

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

**No. 1280 of 2012
1281 of 2012
1316 of 2012**

BETWEEN:

**RICHARD BOYCE
ANTONIO FORTE
ELPHENE MOORE
JOHN MAXWELL
VERNELLA WILTSHIRE
BARRY HUNTE
ELLIOTT BOVELL
TREVOR BLACKMAN
RODERICK WALCOTT
WINSTON HOLDER
VERNON MOORE
SONIA BOYCE
ANDREW MOORE**

APPLICANTS/CLAIMANTS

AND

**COMMISSIONER OF POLICE FIRST RESPONDENT/DEFENDANT
POLICE SERVICE COMMISSION SECOND RESPONDENT/DEFENDANT
ATTORNEY GENERAL THIRD RESPONDENT/DEFENDANT**

BETWEEN

JEDDER FERNEAUX ROBINSON

APPLICANT/CLAIMANT

AND

COMMISSIONER OF POLICE FIRST RESPONDENT/DEFENDANT

DECISION

Introduction

- [1] This is the fourth decision delivered by this judge in this consolidated action.
- [2] The first decision was delivered in March 2014 and involved the hearing of a constitutional issue raised by the Claimant in suit #1316/2012. In that interlocutory application, the constitutionality of **sections 9 and 10** of the **Service Commissions Act Cap. 34** was questioned. This Court upheld the constitutionality of these sections.
- [3] The second decision was delivered in October 2014 and concerned the determination of an application by one of the Respondents, the Police Service Commission (hereinafter referred to as the PSC), filed May 30th 2014 and heard September/October 2014, to strike out this action.
- [4] The third decision was delivered September 28th, 2015 and was pursuant to an application made by counsel for the Claimant in suit #1316/2012, and was an application for discovery of documents.
- [5] This fourth and final decision deals with the substantive claim to be found in these consolidated actions.

The Background

[6] It serves as a refreshing of the background of this matter, to set out *‘in extenso’* the following paragraphs of the decision of March 2014:

“[8] At this stage, it is relevant to briefly outline the nature of the substantive application which is generally (but not entirely) the same in all three actions. They have been precipitated by the same event and for reasons which will become evident have been titled locally as “the Police Promotions Case(s).

[9] It was a matter of public knowledge within the Royal Barbados Police Force in or around 2012, that there were a number of senior positions currently or, soon to be, vacant as a result of senior officers retiring or nearing retirement. In fact, it is deposed by several of the Claimants that in May 2012 the First Respondent (Commissioner of Police) actually met with a general assembly of police officers to inform them of the existence of a high number of vacancies among the higher ranks of the Royal Barbados Police Force.

[10] The listed Claimants were generally aware that they had been recommended for promotion and/or fell within the ‘zone of promotion’ pursuant to the rules governing promotion within the Royal Barbados Police Force (presumably by the Promotions Advisory Board and/or the Commissioner of Police.)

[11] Sometime in mid-July 2012 (immediately prior to the commencement of these legal proceedings) it was made known (as deposed by the Claimants) that police officers who had not been recommended by the Promotions Advisory Board and by the Commissioner’s Office were to be promoted to the vacant senior positions with effect from 1st August, 2012 (some in fact purported to take effect from 15th July, 2012) and these said police officers were purportedly about to be handed their instruments of promotion instead of the Claimants.

[12] This fact was allegedly made known by the delivery to the First Respondent/ Commissioner of Police by the Second Respondent/Police Service Commission of letters of appointment.

[13] Generally, all Claimants (being those officers who had been informed of their recommendation for promotion and not included in the list of persons to receive instruments of promotion) are aggrieved that their respective expectation of promotion within the ranks of the Force has been defeated by certain unlawful acts (in breach of the Administrative Justice Act, Cap.109

B and the Rules relating to promotions) deemed by them to be unreasonable, irregular, arbitrary, improper, an abuse of power and in bad faith.”

- [7] On the 13th August 2012 Kentish J. granted the Claimants an Interim injunction restraining the Respondents their servants and/or agents from confirming, making effective or appointing persons other than the Claimants to certain ranks in the Royal Barbados Police Force until the hearing and determination of the substantive matter.
- [8] The Police Service Commission appealed the granting of this interim injunction, but the appeal was dismissed in October 2012.
- [9] The parties as outlined in the decision of March 2014 remain largely the same with two exceptions: by Notice of Discontinuance dated August 5th 2012 police officer Wayne Archer withdrew from this action; and by Consent Order of July 17th 2014 between counsel for the Fourth Defendant and counsel for suit #1316/2012, the Fourth Respondent to suit #1316/2012, the Governor General, was struck out from the proceedings.
- [10] All other parties remain the same, namely the First Respondent being the Commissioner of Police; the Second Respondent being the Police Service Commission and the Third Respondent being the Attorney General. It is noted however that the substantive holder of the office of Commissioner of Police was sent on ‘administrative leave’ on June 17th

2013 (there is now an acting Commissioner of Police); and that there has been a change in the composition of the membership of the Police Service Commission, which is headed by a 'new' Chairman.

The Substantive Claims

[11] There are two major claims (albeit three actions) precipitated by the same event. However, while the actions have been consolidated and there are issues common to both actions, the nature of the claims and the nature of the relief sought have precipitated a divergence/bifurcation of the issues which must be explored separately. This is best revealed by setting out the full text of the claims.

[12] The Claimants in suit #1280/2012 and #1281/2012 are represented by the same counsel and their claims (substantively) a carbon copy of each other are as follows (set out below is the Claim of Jedder Ferneaux Robinson now retired from the Royal Barbados Police Force and the joint claim of the 14 officers):

“The Applicant/Claimant makes an Application for Judicial review of the decision of the Second Respondent/Defendant in failing to promote the Applicant/Claimant to the rank of Senior Superintendent in the Royal Barbados Police Force.

AND the Applicant/Claimant applies to the Court for the following orders:

- a) A Declaration that the Applicant/Claimant is qualified and so entitled to be promoted to the rank of Senior Superintendent in the Royal Barbados Force.

- b) A Declaration that the Applicant/Claimant is qualified and so entitled to be promoted to the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012.
- c) A Declaration that the Applicant/Claimant has a legitimate expectation that he would be promoted to the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012.
- d) A Declaration that the First and Second Respondents/Defendants have by their conduct led the Applicant/Claimant to function in the belief and expectation that the said promotion to the rank of Senior Superintendent in the Royal Barbados Police Force would be made effective from the 15th day of July, 2012.
- e) A Declaration that the Applicant/Claimant is the holder of the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012.
- f) An order of Certiorari in quashing the decision of the Second Respondent/Defendant in confirming such person or persons other than the Applicant/Claimant into the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012.
- g) An order of Mandamus requiring the First and Second Respondents/Defendants and any or all of them to confirm and to make effective the promotion of the Applicant/Claimant to the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012.
- h) An order of Prohibition prohibiting the First and Second Respondents/Defendants and any or all of them from confirming and making effective the promotion of such person or persons other than the Applicant/Claimant into the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012.
- i) An injunction compelling the Second Respondent/Defendant to immediately confirm and make effective the promotion of the Applicant/Claimant to the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012.
- j) A Declaration that the decision of the Second Respondent/Defendant not to confirm and make effective the promotion of the Applicant/Claimant and make effective the

promotion of the Applicant/Claimant to the rank of Senior Superintendent in the Royal Barbados Police Force with effect from the 15th day of July, 2012 is invalidated by the acts and omissions of the Second and Third Respondents/Defendants on the following grounds:-

- i) carrying out an administrative act or omission in a way unauthorized or contrary to law;
 - ii) exceeding jurisdiction;
 - iii) failing to satisfy or observe conditions or procedures required by law;
 - iv) breaching the principles of natural justice;
 - v) unreasonably, irregularly or improperly exercising discretion;
 - vi) abusing power
 - vii) acting upon bad faith, improper purposes and irrelevant considerations;
 - viii) acting on instructions from an unauthorized person;
 - ix) acting in conflict with the policy of an Act of Parliament;
 - x) acting in error of law, whether or not apparent on the face of the record;
 - xi) acting in the absence of evidence on which a finding or assumption of fact could reasonably be based; and
 - xii) breaching of and omitting to perform a duty.
- k) Damages
 - l) Costs”.

[13] Claim #1316/2012 is drafted in different terms and seeks different relief as follows:

“The Claimant Errol Ellis of Prospect in the parish of St. James in this Island claims against the Respondents, Police Service Commission, a body established by Section 91 of the Constitution of Barbados, situate at E. Humphrey Walcott Building, Cnr. Culloden Road & Collymore Rock, in the parish of St. Michael, and the Commissioner of Police, the Office responsible for the governance and supervision of the Royal Barbados Police Force and the making representations to the First Respondent in respect of promotions within the Royal Barbados Police Force, The Attorney General of Barbados who is sued as representing the Crown in right of its Government, and The Governor General of Barbados who is joined as his Office is the office ultimately responsible for making all

promotions within the Barbados Police Force acting on the representations of the First Respondent.”

