

# The Caribbean

LILLIAN CRAWFORD-ABBENSETTS, ANDREA EWART, AND DOUGLAS EARL McLAREN\*

This section reviews legal developments that are pertinent to and affect the Caribbean as a region and more particularly, the English-speaking Caribbean.

## I. Privy Council Decisions

The Judicial Committee of the Privy Council<sup>1</sup> in London has, up to the time of writing,<sup>2</sup> been the final Court of Appeal for the English-speaking countries of the Caribbean Community (CARICOM).<sup>3</sup> The Committee pronounces law that applies across the region, except with respect to Guyana, which has its own final Court of Appeal.

### A. MANDATORY DEATH PENALTIES

In 2004, several appeals to the Privy Council from Jamaica, Trinidad and Tobago, and Barbados spoke to the constitutionality of the mandatory death penalty and were heard simultaneously. In addition, representatives of several other Caribbean jurisdictions with similar constitutions were allowed to intervene. In an appeal from the Court of Appeal of Jamaica,<sup>4</sup> the Privy Council voided an Act that required, rather than merely authorized, the

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\*Lillian Crawford-Abbensetts is the holder of an LLM, Howard University School of Law, LLB (Hons), University of the West Indies, LEC, Hugh Wooding Law School, Trinidad and Tobago, and is qualified for admission to practice in the English speaking common law Caribbean Community member states and admitted to practice at the Guyana Bar. Andrea Ewart is a customs and trade attorney with her own law firm in Washington, DC and is Of Counsel to the law firm of Adorno & Yoss. Douglas Earl McLaren is senior Government Affairs Representative with Bechtel SAIC Company, LLC in Washington, D.C.

1. The Judicial Committee of the Privy Council performs the judicial function of Her Majesty's Most Honourable Privy Council, which is a body of advisors to the British Sovereign. WIKIPEDIA, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, at [http://en.wikipedia.org/wiki/Privy\\_Council](http://en.wikipedia.org/wiki/Privy_Council) (last modified Apr. 17, 2005).

2. This article was written in February 2005.

3. The regional grouping of the Caribbean Community and Common Market, established under the Treaty of Chaguaramas, came into effect on August 1, 1973 and is comprised of Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 4, 1973, art. III(1), available at <http://www.caricom.org/archives/revisedtreaty.pdf> [hereinafter Treaty of Chaguaramas].

4. *Watson v. The Queen*, [2004] UKPC 34 (July 7, 2004) (Jamaica).

imposition of the death penalty because the Act deprived the judiciary of its discretion in sentencing. The Jamaican legislation, however, had been amended subsequent to the introduction of the Constitution and, therefore, could not benefit from the savings provision under the Constitution. In appeals from Trinidad and Tobago<sup>5</sup> and Barbados,<sup>6</sup> the Privy Council upheld mandatory death penalty laws that were in force before the enactment of the respective constitutions. Although both constitutions prohibit the imposition of cruel, inhuman, and degrading punishment, other sections provide that those prohibitions shall not invalidate laws that were in existence prior to the constitution taking effect.

## B. VICARIOUS LIABILITY

The Privy Council issued two important decisions dealing with the liability of employers for torts committed by their employees while they were off duty. In an appeal from the Court of Appeal of the British Virgin Islands,<sup>7</sup> the Privy Council held that when police authorities entrust a police officer with a gun, they owe the public a duty to take reasonable care to see that the officer is a suitable person to be entrusted with such a dangerous weapon. No distinction was drawn between personal injuries inflicted in the course of police duties and those inflicted by a police officer using a police gun for his own ends.

