

COMPLAINT #1/2008/2009

INTEGRITY IN PUBLIC OFFICE ACT, 2003:
COMPLAINT TO THE COMMISSION BY
MR. LENNOX LINTON CONCERNING BREACHES OF THE
CODE OF CONDUCT BY
PRIME MINISTER ROOSEVELT SKERRIT

DECISION

BACKGROUND

On the 2nd September 2008 the Integrity Commission received a letter from Mr. Lennox Linton in which he complained of breaches of the Code of Conduct specified in the Second Schedule to the Integrity in Public Office Act, 2003, No. 6 of 2003 (hereinafter referred to as the IPO Act, 2003) by Hon. Roosevelt Skerrit, Prime Minister of the Commonwealth of Dominica.

At its meeting on the 23rd October 2008, the Commission examined the complaint and, on the 24th October 2008, the provisional view of the Commission that the complaint did not pertain to a matter which the Commission was empowered to deal with was communicated to Mr. Linton. He was asked to inform the Commission by 10th November 2008 as to whether he wished to make a written submission in response or attend an oral hearing on the matter.

By letter dated 10th November 2008 he indicated his wish for an oral hearing and by letter dated 17th November 2008 the Commission notified him that the 28th November 2008 was set for the hearing. This date was postponed, at his request, to 11th December 2008 which date was also postponed by the Commission for operational reasons. A new date of 30th December 2008 was mutually agreed to.

THE COMPLAINT

In his letter dated 2nd September 2008 Mr. Linton made the following complaint:

- (i) “That the Integrity in Public Office Act has been breached by Hon. Roosevelt Skerrit by a pattern of ministerial conduct spanning more than four years and which has fallen short of the sworn ministerial obligation to the good and just governance of the Commonwealth of Dominica”.

- (ii) “That in his failure to uphold and defend the public interest while facilitating the private investment agenda of Dominica’s Ambassador to China, David King Hsiu, Prime Minister Roosevelt Skerrit has breached sections (d), (e), (g) and (i) of the Code of Conduct.”

- (iii) “That specifically, Prime Minister Skerrit appears to have:
 - 1. Allowed the interest of a personal relationship to conflict with his public duties and may have been improperly influenced in that process.

 - 2. Used his official influence as Prime Minister of Dominica in support of a scheme that privately benefited a personal interest.

 - 3. Allowed the use of public property (passports and government concessions) for a purpose other than officially approved purposes.

 - 4. Aided and abetted an advisor to Government serving at Ambassadorial level to breach the Code of Conduct.”.....

In his letter he referred to conduct and events occurring in the years 2004, 2005 and 2006.

He also indicated the nature of the evidence he proposed to produce in the following terms:

“Sworn affidavit with all supporting documents filed on behalf of Prime Minister Roosevelt Skerrit in the High Court of the British Virgin Islands in June 2008. The supporting documents include:

- Exchange of correspondence between Roosevelt Skerrit and Felix Chen
- Exchange of correspondence between Roosevelt Skerrit and Kieron Pinard-Byrne

- Correspondence from Roosevelt Skerrit to David Hsiu

- Correspondence from David Hsiu to Roosevelt Skerrit

- Rich Victory Share Transfer Instrument

- Media Interview with Felix Chen

- Media interview with Anthony Astaphan – Counsel to the Prime Minister

Should the Commission deem consideration of any or all of these items of evidence necessary, they will be made available on request.”

EXAMINATION OF COMPLAINT: PROVISIONAL VIEW

Under section 32(1) of the Integrity in Public Office Act, 2003, the Commission is required to examine the complaint and may reject it if the Commission is of the opinion:

- (a) that the complaint is frivolous; or
- (b) it does not pertain to a matter the Commission is empowered to deal with under the Act.

Before rejecting any such complaint the Commission is required to give the complainant a reasonable opportunity of being heard and this right is contained in section 32(3).

At its meeting on 23rd October 2008, the Commission examined the complaint and was provisionally minded to find that the complaint should be rejected under section 32(1)(b) of the Act on the grounds stated in the letter to Mr. Linton, dated the 24th of October 2008, the text of which is set out hereunder:

“Mr. Lennox Linton
P. O. Box 2052
Roseau
DOMINICA

Dear Mr. Linton,

**COMPLAINT TO THE COMMISSION: RE BREACH OF CODE OF CONDUCT BY A PERSON
IN PUBLIC LIFE**

I write further to my letter dated 12th September 2008 on the above-mentioned matter.