Relief Sought

1. A Declaration that the claimant has and had a legitimate expectation that any consideration of his application for promotion would be fair and that it would follow the process for promotions with the Royal Barbados Police Force as set out in the relevant regulations and that it would be transparent and the Claimant would be notified of any reasons that would prevent his promotion.
2. A Declaration that the claimant has and had a legitimate expectation that any consideration of his application for promotion would be given a fair and transparent adjudication and he would be notified of any reasons and/or adverse findings that would prevent his promotion and an opportunity to be heard on those adverse findings.
3. A Declaration that at all times the first respondent has a duty and/or a procedural obligation to act fairly and/or transparently to the claimant prior to the exercise of the power under section 96 of the Constitution of Barbados to make recommendations and/or advise on promotions appointments to and removal from offices and exercise disciplinary powers over members of the Royal Barbados Police Force (the “Force”).
4. A further Declaration that at all times the claimant has and had a legitimate expectation that he would be informed of any impediment to the First Respondent exercising its power in his favour under section 96 of the Constitution of Barbados to make recommendations and/or advise on his promotion to the offices of Station Sergeant in the Royal Barbados Police Force.
5. A still further Declaration that a failure to consult and/or inform the claimant of any impediment to his promotion prior to refusing any recommendation for the PAB to promote him to Station Sergeant in the Royal Barbados Police Force was in breach of the claimant’s rights to a fair and transparent consideration of his promotion.
6. A declaration that the Claimant has been discriminated against contrary to his constitutional rights as enshrined by section 11 and protected by section 23 of the Constitution.
7. A Declaration that the decision of the first Respondent to confirm and make effective the promotion of the certain officers to various ranks in the Royal Barbados Police Force with effect from the 1st day of August, 2012 is invalidated by the acts and omissions of the First Respondent on the following grounds:-

- i) carrying out an administrative act or omission in way unauthorized or contrary to law;
 - ii) exceeding jurisdiction;
 - iii) failing to satisfy or observe conditions or procedures required by law;
 - iv) breaching the principles of natural justice;
 - v) unreasonably, irregularly or improperly exercising discretion;
 - vi) abusing power;
 - vii) acting upon bad faith, improper purposes and irrelevant circumstances;
 - viii) acting on instruction from an unauthorized person;
 - ix) acting in conflict with the policy of an Act of Parliament;
 - x) acting in error of law, whether or not apparent on the face of the record;
 - xi) acting in the absence of evidence on which a finding or assumption of act could reasonably be based; and
 - xii) breaching of and omitting to perform a duty.
8. An order or Prohibition prohibiting the First and Second Respondents and any or all of them from confirming and making effective the promotion of such person or persons other than the Claimant into the rank as aforesaid in the Royal Barbados Police Force with effect from the 1st day of August, 2012.
 9. An Order Certiorari to remove any recent promotions of the First Respondent into this Honourable Court for quashing.
 10. An Order of Mandamus mandating the Respondents to notify the Claimant of any impediments to his promotion and to give him an opportunity to be heard and to reconsider the Claimant's application for promotion.
 11. A Declaration that the right of the Claimant to equality of treatment has been infringed and an Order that Respondents do reconsider the Claimant's application for promotion to the rank of Station Sergeant.
 12. An Order of Mandamus mandating the Respondents to determine based on the assumption of the Claimant's promotion to the rank of Station Sergeant in 2010 any future promotions.
- 13. Damages**
14. An Injunction compelling the Second Respondent to immediately confirm and make effective the promotion of the Claimants to the rank as aforesaid in the Royal Barbados Police Force.

Grounds in accordance with section 4 of the Administrative Justice Act Cap 109B of the Laws of Barbados

1. The Claimant is eligible for promotion to the rank of station sergeant in the Royal Barbados Police Force having satisfied all the requirements for such promotion.
2. The Claimant has requested the reason why he has not been promoted and there has been no response.
3. The Claimant has been discriminated against in that he has without good reason been passed over for promotion even though he has acted on occasions as station sergeant with good results.”

The Content of the Affidavits in Support of the Claims

[14] The Claimant Affidavits in Suits #1280/2012 and #1281/2012 were largely identical. They all spoke to the specific officer’s qualification for further promotion. Paragraphs 8 to 13 of the Affidavit of Barry Ian Hunte filed July 26th 2012 addresses the core allegations as follows:

- “8. I am aware that as a result of my success in the foregoing assessments and exercises that it was recommended to the Second Respondent/Defendant that I should be promoted to the rank of Assistant Superintendent in accordance with the rules of procedure and established practice.
9. Based on my success and on the recommendation made to the Second Respondent/Defendant I held the legitimate expectation that I would be promoted to the rank of Assistant Superintendent since it would only be in the most exceptional circumstances adverse to my interest as a candidate for promotion that the said promotion would not be confirmed by the Second Respondent/Defendant. I know of no such circumstances capable of disqualifying me from the said promotion that I fully expected to receive after the Second Respondent/Defendant would have been so informed of recommendation for the said promotion.
10. I am aware that during May, 2012 the First Respondent/Defendant met with a general assembly of police officers to inform, inter alia, of the existence of a high number of vacancies among the higher ranks of the Royal Barbados Police Force. It was also on this basis that I felt that my quest for promotion would not be in vain.
11. I am now also aware and shocked to discover that a significant number of the batch of police officers recommended for promotion have not been so confirmed by the Second Respondent/Defendant

and I am also further shocked to discover that that significant number of police officers have been replaced for promotion by other police officers who had not been so recommended in accordance with the rules and established practice. I have accordingly been a victim of discriminatory treatment.

12. I therefore fear that the process of promotion has been subject to interference and that my legitimate expectation for promotion has been defeated and my prospects have been extinguished by irregular intervention in breach of the rules and established practice.

13. I had always regarded with some discomfort the report in 'the Daily Nation' newspaper of January 12, 2012 which attributed to the Third Respondent/Defendant the statement that he was confident "that suitable replacements will be found for a number of pending senior positions in the Royal Barbados Police Force." The report also attributed to the Third Respondent/Defendant the statement that he had not yet sat down with the First Respondent/Defendant to discuss the promotions. I attach hereto a photocopy of the relevant page marked "BH 1".

[15] They all allege, further, that the failure to promote has been unlawful and "that discretion has been exercised unreasonably, irregularly, arbitrarily, improperly and in bad faith" resulting in "embarrassment , financial loss and severe injury to [my] career prospects as a police officer."

The Claimant's Affidavits in Suit #1316

[16] The Claimant, Errol Ellis, a Sergeant in the Royal Barbados Police Force provided the only Affidavit in Support of this Application. Paragraphs 10 to 16 of the same are set out hereunder seriatim:

"10. 7 persons were promoted from the 2010 recommendations, I was senior to the following persons: SSgt 928 Bradshaw, 628 Deane, 351 Craigg, 831 Gittens, 1063 Inniss, 1047 Dottin. I am unaware of anything that would recommend them to be promoted in advance of myself.

11. Since then I caused my Attorney at Law by letter dated the 10th July 2012 I wrote to the Public Service Commission pointing out that in the 1998, I was promoted to the position of Sergeant and as to date, even though I was eligible for promotion having obtained an average of at least 70% and a B+ in his exams and in the interview which I undertook I have been refused promotion. There is now shown and produced to me a true copy of the said letter and I append it hereto and mark it **Exhibit “EE1”**.
12. By letter dated the 19th day of July 2012 the Police Service Commission responded saying that I had been considered but not selected at this time. No reasons were given. There is now shown and produced to me a true copy of the said letter and I append it hereto and mark it **Exhibit “EE2”**.
13. I am also aware that Richard Boyce, Assistant Superintendent, Antonio Forte, Assistant Superintendent, Elphene Moore, Assistant Superintendent, John Maxwell, Assistant Superintendent, Vernella Wiltshire, Assistant Superintendent, Barry Hunte, Inspector Elliott Bovell, Inspector, Trevor Blackman, Inspector, Roderick Walcott, Inspector, Winston Holder, Station Sergeant, Vernon Moore, Station Sergeant, Wayne Archer, Station Sergeant, Sonia Boyce, Station Sergeant, Andrew Moore, Sergeant have all filed applications for similar relief to the relief I seek.
14. I have been told and verily believe that some time ago a senior officer was heard to say that she had recently received a double promotion. This turned out to be true as I understand she has not received her letter of appointment. This means that the PSC has recently made appointments/promotions and I have again been disappointed. Recent promotions would also mean that any available posts of Station Sergeant would have now been filled and I would again have to wait a further period which is unfair to me.
15. There are now about 23 members of the Force in the drug squad of which I am a member. The drug squad plays a crucial role in policing in Barbados. Within the drug squad there are promotions of officers who are junior to me and my seniors have been promoted and the post station sergeant has not been filled from within the squad. I have acted as station sergeant from time to time and I have always received a good report from my Superintendent Phillips who is head of the drug squad. All of these circumstances lead me to believe that there is something personal in all of this.
16. I am saying that the PSC has not acted fairly towards me and has not given me a fair hearing in relation to my promotion. There are a limited number of posts of Station Sergeant and I am fearful that if the current promotions are acted upon then the jurisdiction of this Honourable Court to grant me relief to which I may ultimately become entitled will be compromised. All I ask at this stage is that the Court grant an injunction to retain the status quo until the application can be heard.”

The Affidavits in Response

- [17] There are Affidavits in Response (both to the substantive claim and in support of the application for Interim Relief) filed by Commissioner Dottin (July 31st, 2012 (of which there are 2) and October 23rd, 2012), (then) Chairman of the Police Service Commission Sir Trevor Carmichael (July 31st, 2012, August 2nd, 2012, August 24th, 2012), and the Permanent Secretary in the Attorney General's Office, Ms. Diana Campbell on behalf of the named Respondents. (October 31st, 2014)
- [18] In addition thereto, Deputy Commissioner of Police Bertie Hinds (since retired) on August 27th 2012 filed an Affidavit in Support of the Police Service Commission against the application for an interim injunction.

The Issues Arising Therefrom

- [19] It is regretted that the parties, in the case management of this matter, failed to co-operate with each other in the conduct of these proceedings, and thereby failed to produce an agreed statement of the issues to be addressed in these consolidated actions.
- [20] Much like the Commissioner and his deputy and the Police Service Commission in 2009, two separate lists were produced to this Court.
- [21] At paragraph 43 of my decision of October 2014, I stated as follows:

“[43] There are complex issues to be addressed and explored in this action, being, inter alia, the boundaries of the doctrine of Legitimate Expectations...; the issue of the constitutional and statutory ousters being invoked by the PSC (that the PSC is constitutionally and statutorily

safeguarded from any inquiry by any court); whether the provisions of the Public Service Act are a condition precedent to the Court's jurisdiction in the hearing of this matter filed by the police officers (which raise complex issues surrounding the difference between a 'right' and a 'permission'); the nature of the remedies that can be granted by a court in applications of this nature. Not to be forgotten, is the primary issue, being the determination of whether the procedure adopted by the PSC contravened the police promotion regulations and the practice relating to the promotion of gazette officers.”

[22] I am still of the view that this paragraph encapsulates the issues to be determined in this case.

[23] A review of the two lists suggests to me that the issues outlined by the parties can be subsumed under the following four (4) heads:

1. The '*in limine*' submissions (whether the provisions of the Public Service Act are a condition precedent to the Court hearing this matter and the issue of the constitutional and statutory ouster clauses.);
2. The (respective) Legitimate Expectation Claims;
3. Whether the procedure adopted by the PSC contravened the Police Promotions Regulations and the Practice relating to the promotion of Inspectors and Gazetted Officers. (this encompasses the exploration of the law and whether there is a procedure and/or established "practice" as pleaded; and whether that practice was breached) and
4. What relief, if any, is available to the Claimants.