In an appeal from the Court of Appeal of Jamaica, the Privy Council elucidated an approach to determining if vicarious liability should be found by concentrating "on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable."<sup>8</sup>

## C. LEGISLATION ESTABLISHING THE CARIBBEAN COURT OF JUSTICE

Legal and human-rights interest groups challenged the constitutionality of the Jamaican legislation passed by Parliament that, in effect, abolished the right of appeal to the Privy Council and substituted a right of appeal to a new regional court of final appeal, the Caribbean Court of Justice (CCJ). The Privy Council heard the challenge on appeal from the Court of Appeal of Jamaica and handed down a decision on February 3, 2005.<sup>9</sup> The Appellants posited that it was unconstitutional to establish a new court for appeals from the Court of Appeal when the new court would enjoy none of the entrenched protections afforded by the constitution to the Supreme Court and the Court of Appeal.

The Privy Council advised that the appeal should be allowed and a declaration made that the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, the Caribbean Court of Justice (Constitutional Amendment) Act 2004, and the Caribbean Court of Justice Act 2004 were not passed in accordance with the procedure required by the Constitution of Jamaica and were, accordingly, void. CARICOM member countries that have enacted or are contemplating enacting enabling legislation will have to take this Privy Council decision into account.

5. *Matthew v. The State*, [2004] UKPC 33 (July 7, 2004) (Trinidad and Tobago).

6. *Boyce v. The Queen*, [2004] UKPC 32 (July 7, 2004) (Barbados).

7. *Attorney General v. Hartwell*, [2004] UKPC 12 (Feb. 23, 2004) (British Virgin Islands).

8. *Bernard v. Attorney General*, [2004] UKPC No. 47 (Oct. 7, 2004) (Jamaica).

9. *Indep. Jamaica Council for Human Rights (1998) Ltd v. Marshall-Burnett*, [2005] UKPC 3 (Feb. 3, 2005) (Jamaica).

## II. Caribbean Court Of Justice

February 14, 2001 marked a watershed in the English-speaking Caribbean regional legal system, when ten CARICOM member states signed an agreement establishing the Caribbean Court of Justice (the Agreement).<sup>10</sup> With its seat in Port of Spain, Trinidad and Tobago, the CCJ is a regional judicial tribunal vested with both original and appellate jurisdiction for which all decisions shall be final.<sup>11</sup> The Agreement entered into force July 23, 2002, when Guyana deposited the instruments of ratification, the third country to do so after St. Lucia and Barbados.<sup>12</sup>

### A. JURISDICTION OF THE CCJ

In the exercise of its original jurisdiction, the CCJ will function as an international tribunal with compulsory and exclusive original jurisdiction. The Court will apply the norms of international law as the final arbiter and interpreter of the Treaty of Chaguaramas establishing the CARICOM Single Market and Economy (2001), as revised by nine Protocols (Revised Treaty).<sup>13</sup> CARICOM leaders consider this function of the CCJ to be vital to the operation of the CARICOM Single Market and Economy (CSME). The CSME creates an extensive range of rights and obligations for the Member States and Community nationals relating to, inter alia, the establishment of economic enterprises, the provision of professional services, and the movement of people and capital.<sup>14</sup> The CCJ is a permanent, regional institution set up to pronounce authoritatively and definitively on those rights and corresponding obligations.<sup>15</sup>

The original jurisdiction of the CCJ is crucial to ensuring that the laws of the CSME, in accordance with the Revised Treaty, are uniform and predictable in their application, thereby creating a stable macro-economic environment for attracting foreign capital investment into the region.<sup>16</sup> The principle of *stare decisis* applies to the deliberations of the CCJ, ensuring that the Court is established as an agent of stability and predictability within the CSME.<sup>17</sup> Common law and civil law jurisdictions are allowed to participate in the CCJ's original jurisdiction, thus including the member states of Haiti and Suriname.

As a municipal court of last resort, the CCJ decides appeals in civil and criminal matters from common law courts within the jurisdiction of CARICOM member states which are

10. Antigua and Barbuda, Barbados, Belize, Grenada, Guyana, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Dominica and Jamaica both signed on February 2, 2003. See Caribbean Court of Justice, *Establishing the Caribbean Court of Justice-Status of Court Instruments in Member States* (Dec. 2, 2004), available at <http://www.caricom.org> [hereinafter Status of Court Instruments].