The Commission has examined the complaint and is provisionally minded to find under section 32 of the Integrity in Public Office Act, 2003 that the complaint does not pertain to a matter the Commission is empowered to deal with on the grounds that the alleged breaches of the rules in paragraphs (d), (e), (g) and (i) of the Code of Conduct (specified in the Second Schedule to the Act) took place during a period spanning the years 2004, 2005 and 2006 before the Act of 2003 entered into operation.

The Commission wishes to give you the opportunity in writing (or at an oral hearing if you so wish) to demonstrate that the provisional view is unfounded.

Please let me have your reply by the 10th day of November 2008 as to whether you shall make a written submission or whether you wish an oral hearing so that an appropriate date may be set.

Yours very sincerely,

Julian N. Johnson
CHAIRMAN”

SUBMISSIONS AT THE HEARING ON 30th DECEMBER 2008

At the hearing on the 30th December 2008, in seeking to persuade the Commission that its provisional view was wrong, Mr. Linton made the following submissions:

1. “In stating the case for the breach of the Code by Mr. Skerrit as a matter of his relationship with Ambassador Hsiu, I did cite a series of events and correspondence that are time based. However, my view is that notwithstanding the necessity of those dates and those times to establish the pattern of ministerial conduct against which I am complaining, Mr. Skerrit, as Prime Minister of the country, breached the Code, was in breach of the Code before the Act came into operation and remained in breach of the code after the Act came into operation. That is my view and that is the reason why I brought this complaint”.
2. [Prime Minister Skerrit] “remained in breach because notwithstanding public disclosure of the nature of the relationship and things that he himself found wrong with the arrangement, Prime Minister Skerrit is yet to make any public statement on the matter to the people of Dominica”.
3. “The resignation of Ambassador Hsiu took place after the Commission was in effect but we do not know and the public has not been told why exactly Ambassador Hsiu has resigned. We have just heard a statement from the Attorney General at a recent press

conference that he is no longer Ambassador to China. My view is that there is much in that particular issue that requires investigation..... There was no investigation into any of these matters; there was no attempt to indicate that anything would be different or be done differently or any behaviour would have changed. I humbly submit to the Commission that this is a matter that remained alive after the Commission came into effect and therefore it is a matter that is properly before the Commission”.

4. “I do not accept that matters which may have emerged in the governance of Dominica which could have been inimical to the public service or in breach of the Code of Conduct between June 15, 2003 and 1st September 2008 cannot properly be brought before the Commission... I have a grave difficulty as a citizen and as an individual accepting this. I think all of these matters especially where they relate to Parliamentarians who had responsibility for passing the law and, therefore, had knowledge of its contents, therefore had judicial notice of its existence, should not be allowed to benefit from the excuse that they themselves set up, that the Act was asleep.”

5. “I am also concerned that when you put legislation to sleep or you delay their implementation there has to be good reason for that to happen. We the Members of the public have heard absolutely no good reason for the delay. It seemed inordinate, it seemed unreasonable, it seemed arbitrary and there was a point then in the public discussion when you just simply did not know and it took more than five years for this to come into operation. I hope the Members of the Commission can understand and appreciate the difficulty that I have, and I am sure a lot of other people outside there have is, how do we exclude that five years and more period between the 15th June 2003 and 1st September 2008 from the purview of the Commission?”

THE LAW

Sections 30, 31, 32, 33 and 34 of the Integrity in Public Office Act, 2003 provide:

“30 (1) Every person in public life shall observe the body of rules known as the Code of Conduct, specified in the Second Schedule.

(2) A person in public life who is in breach of the Code of Conduct commits an offence, and is liable, on summary conviction, to a fine of ten thousand dollars or to imprisonment for a term of one year or to both such fine and imprisonment.

31 (1) A person who has reasonable grounds to believe that any person in public life has breached any provision of the Code of Conduct may make a complaint in writing to the Commission stating –

- a) the particulars of the breach;
- b) the particulars, as far as they are known, of the person against whom the complaint is made;
- c) the nature of the evidence that the complainant proposes to produce in respect of the complainant.
- d) such other particulars as may be prescribed in Regulations made by the Minister” (No such Regulations have been made by the Minister for Legal Affairs).