[24] By Order dated the 23rd October 2014 the parties agreed a core bundle of documents to be used at the trial, and by the Court in its review and determination of this matter.

The Oral Evidence and Disputes of Fact

[25] Eight [8] persons were tendered generally (or in some cases ostensibly) by way of amplification and cross-examination on their Affidavits.

[26] They were: Permanent Secretary in the office of the Attorney General, Ms. Diane Campbell, now former Chairman of the Police Service Commission Sir Trevor Carmichael QC, former Deputy Commissioner of Police Mr. Bertie Hinds, present Commissioner of Police (Ag) Mr. Tyrone Griffith, current Commissioner of Police Mr. Darwin Dottin, Claimant in suit no. 1316 Mr. Errol Ellis; representative Claimants in Suits 1280 and 1281 Mr. Richard Boyce and Mr. Vernon Moore.

[27] In the final analysis, there were few ‘relevant’ disputes of fact. There was a noticeable reluctance by the PSC to admit that there were two lists in 2012, while admitting that this occurred in 2009. As will be seen below, this pales into insignificance as the core issue became the ‘practice’ giving rise to a ‘Legitimate Expectation’: that in the event that the PSC did not follow the recommendations of the PAB and COP, that it would consult with the COP about any changes.

What is the role of The Police Service Commission (PSC)

[28] The rationale behind the establishment of Service Commissions in our Constitutions has been indelibly etched in our memories by **Lord Diplock** in the celebrated case of **Endell Thomas v AG of Trinidad and Tobago [1982] AC 113** where he stated as follows:

“The whole purpose of chapter VIII of the Constitution which bears the rubric “The Public Service” is to insulate members of the civil

service, the teaching service and the police service in Trinidad and Tobago from political influence exercised directly upon them by the government of the day. The means adopted for doing this was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments to the relevant service, promotions and transfers within the service and power to remove and exercise disciplinary control over members of the service... These autonomous commissions, although public authorities, are excluded by section 105(4) (c) from forming part of the service of the Crown.”

[29] The Police Service Commission has been established and provided with its power and authority by the Constitution of Barbados at **section 91** thereof which provides as follows:

“(1) There shall be a Police Service Commission for Barbados which shall consist of a Chairman and not less than two nor more than four other members, who shall be appointed by the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition by instrument under the Public Seal.
(2) No person shall be qualified to be appointed as a member of the Police Service Commission if he is a member of either House or a public officer.”

[30] Also significant is **Section 96** which provides as follows:

“Subject to the provisions of this Constitution, power to make appointments to offices in the Police Force and to remove and to exercise disciplinary control over persons holding or acting in such offices, is hereby vested in the Governor General, acting in accordance with the advice of the Police Service Commission.”

[31] The Governor General therefore, is the person/authority who indisputably, under **Section 96** is concerned with matters of appointment, promotions and discipline in the Royal Barbados Police Force, acting on the recommendation of the PSC.

[32] **Sections 4(1)(a) and 5 of the Public Service Act** are also relevant and they state as follows:

“4 (1) The Public Service shall be managed by the
(a) Service Commissions in accordance with their functions under the
(i) *Constitution*;
(ii) *Services Commissions (Public Service) Regulations, 1978*; and
(iii) *Services Commission (Police Service) Regulations, 1964*; and
(iv) *the provisions of the Codes as set out in the Schedules to this Act*”

[33] **Section 5** provides:

“5. Each Commission, in carrying out its functions mentioned under section 4(1)
(a) Shall be responsible for giving such advice or making such recommendations as the case may be, in respect of appointments in the Public Service in both established and temporary offices.”

[34] The interpretation and import of **Regulation 7 of the Service Commissions (Police Service) Regulations, 1964** is central to this Court’s assessment of that body’s actions in the determination of these several actions. That section provides as follows:

“7. The Commission in considering any matter or question may consult with such public officer or other person as the Commission considers proper and desirable and may require any public officer to attend and give evidence before it to produce any official documents relating to such matter or question.”

[35] Paragraph 16 of the affidavit of the (then) Chairman Sir Trevor Carmichael QC filed July 31st 2012 speaks to his view of the role and functions of the Commission as follows:

“16. ... The practice has always been that PSC will receive recommendations for promotions from the Commissioner of Police as well

as those officers who are within the “zone of selection”. Normally these recommendations will be made through a Promotions Advisory Board, Section 12 of the Police (Promotion) Regulations, 1998 Cap. 167. On occasion it will be necessary to invoke the provisions of section 7 of the Service Commissions (Police Service) Regulations 1964 Cap 34 so that the PSC can be fully seized and informed in order to exercise all of the considerations necessary before making its recommendations to the Governor General.”

[36] It bears repeating here as set out at paragraph [34] above, that in carrying out its functions the PSC “may consult with such public officer or other person as the Commission considers proper and desirable.” Interpreted, Commissioner Carmichael was emphasizing that the Commission can inform itself in such manner as it considers ‘proper and desirable’ in identifying officers for promotion.

[37] Stated differently, it can be said that **Regulation 7** establishes the PSC’s right/power to regulate its own procedure in this respect. It was not constrained simply to receive the Commissioner’s list and recommendations and act only on that information.

The Rules Relating to Promotion

[38] All parties appear agreed that the Rules relating to the promotion of officers in the Royal Barbados Police Force are best and most accurately set out in paragraphs 20 and 22 of the Affidavit of Darwin Dottin filed

on the 31st July 2012. (see *inter alia*, the evidence of Tyrone Griffith Commissioner of Police (ag) and Ms Diana Campbell, Permanent Secretary at pages 13-168 of the transcript of evidence).

[39] It states as follows:

“20...

Promotion of Subordinate Police Officers, such as Sergeants and Station Sergeants is governed by The Police (Promotions) Regulations, 1998 and the procedure therein contained. In respect of Inspectors and Gazetted Officers, excluding the Commissioner, there are no regulations or other statutory provisions. The practice since 1998 has been for the Commissioner to make recommendations for the consideration of the Commission. It is to my knowledge that the Commission has, on occasions, interviewed candidates who have been recommended and even others who have not been recommended. **On occasions when the Commission has contemplated not to accept the Statutory Short List of Officers recommended for promotion, the Commission has consulted with the Commissioner. (my emphasis)**

22. The Police Promotion Rules set out the procedure for dealing with promotions in the RBPF. The rules apply to officers below the rank of Inspector. They provide for a Promotions Advisory Board (“the Board”). The Board is chaired by the Commissioner of Police. Other members may include the Deputy Commissioner or an Assistant Commissioner and a Superintendent. An Official List of recommendations for promotions is sent under the hand of the Commissioner to the Commission through Permanent Secretary in the Office of the Attorney General to the Chief Personnel Officer whose office provide the Secretariat to the Commission.”

[40] The above reflects the provisions of **The Police (Promotions) Regulations, 1998 Cap 167. Regulation 2** for example, provides as follows:

“2. In these regulations

“officer” means a member of the Police Force below the rank of Inspector.

“promotion examination” means any examination required to be taken for the purpose of qualifying for promotion in accordance with these Regulations;

"zone of selection" includes those persons who are entitled to be considered for promotion by reason of having passed the appropriate promotion examination.”

[41] And **Regulation 3**:

“These regulations apply to the promotion of officers to a rank not higher than that of Inspector.”

[42] The **Police Act Cap. 167** speaks of a “subordinate police officer” defined at **section 2** thereof as ‘a member of the Police Force of the rank of Station Sergeant or Sergeant”.

[43] **Regulation 4** deals with Promotion of officers; **Regulation 5** deals with Qualified Candidates; **Regulation 6** with Promotion examinations (special provisions being made for officers in the Police Band); **Regulations 7 and 8** the Examination Board and Examination results.

[44] **Regulation 9** calls for special mention, as it speaks to the Zone of Selection as follows:

“9. Qualified candidates who have passed the appropriate promotion examination shall be in the zone of selection from the date of passing the examination and shall remain in the zone of selection, without having to sit another promotion examination, until promoted.”

[45] **Regulation 10** speaks to the process of the Promotions Advisory Board, in requiring reporting officers to provide biannual reports for prescribed

periods and in a prescribed form to the Promotions Advisory Board in respect of every officer below the rank of Inspector.

[46] **Regulation 11** details a process for the handling of Adverse Reports.

[47] **Regulation 12** sets up the Promotions Advisory Board, its composition and its process in the assessment and recommendation of officers for promotion. **Regulation 12 (6)** provides a non-exhaustive list of criteria for the consideration of the Board as follows:

“(6) The Promotions Advisory Board shall, whenever necessary, compile in order of merit, a list of the names of the officers they recommend for promotion based on

- (a) the officers’ performance at the interview referred to under paragraph (2);
- (b) any credit awards of the officer,
- (c) the general performance of the officer;
- (d) any special course of training that the officer has taken;
- (e) the officer’s examination results;
- (f) the officer’s last report;
- (g) the duties assigned to the officer;
- (h) any letter of commendation received by the officer;
- (i) the disciplinary records of the officer; and
- (j) any other relevant matters.”

[48] **Regulation 13** and its import also calls for special mention:

“The Commissioner shall submit to the Police Service Commission

- (a) A short list of the names of the officers that the Promotions Advisory Board recommends for promotion; and
- (b) Any information which the Commission may require for the purposes of these regulations.”

[49] This list of recommendations is sent by the Commissioner to the Police Service Commission through the Permanent Secretary in the Office of

the Attorney General to the Chief Personnel Officer, whose office provides the Secretariat to the Police Service Commission.

[50] Counsel for the Commissioner of Police and the Attorney General submits, and this Court accepts, that neither the Promotions Advisory Board or the Commissioner of Police have the authority or power to make appointments in the Royal Barbados Police Force. It is not to be disputed that there is no evidence suggesting that the PSC has delegated its authority to either the COP or the PAB.

[51] Why then should it be advanced as an argument that the PSC is bound to confirm the list provided by the Commissioner and advise the Governor General accordingly? (See Written Submissions of counsel for the applicants in #1280/2012 and #1281/2012).