11. See Agreement Establishing the Caribbean Court of Justice, July 23, 2002, art. III, available at <http://www.caricom.org> [hereinafter Agreement].

12. The other eight countries which have since ratified the Agreement to make it a total of eleven are Belize, Dominica, Grenada, Jamaica, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. See Status of Court Instruments, *supra* note 10.

13. Duke Pollard, *The Caribbean Court of Justice: What it is, What it does* (April 17, 2000), available at <http://www.caricom.org/archives/ccj-q&a.htm> [hereinafter *Caribbean Court*]; see also Treaty of Chaguaramas, *supra* note 3.

14. *Caribbean Court*, *supra* note 13.

15. *Id.*

16. *Id.*

17. *Id.*

parties to the Agreement, and applies the law of the member state from which the appeal emanates. States will have the option of acceding to this arrangement immediately or at a later date.<sup>18</sup> The Regional Judicial and Legal Services Commission (RJLSC) is charged under the Agreement with the appointment of judges to the CCJ, who may be selected from any Commonwealth jurisdiction. However, the Conference of the Heads of Government of CARICOM appoints the President upon the recommendation of the RJLSC. The President of the CCJ, the Right Honourable Justice Michael de la Bastide of Trinidad and Tobago, was appointed on August 18, 2004; and the RJLSC has appointed the judges of the CCJ.<sup>19</sup>

## B. FINANCING THE COURT

In the initial five-year period, the Ministers of Finance of each member state that has signed the Agreement will meet the financing of the recurrent expenditures, including salaries of judges to the CCJ.<sup>20</sup> A Trust Fund, administered by the Caribbean Development Bank (CDB), is to be established during this initial period and capitalized to fund the ongoing operations of the CCJ. The CDB is an AAA-rated multilateral financial institution dedicated to the development of the economies of its Caribbean member countries through project loans and technical assistance, to public agencies, and to other entities in those countries. The CDB successfully placed an issue of \$150 million ten-year floating rate notes in the market in a transaction that closed on July 16, 2004. A large portion of the proceeds will be used to provide loans to the eleven member countries of the CDB and pay for the costs associated with establishing and operating the CCJ.<sup>21</sup>

## C. POLITICAL IMPERATIVES

One of the strongest arguments for the CCJ is that the Court is pivotal for the success of the CARICOM Single Market and Economy. Coexistent with this political imperative is the fact that other state institutions in the region were made independent from the colonial powers while the administration of justice was not.<sup>22</sup> Abolition of the Privy Council's jurisdiction in the CARICOM member states is seen as the last step in closing the circle of independence, which began as early as 1962, in the region.<sup>23</sup>

# III. Trade Developments

## A. IMPLEMENTATION OF THE CARIBBEAN SINGLE MARKET & ECONOMY TREATY PROVISIONS

The following is an update on the status of the legislative and regulatory steps required to introduce the Caribbean Single Market Economy (CSME) into the Caribbean Com-

18. The twelve signatories to the Agreement have acceded to the original jurisdiction of the CCJ. However, only six of these have acceded to both the original and appellate jurisdiction: Barbados, Belize, Dominica, Guyana, Jamaica and St. Lucia. See Status of Court Instruments, *supra* note 10.

19. Press Release, CARICOM Communication Unit, Caribbean Court of Justice President to be Sworn In (Aug. 17, 2004), available at [http://www.caricom.org/pressreleases/pres136\\_04.htm](http://www.caricom.org/pressreleases/pres136_04.htm).

20. Agreement, *supra* note 11, art. XXVIII.

21. *Caribbean Development Bank Issues Notes to Pay for Regional Supreme Court*, LATIN LAWYER ONLINE, Aug. 2004, at [www.latinlawyer.com](http://www.latinlawyer.com).

22. Godfrey Smith, *The Caribbean Court of Justice: An Overview of the Challenges & Prospects* (Aug. 28, 2001), available at <http://www.belize.gov.bz/features/Caribbean Court/Challenges&Prospects.html>.