32 (1) Where a complaint has been sent to the Commission under section 31, the Commission, after examining the complaint, may reject the complaint if the Commission is of the opinion that –

- (a) the complaint is frivolous; or
- (b) it does not pertain to a matter the Commission is empowered to deal with under this Act.

(2) Where the Commission rejects a complaint, the person against whom the complaint was lodged shall have the right to institute legal proceedings against the complainant; but it shall be a defence that the complaint was not made maliciously, frivolously or in bad faith.

(3) No complaint shall be rejected by the Commission without giving the complainant a reasonable opportunity of being heard.

33 (1) Where upon examination of a complaint made under section 31, or otherwise, the Commission is of the view that investigation is necessary to ascertain whether any person in public life commits a breach of any provision of the Code of Conduct it shall inquire into the matter.

(2) The sittings of the Commission to take evidence or hear arguments in the course of any inquiry under subsection (1) shall be held in private.

(3) The complainant and the person in public life against whom any inquiry is held under this section are entitled to notice of the proceedings of the inquiry and to be represented in the inquiry either personally or by an attorney-at-law.

34 (1) On the conclusion of any inquiry under section 33, the Commission shall submit a report to the Director of Public Prosecutions and the President.

(2) Where the Director of Public Prosecutions is satisfied, on the examination of the report referred to in subsection (1) and other relevant evidence, that any person in public life ought to be prosecuted for an offence under section 30, he shall institute and undertake criminal proceedings against the person in public life.”.....

Rule 1, paragraphs (d), (e), (g) and (i) of the Code of Conduct, specified in the Second Schedule to the Integrity in Public Office Act of 2003, provides:

“1. A person in public life shall not:

- (d) allow private interests to conflict with his public duties or improperly influence his conduct in the performance of his public duties; allow the pursuit of his private interest to interfere with the proper discharge of his public duties; and any conflict between his private interests and his public duties shall be reserved in favour of his public duties;
- (e) use his official influence in support of any scheme or in furtherance of any contract or proposed contract or other matter in regard to which he has an interest;.....
- (g) use or allow the use of public property (including money), equipment, supplies or services for any purpose other than for officially approved purposes;.....
- (i) in the course of the performance of his official duties, aid, abet, counsel, procure or command any other person to commit a breach of this Code of Conduct.”

Section 3 provides that the IPO Act, 2003 applies to every person in public life.

As a Minister of Government (and Member of the House of Assembly), Prime Minister Roosevelt Skerrit is a person in public life within the meaning of section 2(1) of the Act for he is holding an office or position set out in Part I of the First Schedule to the IPO Act, 2003. The Act, therefore, applies to Prime Minister Roosevelt Skerrit from the date of its entry into force.

Section 30(1) of the Act, read along with the Second Schedule, establishes a body of rules which every person in public life is required to observe. This body of rules is known as the Code of Conduct. Under section 30(2), a person in public life who is in breach of the Code of Conduct commits an offence and is liable on summary conviction to fine and imprisonment.

Under section 32 referred to earlier, the Commission is required to examine any complaint made in accordance with section 31 against a person in public life in respect of a breach of any provisions of the Code of Conduct. It is empowered to reject any such complaint if it is frivolous or if it does not pertain to a matter the Commission is empowered to deal with under the Act.

The powers and functions of the Commission are spelt out in the Integrity in Public Office Act, 2003.

Mr. Linton's complaint raises matters falling within the Commission's powers and functions under section 9(d) and 32 of the Act.

Section 9(d) provides that the Commission shall "receive and investigate complaints regarding non-compliance with any provision of this Act", while section 32 provides for the examination of the complaint, hearing of the complainant and the rejection of the complaint by the Commission in respect of a breach of the Code of Conduct.

All the acts and conduct which are alleged in the complaint and at the hearing to constitute breaches of the Code of Conduct took place before the IPO Act, 2003 entered into force.

The issue, therefore, that falls to be considered is whether the Commission is empowered to deal with complaints alleging breaches of the Code of Conduct which took place before the IPO Act, 2003 was brought into operation.