[52] This is the core issue on which there is commonality between all the parties and it is this: a list having been provided by the Commissioner of Police, is there ‘an accepted practice’ that should the PSC query that list, “as a non-executive body, it must consult the Commissioner.” Stated differently, that the “Police Service Commission cannot act unilaterally and alter that list without such consultation with the Commissioner”; that the PSC acted unlawfully when it carried out its own assessments and evaluations of named officers and this constituted

clear evidence of the PSC's infringement of the law, procedure and practice in relation to promotions.

[53] Interestingly, it can be observed that there are no allegations or further and better particulars speaking to any specific contravention of the Regulations outlined above. The allegations merely speak to the failure to "rubber stamp" the Short List, of (the substantive) Commissioner Dottin; and his submission that he should have been consulted by the PSC if they purported to depart from his List; and therein lies the nub of this matter. There is no evidence or allegation, for that matter, that the COP failed to perform his role or that he acted improperly, unreasonably, improperly etc. Curiously, there is an absence of any allegation of wrongdoing by the COP, which begs the question: why was he made a Defendant in this action?

The Practice as it relates to Senior Officers

[54] As above mentioned, the Police Promotion Regulations relate to subordinate officers.

- [55] **Section 2** of the **Police Act Cap 167** defines “gazetted police officer” as “the Commissioner, the Deputy Commissioner or any Assistant Commissioner or Superintendent of Police.”
- [56] It is noted and agreed that there are no statutory regulations setting out the procedure for promoting Inspectors and Gazetted Officers. The Police Promotions Regulations do not vest in the PAB any authority in this regard.
- [57] The Commissioner of Police is the person who makes recommendations for the promotion of Inspectors and Gazetted Officers for the consideration of the Police Service Commission.
- [58] Permanent Secretary in the Office of the Attorney General, Ms. Diane Campbell speaks to the process of promotion in the Royal Barbados Police Force in her Affidavit herein as follows:

“7. I am advised by Counsel for the First and Third Respondents that officers in the Royal Barbados Police Force are recommended for promotion and promoted pursuant to the provisions of the Police Act Cap 167 of the laws of Barbados and the Police (Promotions) Regulations, 1998.

8. There is also an established practice concerning the recommendation of Gazetted officers eligible for promotion in the Royal Barbados Police Force.

9. The Procedure for appointment on promotion in the Royal Barbados Police Force is set out in paragraphs 20 and 22 of the Affidavit of Darwin Dottin filed on the 31st day of July 2012.”

[59] The process/practice as it relates to senior officers is as outlined by Commissioner Dottin at para. 20 already cited above at and at para. 27 of his Affidavit of July 31st 2012 as follows:

“With respect to the recommendations for promotion of senior or gazette officers, I first met and consulted with the Assistant Commissioners and, thereafter, on 10th April 2012, I met separately with Mr. Hinds to discuss with him a list of senior officers to be recommended for promotion to the senior ranks...”

[60] In so doing, he is exercising the authority vested in him by **section 8** of the **Police Act Cap. 167**, for the command and superintendence of the Force.

[61] The ‘practice’ appears to be, that he may, and does in fact, seek the opinion of his senior officers, although it is noted that there is no statutory requirement to do so.

[62] And at paragraph 25 he states as follows:

“On 11 April 2012, I submitted recommendations for promotions to the Commission in the usual way. These recommendations followed deliberations of the Board which comprised the following persons: (a) Commissioner of Police; (b) Deputy Commissioner Hinds and (c) Senior Superintendent Lionel Thompson. The Board interviewed over 100 candidates including certain candidates who were already in the “zone of selection”. The final selection was made in circumstances where members of the Board participated in the process.”

[63] At paragraph 5 of his Affidavit of August 27, 2012 Deputy Commissioner Hinds has this to say about the process of promotion for senior officers:

“5. The promotion of all ranks to the level of Inspector is governed by the application of the Police (Promotions) Regulations 1998 Cap 167 of the Laws of Barbados. Promotion to ranks above Inspector level that is gazetted officers is the subject of practice developed over the years which the PAB exercises when making recommendations for considerations by the PSC.”

[64] This however differs somewhat from the evidence of Commissioner Dottin and this Court accepts the evidence of (then) Commissioner Dottin on this issue, as corroborated by PSC Chairman Sir Trevor Carmichael and Permanent Secretary Diana Campbell. At para. [6] former Deputy Commissioner Hinds outlines the Practice as follows:

“... The normal practice that the PAB exercised in discussing suitability for promotion was by way of rank and hierarchy. For example a Senior Superintendent would be canvassed as suitability for a candidate for the role of a Superintendent and so on. However all ranks for Senior Superintendents and above remained reserved solely for the Commissioner and Deputy Commissioner. This was the practice that I had inherited from the current Commissioner of Police and this was the practice that was followed by the PAB in 2005 for promotions effected in the year 2006.”

[65] This Affidavit was used by the Deputy Commissioner to level several accusations at the Commissioner for his abnegation from the accepted ‘practice’ and sheds much light on the poor and deteriorating relationship between these two persons.

[66] His evidence of the ‘practice’ is rejected. In any event, ‘the practice’ the subject of this complaint relates not to the actions of the COP, but rather that of the PSC.

[67] It appears undisputed that of the sixteen (16) Claimants, 6 are subordinate officers, four are Inspectors, five are Assistant Superintendents, and one is a Superintendent in the Royal Barbados Police Force. In other words, the majority of the Claimants are Gazetted Officers.

The “*In Limine*” Submissions

[68] There are two such submissions made by counsel for the PSC as follows:

- 1. Whether the failure to comply with General Orders which is a breach of the Public Service Act, is a condition precedent to the Court’s jurisdiction in hearing the matter filed by the Claimants?**

[69] Counsel for the PSC submitted and argued that the failure of the Claimants to comply with the General Orders was a breach of the Public Service Act, and a condition precedent to this Court’s jurisdiction in hearing the three actions filed by the Claimants.

[70] By way of background, it is to be noted that **Order 3.20** of the **General Orders of the Public Service** provides as follows:

“No steps may be taken by officers to institute civil proceedings in any Court in connection with matters arising out of the discharge of their public duties, or against a Minister or Permanent Secretary or the Head of any Government Department or other officer, for anything done in the performance of his duty, unless and until the sanction of the appropriate Service Commission has been obtained.”

[71] A warning shot was clearly fired at the Claimants when counsel on behalf of his client, the PSC, made special reference to **Section 11(1)(c)** and Third Schedule (Code of Discipline in the Public Service) **Section 2 (h)** of the **Public Service Act** which with effect from December 2007 established the Code of Discipline of the Public Service. The message sent (and received), is that the Claimants have been deemed by the PSC to be in breach of this Code and are likely to be disciplined for “misconduct of a serious nature”, which counsel generously defines in his Written Submission as follows:

“1. In the Code,

“misconduct of a serious nature” means conduct that warrants the dismissal of the offending person and, in addition to the misconduct specified in paragraph 27(b)(i) of the Code of Conduct and Ethics, included the following: (h) failure to observe any laws, orders, rules, or regulations governing the Public Service;”

[72] The Court is of the opinion that there is a constitutional, statutory and regulatory framework for the discipline of public servants, which must be complied with. This Court has no authority (at this time) to make findings as to whether the Claimants are guilty of ‘misconduct’. The

effect of counsel for the PSC's submissions is that he is erroneously inviting this Court to make such a finding.

[73] What is of more concern to this Court, is the submission of counsel for the PSC that Claimants' contravention of the Code of Discipline invalidates the Claimants' application for Judicial Review. Stated differently, he argues that a breach of the provisions of the Public Service Act, which governs the conduct of officers, prevents this Court from exercising its jurisdiction in this matter.

[74] Besides the fact that such submission assumes a finding of fact that this Court is not empowered to make, (because the constitutionally guaranteed disciplinary procedure has NOT yet been invoked) for reasons given below, this Court strongly rejects that submission.

[75] This, in my opinion, is simply an issue of Access to Justice, which is a fundamental constitutional Right. A 'Permission' should never be a condition precedent to the exercise of a 'Right' that is as old as the **Magna Carta 1215, Chapter 40** of which states:

"To no one will we see, to no one will we deny or delay right or justice."

[76] **Lord Diplock** speaks directly to this issue in **Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp Ltd [1981] 1 All ER 289, HL at 295** as follows:

“Every civilized system of government requires that the state should make available to its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff’s choice; if he chooses to do so, the defendant has an option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.”

[77] The import of counsel’s argument can only promote the undesirable result that guidelines and/or regulations governing the activities of a group, can take precedence over an Inherent Right and the jurisdiction and authority of the Supreme Court.

[78] Such an argument is strongly rejected by this Court. Public service internal regulations governing the conduct of police officers cannot operate to deny access to the courts for redress of a perceived wrong. While a police officer who institutes action in contravention of a staff order may well render himself vulnerable to internal discipline, the court cannot by reason of this treat the action so commenced as invalid.

2. The argument that the Constitutional and Statutory Ouster Provisions prohibit this Court from inquiring into the Claimants’ claim for Judicial Review.

[79] In this submission counsel for the PSC relies on **section 106** of the **Constitution of Barbados**, an Ouster provision or “Non certiorari clause” providing as follows:

- “1. The question whether-
- (a) any Commission established by this Chapter has validly performed any function vested in it by or under this Chapter;
 - (b) any person has validly performed any function delegated to him in pursuance of the provisions of section 95 or 97, as the case may be; or
 - (c) any member of such a Commission or any other person or authority has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in paragraph (b),

shall be enquired into by any court.”

[80] The statutory ouster provision relied on by counsel for the PSC can be found at **Section 13 of the Administrative Justice Act, Cap. 109B** as follows:

“13. It is the duty of any person or body making a decision to which this section applies, if requested in accordance with section 14 by any person adversely affected thereby, to supply to that person a statement of the reasons for the decision.

(2) This section applies to any decision that is required by law (including any enactment) or by contract to be made in accordance with the principles of natural justice or in a fair manner with the exception of

(b) any such decision as is specified in the First Schedule.”

[81] The First Schedule lists the following exceptions:

“(a) any decision other than a decision relating to a disciplinary matter made by

- (i) the Judicial and Legal Service Commission;
- (ii) the Public Service Commission;
- (iii) the Police Service Commission;
- (iv) the Statutory Boards Service Commission;
- (v) the Defence Board or any other authority under the Defence Act.”