23. Duke Pollard, *Appellate Jurisdiction of the Caribbean Court of Justice* (Nov. 2003), available at <http://www.caricom.org/archives/appellatejurisdiction-pollard.htm>.

munity by the end of 2005. These steps are intended to create a single market for goods, services, and selected categories of workers.<sup>24</sup>

As of the end of 2004, the following legislative and regulatory pattern had emerged in the region. First, National Standards Bureaus had been created in eleven states (minus Montserrat and Suriname). Plans are currently underway to develop a regional bureau. Second, National Competition Bodies had been created in Barbados, Jamaica, and St. Vincent and the Grenadines. Third, countries had removed most tariff and non-tariff barriers against the entry of goods of CARICOM origin. Barbados, Jamaica, and Trinidad and Tobago now permit tariff-free entry of CSME goods with a certificate from the exporting Customs department. Fourth, eleven countries, with the exception of Antigua & Barbuda and St. Kitts & Nevis, had adopted legislation and taken regulatory and administrative steps to allow the free movement of university graduates, artists, media workers, musicians, and sports persons. Only Jamaica and St. Vincent & the Grenadines had removed restrictions on the movement of the self-employed, entrepreneurs, and service professionals. Work had begun to establish a regional accreditation unit to manage the development of mechanisms for certifying and establishing the equivalency of degrees and certificates. Fifth, Guyana alone had amended its legislation to accept documents other than passports at the border; all other countries continued to require passports as of October 2004. Finally, most barriers to the movement of capital and services remained in place at the end of 2004.<sup>25</sup>

The Caribbean Court of Justice will function as a dispute settlement body for disputes arising from the interpretation and application of the Revised Treaty, as well as the principles of equity and non-discrimination within the CSME. Furthermore, the CCJ Agreement also charges member countries with encouraging and facilitating "the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes."<sup>26</sup>

#### B. ANTIGUA SUCCESSFULLY USES THE WTO DISPUTE SETTLEMENT MECHANISM

Antigua successfully used the World Trade Organization (WTO) dispute settlement mechanism to enforce its right of access to the U.S. gambling market under Antiguan legislation and, thus, introduced internet gambling to the island. A March 2004 WTO panel decision ruled that U.S. federal and state law that prohibits Antigua's access, via the Internet, to the U.S. gambling market violates the U.S. market commitments.<sup>27</sup> Whether this ruling will withstand the appeal that the United States has launched is unclear.<sup>28</sup> However, the ruling indicates that small states can succeed in trade disputes through their use of the WTO dispute settlement system.

24. See Treaty of Chaguaramas, *supra* note 3. The thirteen signatories to the CSME are Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

25. *Establishment of the CARICOM Single Market and Economy—Key Elements* (Oct. 30, 2004), available at <http://www.caricom.org>.

26. Agreement, *supra* note 11, art. XXVIII.

27. Dispute Panel Report, *United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

28. Appellant Submission of the United States of America, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/6 (Jan. 14, 2005) (No. AB-2005-1).

#### IV. Financial Regulatory Developments

In 2004, most countries in the English-speaking Caribbean continued to enact and implement anti-money laundering and counter-terrorism financial enforcement laws. Two items of legislation brought before the Jamaican Parliament are illustrative. The *Act to Amend the Money Laundering Act* and the *Financial Investigations Act, 2004* tighten the reporting controls over banking transactions. These controls minimize the likelihood of the country being used for illegal transactions related to money laundering; create a Financial Investigations Division; and give senior personnel at the Division access to confidential information about citizens, while imposing strong penalties for the misuse of that information.<sup>29</sup>

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29. Jamaica Information Service, Ministry of Finance & Planning, *Money Laundering Bills to Give Government Access to Confidential Information* (Nov. 22, 2004), available at [http://www.jis.gov.jm/finance\\_planning/html](http://www.jis.gov.jm/finance_planning/html).