Second, the Conseil must have jurisdiction over the subject matter of the complaint. **Section 263 of the CJA specifies that the Conseil receives and examines a complaint lodged by any person against a judge alleging that he has failed to comply with the code of ethics**. At the hearing before the committee of inquiry of the Conseil de la magistrature, counsel for the Minister of Justice explained that the complaint lodged related to breaches of ss 2, 4, 5 and 10 of the Judicial Code of Ethics, which provide:

> *'2. The judge should perform the duties of his office with integrity, dignity and honour … 4. The judge should avoid any conflict of interest and refrain from placing himself in a position where he cannot faithfully carry out his functions. 5. The judge should be, and be seen to be, impartial and objective … 10. The judge should uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society.'*

The Conseil de la magistrature therefore had jurisdiction over the person and over the subject matter of the complaint. Whether or not the actions were prior to the appellant's appointment is not relevant under the Act.

[55] Furthermore, the Barreau du Québec has no jurisdiction over the actions in question. In *Maurice v Priel* [1989] 1 SCR 1023 this court set out the procedure to be followed in order to determine the jurisdiction of the Law Society of Saskatchewan to proceed with discipline proceedings against the respondent, a judge of the Court of Queen's Bench for Saskatchewan, for breaches of its Code of Professional Conduct while he was a practising lawyer. It stated (at 1033):

> *'Rather [the case at bar] is concerned with the narrow issue as to whether pursuant to the provisions of The Legal Profession Act of Saskatchewan the Law Society of that province can institute discipline proceedings against a judge for alleged misconduct committed while still a lawyer. The resolution*

of the issue turns solely upon the wording of The Legal Profession Act and the Judges Act.' (Our emphasis.)

[56] In Quebec, s 116 of the Professional Code describes the extent of the jurisdiction of the committees on discipline constituted within each professional order:

> *'116. A committee on discipline is constituted within each order … The committee shall be seized of every complaint made against a professional for an offence against this Code, the Act constituting the order of which he is a member or the regulations made under this Code or that Act … The committee shall also be seized of every complaint made against a former member of an order for an offence referred to in the second paragraph that was committed while he was a member of the order. In such a case, every reference to a professional or a member of the order in the provisions of this Code, the Act constituting the order of which he was a member or a regulation under this Code or the said Act shall be a reference to the former member.'* (Our emphasis.)

Although the complaint lodged against Judge Therrien concerns allegations of misconduct committed while he was a lawyer, something that is expressly provided for in the third paragraph of s 116, it does not relate to any 'offence against this Code, the Act constituting the order of which he [was] a member or the regulations made under this Code or that Act'.

[57] Apart from the statutory provisions, a number of other reasons stated both by the committee of inquiry of the Conseil de la magistrature and by the Court of Appeal may be raised. For example, in the interests of judicial independence, it is important that discipline be dealt with in the first place by peers. I agree with the following remarks by Professor H P Glenn in his article 'Indépendance et déontologie judiciaires' (1995) 55 R du B 295 at 308:

> *'If we take as our starting point the principle of judicial independence—and I emphasize the need for this starting point in our historical, cultural and institutional context—I believe that it must be concluded that the primary responsibility for the exercise of disciplinary authority lies with the judges at the same level. To place the real disciplinary authority outside that level would call judicial independence into question.'*

[58] In addition, as I said in *Ruffo* [1995] 4 SCR 267 at 309, the committee of inquiry is responsible for preserving the integrity of the whole of the judiciary. Accordingly, it must be able to examine the past conduct of a judge, if it is relevant to the

> assessment of his candidacy, having regard to his capacity to carry out his judicial functions, and to determine, based on that, whether it may reasonably undermine public confidence in the incumbent of the office. In this case, the appellant's actions, though predating his appointment, were alleged to have had that kind of impact on the performance of his functions. In conclusion on this point, I am of the same view as LeBel JA, who held that the process of selecting persons qualified for appointment as judges is so closely related to the exercise of the judicial function itself that it cannot be dissociated from it."