[82] This Court has on several occasions ruled on the issue of Ouster Provisions (non certiorari clauses), most recently in an unreported decision of December 17th 2012 in the case of **Raul Garcia v Minister Responsible for Immigration and the Chief Immigration Officer No. 1666 of 2012**, where *‘in limine’* submissions of similar import were made.

[83] The celebrated/seminal case of **Anisminic v Foreign Compensation Commission [1969] 2 AC 147**, and a number of notable cases since that time, have made it trite law that Ouster Clauses are open to challenge, especially where the actions of public authorities go outside of their jurisdiction. This was the case in **Anisminic** where **Lord Reid** concluded that the ouster clause therein did not hinder the supervisory jurisdiction of the Court where the decision of the tribunal was a nullity and where he made the following (often quoted) statement at **page 170**:

“It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly-meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.”

[84] In **Anisminic**, the reasons for excluding judicial review appeared to be that payments awarded claimants were discretionary and that it would be undesirable for the calculations made by the Commission for

distribution of the limited sums at its disposal to be upset by successful applications to the Court. The House of Lords held that the exclusionary formula did not apply to a “determination” that was a nullity, because it was not one that the Commission had jurisdiction to make.

[85] **Anisminic** and other celebrated cases have demonstrated how jealously the Courts guard their inherent supervisory jurisdiction of inferior bodies, how they guard the subject’s right of access to the court, and how they guard the principles enshrined in our Constitutions: see also **Hinds v R [1977] AC 195** and **Thomas v AG of Trinidad and Tobago [1989] WIR 375**; **Joseph and Boyce v Attorney General of Barbados [2006] CCJ1**; **O’Reilly v Mackman [1983] 2 AC 237**; **Barnard CJ in RE: Aubrey Norton GY 1998 HC 1**; **Blackman J in Re Bain TT 1987 HC 132**. This observation is also particularly relevant to the question raised at para [68] above.

[86] As enumerated by this Court in **Raul Garcia v the Minister Responsible for Immigration and the Chief Immigration Officer No. 1666 of 2012**, the Learned Author of **Commonwealth Caribbean Public Law 3rd ed at page 77** lists (10) exceptions, which by their nature preserve the jurisdiction of the Supreme Courts where ouster clauses exist (the most commonly applied being breaches of the rules of natural

justice or the fundamental rights and freedoms enshrined in the Bill of Rights: **Thomas v Attorney General of Trinidad and Tobago (supra)**).

[87] In this case, I follow the position already taken by this Court in **Brathwaite v AG and Raul Garcia v Minister Responsible for Immigration and the Chief Immigration Officer** where I followed the position of the Court of Appeal in **Judy Lloyd v The Attorney General, Civ App #9 of 1998** where on the same point **Chief Justice Williams** stated:

“These considerations may have weight when the substantive matter is heard and the Court has to decide whether to grant the relief. But the fact is that section 8 makes no provision for the Court to take such considerations into account before it is called upon to decide the questioning of substantive relief.”

[88] The preliminary (in limine’) submissions are therefore denied and this Court will proceed to assess the substantive submissions.

The Claim in #1280/2012 and #1281/2012 of a Legitimate Expectation[s]

[89] The Claimants in #1280/2012 and #1281/2012 represent persons forming part of the list submitted by Commissioner of Police Darwin Dottin, who were not promoted by the Police Service Commission. Their counsel submits: “The Police Service Commission removed the names of the several Applicants from among the lists of persons

recommended for promotion and substituted the names of persons who had not been so recommended by the Commissioner of Police”.

[90] This is a purposely provocative description of the event and the evidence suggests differently, (COP Dottin, former deputy Hinds and the Chairman all deny the existence of a second list in 2012) and this Court finds this to be a more accurate re-statement of events: a list was submitted to the PSC, that of Commissioner of Police Darwin Dottin. Subsequently, Deputy Commissioner of Police Hinds sought audience with the PSC, which subsequently sought audience with the PAB. There is no accurate statistical analysis of what proportion of the Commissioner’s list was selected by the PSC, but this Court accepts that persons from that list together with other persons were promoted.

[91] At paragraph [30] of his Affidavit of October 23 2012 COP Dottin alleges that there were twenty-one variations from the shortlist he forwarded. This assertion is challenged by Chairman Carmichael in his Affidavit of August 2nd 2012 where he asserts at paragraph [22] thereof that the “... PSC preserved 50 of the 68 recommendations made through the office of the First Respondent/Defendant; in effect almost 74 % of the recommendations received were agreed by the PSC”.

[92] This significant evidence was given by its (then) Chairman Sir Trevor Carmichael, when being cross-examined by counsel Mr. Ralph Thorne Q.C.:

“At the end of the day it comes back to the point that I have made, the Police Service Commission had to look at matters in their totality and make sure that we as a body was satisfied that the persons who in our minds were the proper and correct persons to be recommended for promotion were so recommended ... And it didn’t matter, to be quite candid, whether they were on Mr. Dottin’s list or Mr. Hinds’ list, it didn’t really matter.”

[93] The argument of counsel for these Claimants is that before doing so, they failed to consult with the Commissioner of Police.

[94] They thus seek a Declaration that the decision of the PSC is invalidated on the various grounds referred to at **section 4** of the **Administrative Justice Act, Cap. 109B** of the **Laws of Barbados**.

[95] They argue further that they had a ‘Legitimate Expectation’ that they would be promoted and ask the Court to give effect to the recommendations of the Commissioner of Police and thereby make effective their promotions.

[96] Their claim to the ‘expectation’ that they would be promoted was buttressed by the evidence of officers Richard Boyce and Vernon Moore, nominated by the collective officers to give evidence for themselves and on behalf of the several Claimants/Applicants. Their evidence is that they were informed by Human Resource Officer, Senior

Superintendent Acting, Mr. Jedder Robinson that they had been **recommended** (my emphasis) for promotion. They both expressed that they treated Mr. Robinson as a person in authority, having responsibility for matters of personnel, and they relied on the information and therefore had the expectation that they would be promoted. It was also their evidence (significant in my opinion) that the PSC never communicated with them concerning the recommendation. I have already observed that at no time did the PSC delegate its authority to the COP or the PAB.

[97] Ironically, Jedder Ferneaux Robinson is the Claimant in suit #1281; but he gave no evidence in this matter and shed no light on this issue.

[98] Counsel's submission was, *inter alia*, that the evidence (affidavit and oral) would have given rise to the 'Legitimate Expectation' held by the Applicants that they would have been promoted. He states in his Written Submissions: "... when a police officer is recommended for promotion, and is so informed, certain rights, interests and legitimate expectation accrue thereafter".

[99] Counsel argued on the authority of **Cooper v Wandsworth Board [1863] 143 ER 414, Wiseman v Borneman [1971] AC 297, and Lloyd v McMahon [1987] 1 A11 ER 1118** that the principles of natural justice must be read into the promotions procedure (both as it relates to the

Police (Promotions) Regulations 1998 and the Public Service Act, 2007-41) as it relates to recommendation and confirmation; in other words, “where the Commission raises questions or doubts in relation to a particular recommendation it must treat the recommended officer fairly and give him or her the right to make representation and that representation is properly to be made during the statutory process of the consultation between the Commission and the Commissioner of Police.”

The Claim in #1316/2012 of a Legitimate Expectation[s]

[100] The Claimant Errol Ellis, as already stated, is a Sergeant of Police; a non-gazetted officer. He deposes, (and it has not been disputed) that he is within the ‘zone of selection’ and has been for some time: he has satisfactorily completed all his examinations and pre-qualified for the rank of Station Sergeant since 2008. The PAB recommended him for promotion on 3 occasions, but he has never been promoted.

[101] This is an interesting bit of evidence that immediately challenges the submission of counsel for #1280/2012 and #1281/2012 that the recommendation for promotion, in and of itself accrued “certain rights, interests and legitimate expectations.” This submission to a large extent conflicts with his submission at page 4 of his Written Submissions that “there is no right to promotion” and the evidence of one of his witnesses

(the Claimant Richard Boyce and Station Sergeant Vernon Moore) that not every recommendation led to promotion. (See pages 789 to 824 of the transcript). It further conflicts with the evidence that in some cases more than one person was recommended for promotion to certain vacant posts. It is a given fact that there are generally fewer vacancies than candidates (see evidence of Commissioner Dottin at page 637 of the transcript of evidence).

[102] Like the Claimants in #1280/2012 and 1281/2012, this Claimant alleges that there is a procedure which is followed in considering promotions within the force, which includes a reference back to the Commissioner of Police in the event that the PSC wishes to ignore the recommendations of the PAB. Since this did not happen, on this basis alone the Claimant is entitled to the declarations sought.

[103] He alleges that the nine persons promoted in 2009 were all junior to him. Six of the seven persons promoted in 2010 were junior to him. He has never been told why or given an opportunity to be heard.

[104] He submits, that if the PSC was awarding promotions on merit he would have every 'Legitimate Expectation' that he would have been promoted.

[105] When his attorney queried his lack of promotion with the PSC, they responded by saying that this Claimant had been considered but not

selected at this time. No reasons were given by the PSC. And this Court observes that the PSC was acting well within the law to take such a position in the context of the statutory provision to be found at **Section 13** and the **First Schedule** of the **Administrative Justice Act, Cap. 109B**.

[106] It also bears noting here, that there is a procedure allowing an officer in the position of Sergeant Ellis (that is in the zone of selection, recommended but not promoted) to seek audience with the PSC. Sergeant Ellis opted not to do this, but instead came directly to the High Court for judicial review.

[107] That Claimant Ellis was himself aware of such a procedure can be found at page 779 of the transcript of the evidence where he states under cross-examination:

“... Ma’am I am not sure if that is right because I have heard persons going to the Service Commission and having an audience with them and some sort of dialogue.”

(See further line 23 of page 779 of the transcript of evidence).

[108] Had he not been recommended by the PAB/COP, there was also a procedure for being heard by the COP. Deputy Commissioner Hinds (see page 66 of the transcript) told the Court that ‘it is his experience that officers who are not promoted seek explanation from the COP’.