COMMENCEMENT OF THE ACT

The acts and conduct as stated by Mr. Linton raise the fundamental question of the effect of the date of the commencement of the IPO Act, 2003. Though the Act was passed on the 30th day of April 2003, assented to by the President on the 29th day of May 2003 and Gazetted on the 5th day of June 2003, the Parliament of the Commonwealth of Dominica, as authorized by the Constitution, postponed the operation of the Act to a date to be set by the President. Section 2 (1) of the Act provided that the Act shall come into operation on such day as the President may, by order in the Gazette, appoint.

Section 49(4) of the Constitution empowers Parliament to postpone the coming into operation of any law. It provides:

“49(4) No law made by Parliament shall come into operation until it has been published in the *Official Gazette* but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect”. (Emphasis added).

Under section 2(1) of the IPO Act, 2003, the President made the Integrity in Public Office (Commencement) Order, 2008, SRO 24 of 2008 appointing the 1st day of September 2008 as the day on which the Act came into operation. (Gazetted 14th August 2008.)

It is well settled law that an Act of Parliament will not have any operation until the day of its commencement. “Commencement” means “the time at which the written law comes into operation”. (Interpretation and General Clauses Act, Chap. 3:01, Section 3 (1)). “The last thing settled is when the Act shall come into operation, therefore all the

sections are to be considered as speaking from the date as fixed and are all governed by the last section” (i.e. the section which fixes the date). (Wood v. Riley (1867) L. R. 3 C.P.26, 27). (Emphasis added).

Section 10 (1) of the Interpretation and General Clauses Act, also addresses the point. It states that, “Acts and subsidiary legislation shall be published in the Gazette and unless it be otherwise provided therein shall take effect and come into operation on the date of such publication.” (Emphasis added)

The Parliament of the Commonwealth of Dominica has clearly and unambiguously “otherwise provided therein” in the IPO Act, 2003. It enacted that the Act shall come into operation on a date to be set by the President. The President has set the 1st day of September 2008 as that date. It means that Parliament had ordained that until that date, 1st September 2008, the law was to remain as before the Act. As Lord Justice Megaw stated it, the position “where Parliament has expressly deferred the operation of the Act for a period, cannot be equated with the position where an Act comes into operation at once on receiving the royal assent” (Wilson v. Dagnall [1972] 2 A. E. R. 44 at 53G).

Having been passed on the 30th day of April 2003, assented to on the 29th day of May 2003 and gazetted on the 5th day of June 2003, the IPO Act, 2003 nonetheless was “put to sleep” by Section 1(2) and remained “asleep”, as Mr. Linton correctly stated it, until the 1st day of September 2008 – the date when it was awakened and entered into force.

CONSTITUTIONAL PROHIBITION

Furthermore, the Constitution of the Commonwealth of Dominica expressly prohibits the giving of retrospective operation to penal legislation.

Section 8(4) of the Constitution provides: “8(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed”.

Section 8(14) of the Constitution defines “criminal offence” to mean “a criminal offence made under the law of Dominica”. The criminal quality of an act can be discovered by reference to one standard: is the act prohibited with penal consequences? (Proprietary Articles Trade Association v. A-G for Canada [1931] A.C 310 at P. 324, per Lord Atkin).

And Section 30 (2) of the IPO Act, 2003 makes a breach of the Code of Conduct a criminal offence. It provides: “30(2) A person in public life who is in breach of the Code of Conduct commits an offence, and is liable, on summary conviction, to a fine of ten thousand dollars or to imprisonment for a term of one year or to both such fine and imprisonment”.

Section 8(4) of the Constitution is absolute. It prevents the operation of retrospectivity in respect of the application of the criminal law.

Similarly, Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“7(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed”.

In construing paragraph 1 of Article 7 of the Convention, the European Court of Human Rights said: “The Court reiterates that Article 7 of the Convention embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it is to an accused’s disadvantage. While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy... The Court must therefore verify that at the time when an accused person performed that act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable” (*Achour v. France* [2006] ECHR 268.) (Emphasis added)

As Judge B.M. Zupancic succinctly summarized it: The principle of legality in paragraph 1, Article 7 of the Convention “precludes retroactivity, that is, the applicability of any subsequent legislation creating an offence to any conduct that precedes it in time. This is what we ordinarily understand under the prohibition of retroactivity, the principle of legality, *nullum crimen sine lege praevia*” (*Achour v. France*, supra). (Emphasis added)

Commenting on Article 10(4) of the Constitution of Guyana, which is the same as section 8 (4) of the Constitution of Dominica, R. H. Luckhoo, J. A, said: “Any legislation authorizing the punishment of people for what they did before the Act came into force offends against the Constitution and is therefore void.” (*Bata Shoe Co. v. C. I. R.* (1976) 24 W. I. R. 172 at 208 E-F.)