[44] In **Re Therrien** the former judge, Mr. Therrien was criminally charged, convicted and pardoned years before his appointment as a judge. He was not removed as a result of his criminal conviction but it was for his failure to disclose during the interview of his judicial appointment the fact that he had a criminal record when he was asked the question, "*Have you ever been in trouble with the law*..?" It was because of this failure the complaint was lodged with the Conseil to determine whether he was capable of fulfilling the role of a judge with dignity, honour and impartiality. Mr. Therrien challenged the jurisdiction of the Conseil to investigate his conduct since the complaint was based on facts prior to his appointment as a judge.

[45] Further, the complaint lodged against Therrien related to breaches of sections 2, 4, 5 and 10 of the **Judicial Code of Ethics.** Section 263 of the Courts of Justice Act specifies that the Conseil receives and examines a complaint lodged by any person against a judge alleging that he has failed to comply with the Code of Ethics. The Conseil therefore had jurisdiction over the subject of the complaint.

[46] In the instant case, there is no complaint that Awich JA has a criminal record which he failed to disclose before his judicial appointment as a Supreme Court judge. Further, there is no evidence that the appointment of Awich JA as Supreme Court judge was impugned in any way. A Supreme Court judge is removed pursuant to **section 98 (3) & (4)** of the **Belize Constitution** which provides:

> (3) A justice of the Supreme Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity

of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(4) A justice of the Supreme Court may be removed from office if the question of his removal from office for inability to perform the functions of his office or for misbehaviour has been referred to the Judicial and Legal Services Commission in writing and the Judicial and Legal Services Commission, after considering the matter, recommends in writing to the Belize Advisory Council that the question of removal ought to be investigated. …"

[47] The facts of the complaint does not show that Awich JA, as a Supreme Court Judge was removed pursuant to section 98 of the Belize Constitution for inability to perform the functions of his office or for misbehavior. This section can only be triggered whilst the judge holds the office of a Supreme Court Judge and this has to be done by writing to the Commission which will consider the matter. Awich JA no longer holds that office and as such the question of removal does not arise.

[48] The Complaint lodged with the Commission was made after the judge demitted office as a Supreme Court Judge and acted as Chief Justice. Since there has been no proven misbehavior or inability to perform the functions of a Supreme Court Judge, the issue of past conduct is irrelevant to the appointment of Awich JA as a Court of Appeal judge taking into consideration the Constitutional provisions (section 98). The allegations in the complaint by the respondents cannot be considered as proof of wrongdoing since the process under section 98 was never triggered. Hence, the complaint is misconceived. There is no proven misbehaviour whilst Justice Awich was in office at the Supreme Court which can be used as past conduct to impugn his appointment and removal from the Court of Appeal under section 102(2) of the Belize Constitution.

[49] Accordingly, it is my opinion, that the trial judge erred in his findings that the conduct of Awich JA as a Supreme Court judge was significant and that the Commission was wrong to have found that the complaint was "misplaced and misguided" (the Commission said "misconceived") and premature as his appointment was a new situation. The trial judge also erred (as discussed above) in making a finding on the facts in the

complaint which he said was capable of amounting to misbehavior and/or inability to discharge the functions of the office related to the office of the Court of Appeal and therefore, that the Commission did not properly exercise its discretionary power with regards its consideration of the passing of complaints to the BAC.

[50] I do not find it necessary to address the other grounds of appeal based on my determination above.

Costs

[51] In my view, an order for costs should not be made against the respondents although the Commission succeeded. The reason being, the importance of the Constitutional issues raised by the respondents.

Disposition

[52] I would propose the following:

(1) An order be made allowing the appeal by the Commission and setting aside the decision of the trial judge dated 22 August 2014 in its entirety. Accordingly, the declarations and the orders made by the trial judge are set aside.

(2) A declaration that the complaints against Awich JA as a Supreme Court judge were not relevant to the consideration of his removal from office as a Justice of Appeal under section 102(2) and (3) of the Constitution.

(3) A declaration that the decision of the Commission declining to refer the respondents request of the conduct of Awich JA to the BAC under section 102(3) of the Constitution was lawful and valid.

(4) That there be no order as to costs.

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HAFIZ-BERTRAM JA

DUCILLE JA

[53] I have read the judgment of Hafiz Bertram JA, in draft, and I am in total agreement with the reasons and the orders proposed in her judgment. I have nothing further to add.

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DUCILLE JA