[109] Curiously, this Claimant does not speak to whether there were any changes in the 2009 recommended list (even though we have the admission of the PSC that in 2009 there were two lists), and whether the PSC consulted with the COP about such. In other words, he submits strongly, that the PSC in 2012 never followed the recommendations of the PAB, and never reverted back to the COP to discuss why the recommendation of the PAB was not to be followed. While this Court observes that this is unacceptable hearsay evidence (it was however corroborated by the evidence of Chairman Carmichael) it makes the point that if this was indeed the case, surely this would be proof positive that there is no such ‘practice’ as alleged by all Claimants in these consolidated actions.

[110] Stated differently, the strongest evidence against the case for the Claimants of #1280/2012 and #1281/2012, is provided by the Claimant in #1316/2012. (See paragraph 17 above, setting out paragraphs 10 to 16 of the Affidavit of Errol Ellis and the submission at para 2.3 of his counsel’s submissions that the evidence establishes that “although he was recommended by the PAB, the PSC never followed those recommendations and never reverted back to the COP to discuss why the recommendation of the PAB was not to be followed”.) Not only

does this submission raise the age-old issue of seniority v merit, (or supersession) it is showing that being within the ‘zone of selection’ and being recommended for promotion does not create a ‘Legitimate Expectation’ of promotion. It however, raises the question whether an officer in these circumstances is entitled to a hearing by the PSC to address his ‘non-promotion’. This must be answered in the affirmative.

[111] This Claimant makes a further submission for consideration, that he is entitled to an opportunity to be heard as to why he has not been promoted and that his application for promotion be reconsidered: the Natural Justice point. In this regard, he invokes section 11 of the Constitution which he submits give him a ‘Legitimate Expectation’ of a fair and transparent adjudication of his application for promotion.

[112] In answer to this, counsel for the PSC argues that the act of promotion is an administrative or executive function, not a judicial decision that is subject to the principles of natural justice. In this regard, I agree with the submission of counsel for this Claimant that these distinctions are no longer relevant. Natural justice now means no more or no less “than the duty to act fairly...”: **Lord Diplock in O’Reilly v Mackman.**

[113] In so doing he makes reference to and relies heavily on **Narine J.** in the case **Mohanlal Bhagwandeem v the Commissioner of Police HCA No.**

37 of 2000 (Trinidad). (Overturned by the Trinidad Court of Appeal which was affirmed by the Privy Council). This ruling spoke to the finding that, if the Commissioner of Police failed to give his reason for omitting an officer or if he does not give his real reason for so doing, his breach could also lead to unfairness and/or a breach of natural justice. If an officer is not informed of the reason for his omission, then he cannot direct his mind to that reason, with a view to either informing his performance, qualifications or efficiency, or if he is aggrieved, to availing himself of the procedure of review of the decision of the Commission.

[114] This case speaks directly to the Natural Justice submission of counsel for the Claimant in #1316/2012 but can be distinguished simply on two grounds: firstly, it speaks to a breach by the Trinidad COP of Regulations 15(2) of their Police Service Commission (Amendment) Regulations 1995 (there is no allegation here that the COP breached the Regulations although he has been made a Defendant in this action); Secondly, this case does not address the real issue as it relates to Claimant #1316/2012 that is, the statutory ouster clause, exempting the Police Service Commission from providing reasons for its decision. This claim differs from #1280/2012 and #1281/2012, because it raises

issues of supersession (seniority v ability/merit); the role of Natural Justice in the process of promotion (the right to be heard on reasons for non-promotion); as well as the ‘practice’, referenced by all Claimants.

[115] Additionally, **Lord Carswell in Bhagwandeem v The Attorney of Trinidad and Tobago Privy Council Appeal No. 45 of 2003**, established that a Claimant who alleges inequality of treatment or discrimination **MUST** establish that he has been or would be treated differently from other similarly circumstanced persons described by **Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 ALL ER 26**, as actual or hypothetical comparators. Proof of ‘mala fides’ is not always necessary, but the Claimants must establish on a balance of probabilities that they were true comparators. This burden was not discharged by this Claimant on the balance of probabilities.

The Burden of Proof

[116] In **Paponette v Attorney General of Trinidad & Tobago [2010]**

UKPC 32, Sir John Dyson SCJ defined the burden in the following

terms:

“The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear unambiguous and devoid of relevant qualification. If he wishes to reinforce his case

by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to identify any overriding interest on which it relies to justify the frustration of expectation. It will then be a matter for the court to weigh the requirement of fairness against that interest.”

A Review of the Law on Legitimate Expectation

[117] It can hardly be challenged if I state that the law of Legitimate Expectation is not yet fully birthed. It has been described by the Hon. Mr. Justice Michael de la Bastide, President of the Caribbean Court of Justice (as he then was) as “a product of judicial inventiveness designed to fill a gap in the protection which the courts offer against arbitrary action by public officials and authorities with power to make decisions that affect others.”

[118] The Learned Author of **Commonwealth Caribbean Public Law, 3rd edition**, Professor Albert Fiadjoe makes this observation:

“Review for legitimate expectation is thus designed to ensure a harmonious marriage between the policy objectives of the State and the Expectations of the individual.”

[119] A useful review of the law on Legitimate Expectation can be found at paragraphs 85 to 113 of the judgment of **Crane-Scott J.** in **Jerry Bruce Emtage, FRCS v Queen Elizabeth Hospital Board [Unreported] Suit CV 1033 of 2010.**

[120] At paragraph 92 **Crane-Scott J.** reminds us that the evolution of the said doctrine of “Legitimate Expectation” was traced by **Simmons, CJ** in **Pearson Leacock v Attorney-General 68 WIR 181** (see paragraphs 31 to 48) and observes that this case showcases the fact that the Barbadian Courts have no difficulty in assuming jurisdiction under the **Administrative Justice Act** to review the actions complained of and to grant relief on grounds which include the doctrine of “Legitimate Expectation”.

[121] On the strength of this decision, Crane-Scott J. further observed that it is permissible in Barbados for an applicant to invoke the doctrine of “Legitimate Expectation” as a specific ground for relief upon an application for judicial review, notwithstanding that the term, “legitimate expectation” does not appear among the several grounds listed in **section 4** of the **Administrative Justice Act**, for which the High Court may grant relief upon an application for judicial review.

[122] In this regard, this consolidated action is clearly and fundamentally distinguishable from the case of **Jerry Emtage FRCS v Queen Elizabeth Hospital Board HCV 1033 of 2010** cited by and heavily relied on by Counsel for the Claimants in #1280/2012 and #1281/2012. In that case, the claim of ‘Legitimate Expectation’ was powerfully

buttressed by pre-existing contracts showing consultancy services to the Hospital on a continuous basis, and upon largely the same terms and conditions over a period of 19 years. On each such occasion the contract was renewed subject to the completion of mere formalities. Thus, **Crane-Scott J** readily found that the Court was satisfied that the Applicant therein had a ‘Legitimate Expectation’ (both substantive and procedural).

[123] The circumstances of **Pearson Leacock v Attorney General** can also be distinguished on a purely evidential basis. It is to be noted that in his judgment, the Learned Chief Justice (as he then was), was at pains to express his “unease about the evidence in the affidavits filed on behalf of the commissioner when weighed against those of Mr. Leacock.” Also, there was in existence and taken into account a document titled a Policy on Leave from Work for the purpose of Studying issued by the Permanent Secretary in the Ministry of Civil Service to all Heads of Department which set out clearly the policy to enable public officers to pursue higher education while working in their substantive employment. The Chief Justice based his decision on the affidavit evidence submitted, to which he applied the balance of probabilities test and found the evidence submitted on behalf of the Commissioner of Police to be

wanting. In this case, there was no dispute that there was an established practice of many years standing on which the Claimant's claim of 'substantive legitimate expectation' rested. It was the finding of the Honourable Chief Justice that there was "uncontroverted evidence of the practice".

[124] It is to be noted that "Legitimate Expectation" may be either Procedural or Substantive.

[125] The concurring judgment of Lord Carnwarth at paragraphs 79 to 122 in the recent Privy Council case of **The United Policyholders Group and others v The Attorney-General of Trinidad and Tobago**, in the claim by CLICO shareholders that assurances of support for CLICO by the then government amounted to a "Legitimate Expectation" enforceable in law, provides an excellent review of the modern law of Legitimate Expectation.

[126] And we note, as stated by Learned Author Professor Eddy Ventose in his text "**Commonwealth Caribbean Administrative Law**", "that the developments in the Caribbean have followed the approach of the United Kingdom courts, except in the context of the Bill of Rights."

[127] Lord Carnwarth adopted the statement of principle enunciated by Lord Fraser in the Privy Council case of **Attorney-General of Hong Kong v**

Ng Yuen Shiu [1983] 2 AC 629 in defining Procedural Fairness in the context of Legitimate Expectation as follows:

“The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.”

[128] In looking at Substantive Legitimate Expectation, Lord Carnwath noted its emergence as a substantive area of law following the decisions of **R v Secretary of State for the Home Department, Ex p Asif Mahmood Khan [1984] 1 WLR 1337 CA** and **R v Secretary of State for the Home Department, Ex p Ruddock [1987] 1 WLR 1482**; and its later recognition by the House of Lords at the turn of the century: see **R v Ministry of Defence Ex p Walker [2000] 1 WLR 806**; **R v Secretary of State for the Home Department, Ex p Zequiri [2002] UKHL 3**; **R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2003] 1 WLR 348**.

[129] On the definition and scope of Substantive Legitimate Expectation, he adopted the dicta of Lord Hoffmann in **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61**, where he stated as follows:

“It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is “clear, unambiguous and devoid of relevant qualification”; see **Bingham LJ in R v Inland Revenue, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569**. It is not essential that the applicant should have relied on the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of the policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called the ‘macro-political field: see **R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1WLR 1115, 1131.**”

[130] **Lord Carnwath** closed with this notable statement of principle at paragraph [121] as follows:

“In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is “clear, unambiguous and devoid of relevant qualification” has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a “macro-economic” or “macro-political” kind.

[131] Several judgments on this subject area speak to the three practical questions that arise for the consideration of the court. One such was **Schiemann LJ in R v Newham London Borough Council [2002] 1 WLR 237** as follows:-

“In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the Court should do.”

Comment and Discussion

[132] The one undisputed fact in this scenario has been the conflict between the Commissioner of Police Darwin Dottin and his Deputy Commissioner Bertie Hinds. (Not admitted, but nonetheless evident and undeniable, was some measure of conflict/disaffection between Commissioner Dottin and the PSC). The COP by his Affidavits and oral evidence makes, inter alia, three major complaints:

1. That during the period 1st January 2009 to 14th July 2012, I have only been granted one meeting with the Commission notwithstanding my several requests for meetings. That single meeting was on 18th March 2009 and was characterized as an 'introductory meeting'. In effect, that he had been denied an audience with this Commission which has met with officers junior to him, in particular, his deputy Mr. Bertie Hinds.
2. That while he was on leave in July 2009 the Commission invited the Deputy Commissioner to submit recommendations for promotions. It was his view and experience that no other Commission had ever done this. Later in his capacity as Commissioner, he also submitted recommendations to the Commission.
3. That if the Commission was minded not to accept the statutory short list of officers recommended for promotion, the Commission should have consulted the Commissioner of Police (see paragraph 20 of his Affidavit of July 3rd 2012).

[133] While the conflict between the COP and his Deputy is patently evident, attention grabbing and salacious, the real issue is, in the opinion of this

Court, in grave danger of being over-looked. This issue transcends and pre-dates the conflict between these two eminent personalities, and will continue to ‘dog’ this institution if not addressed.

[134] That real, dogged and pervasive issue (which in the humble opinion of this Court was and is the cause of its poor morale) is the longstanding dissatisfaction/frustration with the process of promotion in the Royal Barbados Police Force, and the persistent call for a process that is defined, open (transparent), fair and impartial; a clarion call for much needed reform in the process of promotion (and to a lesser extent the process of discipline); a process that should be governed by objectivity, impartiality and transparency, concepts referenced in Clause 3 of First Schedule of the Recruitment and Employment Code.

[135] Unfortunately, individual concepts of what constitutes “transparency”, in particular, vary greatly.

[136] It is no secret that there exists concerns/apprehension that the process may or is infected with favoritism, nepotism and patronage. And that there is a perception that under the present system of promotion the Commissioner’s ‘men’ are favoured. Inevitably, anyone catching the Commissioner’s eye faces this criticism.

[137] Such concerns often arise, as in the case of the Claimant Ellis, where officers have very good reports, have been recommended for promotion on several occasions without being successful, and more importantly, without any feedback as to the factors influencing that decision.

[138] Like others in the Public Service, there remains unresolved, the intractable problem of Seniority vs Competence/Capability; juniors seen as leap-frogging their seniors, among other concerns. (See evidence of Richard Boyce, Assistant Superintendent of Police that over the years of his service in the Police Force, he had seen a number of officers who he thought should have been promoted who had not been and those he considered should not have been promoted who had been; ironically former Deputy-Commissioner Hinds admitted in oral testimony that he was himself 'superseded' by COP Dottin).

[139] Those concerns are not peculiar to the Barbados Police Force as can be seen from the Darby Commission appointed by the Government of Trinidad and Tobago in 1964 as a result of similar concerns about the state of that jurisdiction's police force.

[140] There is in Trinidad a multiplicity of judicial review applications arising out of this same issue of concern by public officials about the process of promotion. Coincidentally, much of the Trinidad litigation is on the

ground of Inequality of Treatment under the Constitution as opposed to the Legitimate Expectation argument herein: see **Bhagwandeem v The Attorney General of Trinidad and Tobago Privy Council Appeal No. 45 of 2003; Hade v The Police Service Commission of Trinidad and Tobago HCA No. 1139 of 1998.**

Is there a “practice” as alleged by the Claimants in 1280/1281/1316 or is there simply a loose, extremely general constitutional and statutory framework within which respective Commissions and Commissioners have established their own “Practice”?

[141] It is regrettable that there has been little evidence led to meet the burden of satisfying this Court that there is a ‘practice’ and what that ‘practice’ is. We have had the benefit of the Chairman’s opinion and the benefit of the Commissioner’s opinion and little else. (It is noted that in the evidence of Commissioner of Police (ag.) Tyrone Griffith, he could not from his personal experience speak to whether the PSC consulted with the COP in circumstances where it was minded not to accept the COP’s recommendations for promotions. Similarly, Deputy Commissioner of Police Bertie Hinds, when pressed, could give no evidence of a ‘practice’ to this effect, but did express his opinion to the effect that if the PSC was not minded to accept the COP’s shortlist that there should be consultation.

[142] Certainly, COP Dottin's evidence that the Commission only had an 'introductory meeting' with him (if accurate) is proof positive that the 'practice', if it existed was not honoured during his tenure as COP. COP Dottin deposes in his Affidavit that as COP he submitted a list in 2009 and that several of the persons recommended by Mr. Hinds were promoted. It is noteworthy that he does not depose that the PSC consulted him before doing so or that he challenged their failure to conform to an 'established procedure' in 2009.

[143] It is noted that this was the second promotion exercise undertaken by this particular Board.

[144] Commissioner Darwin Dottin in his Affidavit filed July 2012 makes unacceptable 'hearsay' reference to the opinion of two previous Commissioners as to what was the 'practice' during their respective tenure. They provided no Affidavits or sworn testimony. This reference therefore was unhelpful and was given little or no weight by this Court.

[145] He himself provides no particulars of those occasions experienced by him where changes were discussed with him by this or any other Commission.

[146] We are therefore left with Commissioner Dottin's expectation of what approach should have been taken by the Commission rather than

evidence of ‘an established practice’. At paragraph 33 of the July 31st

Affidavit he makes his point as follows:

“I reasonably and legitimately expected that, if the Commission were minded not to accept recommendations in the Short list and to make substantial and far-reaching changes thereto, it would have consulted me and heard my reasons and/or explanation. I certainly did not expect that the Commission would act or purport to act on recommendations made by the Deputy Commissioner of Police at a time when I was in office and holding the substantive office of Commissioner of Police. The officers hereinabove referred to did not receive recommendations from the Commissioner nor was I consulted by the Commission in respect of their promotions. I have been advised by legal counsel that it was irrelevant, unreasonable and improper for the Commission, in respect of these promotions, to have acted either without my recommendations, or, on the recommendation of any other officer of the RBPF, including the Deputy Commissioner of Police.

[147] Deputy Commissioner Hinds disavowed any knowledge of such a procedure very carefully answering that “... I am so informed that this is the procedure... I have never experienced it because I was never Chairman...”

He did however express the view that it would make sense for there to be consultation if there are issues arising.

[148] Yet many of witnesses, when pressed, certainly answered the question of whether the Commission has the power to reject some of the selectees in the affirmative. Deputy Commissioner Hinds [at page 240 of the transcript] in answer to that question states:

“... any sitting body that has to make a decision would have that power of approving or rejecting.”

[149] The two officers chosen in suits #1280 and #1281 as representative of their co-Claimants readily admitted that the recommendation of promotion did not necessarily mean that they would have been promoted (see pgs. 812 to 824 of the transcript containing the evidence of Officers Richard Boyce and Vernon Moore).

[150] Their evidence also speaks directly to the fact that there was no evidence of involvement in this process by the Attorney General, the Third Respondent in this matter. (see p. 821 of the transcript of evidence of Vernon Moore). They also readily admitted that there was no evidence of interference by the Attorney General [see evidence of Richard Boyce at p. 812 of the transcript and evidence of Vernon Moore at p. 822 of the transcript]. Their case (and by extension that of their co-Claimants) is based on a flawed assumption, explained by Richard Boyce at p. 812 of the transcript as follows:

“... I was recommended for promotion by the Commissioner and something there was an intervening factor in there. So once something or somebody played a part in there then something untoward had to occur.”

[151] Their evidence also made clear that there was never any communication between the Claimants and the PSC in relation to their respective recommendations. (See evidence of Vernon Moore at p. 818 of the transcript).

[152] The above-mentioned inference overlooks the Presumption of Regularity with respect to the acts and conduct of public officials. **Lord Carswell in *Bhagwandeem v The Attorney General of Trinidad and Tobago*, Privy Council Appeal No. 45 of 2003 delivered May 17, 2004**, reaffirmed the principle of the Presumption of Regularity in the acts and conduct of officials, stating consequentially that:

“... the burden of proof is upon the aggrieved party to establish *mala fides* in the administration of the enactment”.

[153] At para. 22 His Lordship states:

“22. The presumption of regularity comes into play in the context when there is no evidence either way whether a public authority or official has taken into account the correct considerations in reaching any administrative decision. In such case the decider is entitled to the benefit of the presumption of regularity and is not obliged to adduce evidence to establish that he took only the correct factors into account. In consequence, in the absence of contrary evidence the application for judicial review will fail.”

[154] I am inclined to accept the PSC’s response to this issue when the (then) Chairman states at paragraph 21 of his Affidavit of August 2nd 2012 as follows:

“...I must also arrest the allegation made by the First Respondent/Defendant that the PSC was required to consult with him or inform him of what it proposed to do. The PSC was under no legal duty or obligation to do so.”

[155] While not being under a legal obligation to so do, in all practicality it was the prudent thing to do. But it is not for this Court to say what it would have done, that is not the role of judicial review.

[156] It appears to this Court that certain findings of fact may have been made against the Commissioner of Police without him being afforded the opportunity to be heard in his own defence, but that also, is not the issue for determination in this proceeding.

[157] This rather astounding statement can be found at para. 21 of the Affidavit of August 2 2012:

“The PSC came to a view that the whole process of recommendations for promotions was a sham. The process had been jeopardized by the continuing and more or less public discord between the First Respondent/Defendant and the Deputy Commissioner Mr. Bertie Hinds. The PSC came to a not unreasonable view that there was a possibility that fair consideration in the construction of the recommendations for promotions may not have exercised. In the interests of maintaining the integrity of the RBPF, its operational robustness and the PSC’s overriding duty to preserve and protect this country’s national interest regarding its security the PSC determined that it would review all those candidates who fell within the zone of selection as well as those on the list provided by the First Respondent/Defendant. The PSC had no confidence that the process had been fairly observed.”

[158] Nonetheless, this Court evaluated the evidence given by the Commission’s Chairman Carmichael in order to determine, inter alia, whether there had been a failure to follow ‘an established practice’ and whether the PSC had acted outside of its jurisdiction and authority. The chronology outlined in his evidence speaks to the following:

1. Receipt of the recommendations for promotion from the Commissioner of Police in April 2012;
2. The contacting of the Commission by Mr. Bertie Hinds and his meeting with them in June 2012;

3. The meeting of the PSC with the Promotions Advisory Board (consisting of the Commissioner of Police, the Deputy Commissioner of Police and Mr. Mark Thompson) in June 2012. (see p. 298 of the transcript of evidence).
4. The issuing of recommendations for promotions to the Governor General on 29th June 2012.

[159] It is noted from the evidence of Chairman Carmichael that the PSC carried out its own investigation as to what officers merited promotion. (see Page 560 of the transcript). The compiling of the documents for investigation was done by administrative persons at the Chief Personnel Office.

[160] It is noted that his unchallenged evidence of a June 2012 meeting with the PAB leads to the inference that there was a consultation. There is a presumption of regularity that the PSC acted rationally, etc and carried out its functions in good faith. Unfortunately, the provisions [sections 9 and 10] of the Service Commissions Act precludes the examining of the parties as to the specifics of that consultation.

Findings and Disposal

[161] The evidence shows that the PSC carried out their own investigations as to persons within the ‘zone of selection’ in 2012; they met with the Deputy Commissioner at his request and with the PAB. The evidence does not establish on the balance of probabilities that “... the Commission purported to act on the recommendations of Mr. Hinds

rather than on the Statutory Short List submitted by the Commissioner of Police Dottin”.

[162] There can be no finding that the Claimants are entitled to claim a Legitimate Expectation of promotion once they fell within the ‘zone of selection’ or are recommended by the PAB and COP for promotion to the PSC.

[163] There can be no finding of fact that the Police Service Commission by its conduct or otherwise led the Claimants to believe that their promotions would be effective from August 1st 2012. The evidence is that the Claimants were informed by the Human Resource Officer of the Force that they were recommended for promotion and nothing more. This is in itself an insufficient evidentiary basis to ground the claim of Legitimate Expectation. The answer to the first of three questions posed by **Schiemann L.J** (above) must be that there appears to be no promise by a relevant public authority which is “clear, unambiguous and devoid of relevant qualification.”

[164] The ‘practice’ referenced by the respective parties, adverted to many different (and vague) practices without particularity and in some cases no corroboration; in most cases these references were ‘self-serving’. Stated differently, there is no evidence on the balance of probabilities,

that the PSC would (i) follow the recommendation of the PAB or the Commissioner of Police and (ii) in the event that that advice was not followed that the PSC would consult with the COP about any changes.

[165] There is no evidence in the opinion of this Court that the PSC has acted unreasonably, irregularly, arbitrarily or improperly to the extent necessary to warrant an intervention by this Court.

[166] It is to be regretted however that the Commission and the Commissioner by their respective conduct exacerbated the undesirable conflict between the Commissioner and his Deputy, and while reluctant to say in so many words, the Commission does recognize in some small measure the breakdown of its own relationship with Commissioner Dottin. At para [9] of the Chairman's Affidavit of August 2nd 2012 he deposes as follows:

“paragraph 10 of the COP Affidavit must be read in conjunction with paragraph 19 of the said affidavit. While the PSC cannot go into any detail it is correct to say that the First Respondent/Defendant obtained an injunction against the PSC, the consequence of which has resulted naturally and quite properly in limited communication between the First Respondent/Defendant and PSC.”

[167] And at para. [15]

“... The PSC has had to deal with a lack of communication between the First Respondent/Defendant and his immediate subordinate the Deputy Commissioner Mr. Bertie Hinds. This ongoing and festering dispute has found its expression in the conduct of these officers towards each other and detrimentally impacted the overall management and control of the RBPF. The PSC has been forced to make recommendations in the interest of the RBPF as a whole regarding both the First

Respondent/Defendant and his immediate subordinate the Deputy Commissioner.”

[168] In spite of the Claimants naming the Commissioner of Police and the Attorney General as Defendants in this action, none of the Claimants at any time provided any evidence or made any argument that the Commissioner of Police failed at the relevant time to observe the so-called established processes or practice for the promotion of subordinate police officers, Inspectors and gazette officers. There is no finding of wrongdoing on the part of the Commissioner of Police.

[169] There is no finding of wrongdoing on the part of the Attorney General: there is no statutory responsibility vested in the Attorney General or his ministry in selecting and determining promotions and no evidence before this Court that the Attorney General was in any way involved in the promotions process the subject of this action other than receiving the recommendations of the Commissioner of Police and forwarding them to the Chief Personnel Officer. (See evidence of Ms. Campbell June 2015; evidence of Commissioner of Police Darwin Dottin; evidence of COP (Ag.); evidence of Sir Trevor Carmichael). The unsubstantiated newspaper reports referenced by the Claimants in #1280/2012 and #1281/2012 are probative of nothing and at their highest spoke merely

of a general enquiry as to whether vacancies in the Royal Barbados Police Force had been filled.

[170] The Orders sought by the Claimants in suits #1280/2012 and #1281/2012 are denied.

[171] It can serve no useful purpose to declare that the Claimant in #1316/2012 has a Legitimate Expectation that any consideration of his application for promotion would be fair and would follow the process for promotions with the Royal Barbados Police Force as set out in the relevant regulations or for that matter, any of the declarations sought by this Claimant.

[172] I find no violation of due process by the Commission's failure or decision not to promote the Claimant in suit #1316/2012. There has been no evidential support to (the unfortunate statements of former Deputy Commissioner Hinds notwithstanding) that this Claimant's legitimate expectation of a fair, transparent consideration of his application for promotion had been contravened or that the acts of the PSC were '*ultra vires*'.

What relief, if any, is available to the Claimants

[173] As mentioned above, CJ Simmons (as he then was) conducted a most comprehensive review of the law of 'Legitimate Expectation' in the

Pearson Leacock case. I adopt the following statement of the law to be found at Paragraph [50] of his judgment:

“[50] In conclusion, I merely desire to add that it is no part of my function or indeed of any court’s in a judicial review application to substitute the court’s decision for that of the competent authority. Judicial review is not an appeal. I have only been concerned to determine whether the process by which the Commissioner came to his decision or recommendation accorded with notions of fairness and should be allowed to stand or not. I have found that process to have been flawed and will grant the orders sought accordingly, except that I cannot declare as stated in the motion that Mr. Leacock is “entitled to study leave”. That would be an intrusion into the merits of the case.

[51] The merits of the case will often involve policy considerations. Such considerations are not for the courts...”

[174] However the boundary between the role of the judiciary and that of the Executive becomes somewhat blurred at this point. It would indeed be a most unsatisfactory result were it to be felt or communicated to officers of the Royal Barbados Police Force (or for that matter other public officers) that they should come to the High Court if the swiftness of their promotion fails to accord with their expectations. This in my opinion would be a usurpation of the constitutional function of the Police Service Commission.

[175] A review of Commonwealth Caribbean cases will show that the issue of whether Courts will offer protection to the Legitimate Expectation of receiving substantive benefit beyond the procedural benefit of an opportunity to be heard or consulted before the substantive benefit was refused or taken away remains unsettled with a number of authorities

going either way: see **Judicial Supervision of Executive Action In the Commonwealth Caribbean** presented by the Rt. Hon. Mr. Justice Michael de la Bastide, President of the Caribbean Court of Justice (as he then was) March 2006; **Attorney General v K.C. Confectionery Ltd, Marks v Minister of Home Affairs [1984] 38 WIR 106** and **Re: Gayman Jurisingh [1984] 35 WIR 106, Hade v The Police Service Commission of Trinidad & Tobago (unreported) TT 1999 HC 44; Kent Garment Factory Ltd. v The Attorney General and the Minister of Trade and Tourism Civ. App. No. 3 of 1991 (Guyana); Ameena Ali v North West Regional Health Authority HCA No. S1812 of 2003; Leacock v The Attorney General of Barbados (supra).**

[176] We await the ruling of the Caribbean Court of Justice on this point.

[177] **Lord Hobhouse in Credit Suisse v Aldergate Borough Council**

[1997] QB 306 spoke to the nature of relief in judicial review applications summarizing the principles as follows:

“The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act: see **Agricultural Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd. [1972] 1 WLR 190.**”

Summary and Disposal

[178] In the final analysis, this is a burden of proof issue.

[179] The 'practice' the subject of this claim purports to be that should the PSC choose not to follow the recommendation of the COP they must consult before proceeding further. The Claimants have failed to show on the balance of probabilities that there was or is such a practice. There is a lack of clear cogent evidence of this critical practice on which rests the case for the Claimants.

[180] The Claimant in #1316/2012 has failed to prove on a balance of probabilities that the PSC (no evidence whatsoever being advanced with respect to the wrongdoing of the COP and the AG) treated him unfairly or discriminated against him.

[181] The PSC has authority to regulate its own procedure.

[182] The PSC has the power to carry out investigations separate and apart from the recommendations of the COP. While it makes sense that they should consult with the COP there are neither statute bound or by practice committed to doing so.

[183] The importance of the need for consultation and synergy is persuasively articulated by Commissioner Dottin at page 640 of the transcript of evidence as follows:

“It is a very difficult exercise and so you have to ensure that you deal with the career progression of officers and also that you deal with the needs of the force.”

[184] And later at p. 680 he outlines what is in essence his vision and not ‘practice’:

“I think it is good administration that the Commission, the Permanent Secretary and the Minister operates as a cohesive body to address these issues. If there is not that cohesion, there is going to chaos. There will be fall out.”

[185] In any event it is the evidence of Chairman Carmichael that he did in fact summon the three members of the PAB and ‘consulted’ with them on 19th June 2012. It is outside the authority of this court, pursuant to the provisions of sections 9 and 10 of the Service Commission Act, to enquire into the specifics of that meeting.

[186] The Legitimate Expectation claims of all parties fail both in law and in fact.

[187] There was no synergy between the COP and the PSC, but this Court found no contravention of the law or ‘established practice’ by the PSC.

[188] In view of the above this Court makes the following Orders:

1. Applications #/2012/1280, #1281/2012 and #1316/2012 are dismissed.

2. The injunction granted by Kentish J on August 13th 2012 is hereby discharged.

MARGARET A. REIFER
Judge of the High Court