COMMON LAW PRESUMPTION

Also, at common law, there is a well established cannon of construction that penal enactments are to be read as prospective. “It is a fundamental rule of English Law that

no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction.” (Lindley L. J. in Lauri v. Renad [1892] 3 Ch. 402, 421. See also Re Snowden Colliery Co. Ltd., South Eastern Coalfield Extension Co v. The Co. (1925) 94 L. J. Ch. 305 (C. A.) The latter part of that statement seems no longer applicable to Dominica in so far as criminal offences are concerned because of the provisions of section 8(4) of the Constitution. (See Commissioner of Police v. Woods [1990] L.R.C. Crim. 1 at P 27E, per Melville J.A.)

In his book, “Legislative Drafting”, V.C.R.A.C. Crabbe, at page 157, explains the basis of the presumption of prospectivity in these terms: “It is a fundamental rule of English law that no statute is construed to have retrospective operation unless that construction appears very clearly in terms of the Act, or arises by necessary and distinct operation. The presumption against retrospective operation applies in the operation of legislation of a penal nature and is based on the general principle that penal enactments are construed strictly and do not extend beyond their clear meaning.” (See Phillip v. Eyre [1870] LR6 QB.23 and see dictum by Alleyne J, as he then was, in Chadiramani v. Nawasa [1997] ECLR 103, at 109H)

In the absence of anything in an Act to show that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a matter at the time when the Act is passed. (Leeds and Country Bank v. Walker (1883) 11 Q. B. D. 84 at p.91. Colonial Sugar Refinery Co. v. Irving [1905] A. C. 369.)

And in Gardner v. Lucas, Lord O’Hagas said “unless there is some declared intention of the legislature – clear and unequivocal - or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective.” ((1878) 3 APP Cas. 582, 561).

The State, therefore, may not apply its criminal prohibitions to persons who violated those prohibitions before they were promulgated and the courts have no power to give effect to an Act prior to its coming into force. (Wilson v. Dagnall (1972) 2 A. E. R. 44 (C. A); R. v. Reach (1968) 3 A.E.R. 269, C.A.)

CONCLUSION

At its meetings on the 12th and 18th February 2009 the Commission further considered Mr. Linton's submissions and concluded that he had failed to convince the Commission that its provisional view was wrong.

A person cannot be held to be in breach of the Code of Conduct before he became a person in public life within the meaning of the Act or before the Code of Conduct, specified in the Second Schedule, entered into force. The IPO Act, 2003 under which Prime Minister Roosevelt Skerit became a person in public life only came into operation on the 1st day of September 2008 – a date authorized by the sovereign Parliament of the Commonwealth of Dominica, and the Act can only apply as from that date.

The Commission is prohibited by the provisions of section 8(4) of the Constitution of the Commonwealth of Dominica from retrospectively applying its powers to investigate actions which were not criminal offences before the Act came into force.

The Commission must also be guided by and is required to apply the common law principle, *nullum crimen, nulla poena sine lege*, which precludes the application of any subsequent legislation creating an offence, to any conduct that precedes it in time.

The Commission is confronted by the fact that “the pattern of ministerial conduct” by which Prime Minister Roosevelt Skerit is alleged to have breached paragraphs (d), (e),

(g) and (i) of Rule 1 of the Code of Conduct, spanned the period of four years before the Act entered into operation.

The Commission, like any statutory authority endowed with statutory powers, can legally do only what the statute permits. And, what is not permitted by the statute, properly construed, is forbidden (A.G. v Great Eastern Railway (1880) 5 App. Cas. 473).

In the premises, therefore, the Commission is constrained to hold:

- i. that the provisions of the Integrity in Public Office Act, 2003 cannot apply retrospectively to the alleged conduct on the part of Prime Minister Roosevelt Skerrit, or that of any person in public life, if the alleged conduct complained of occurred before the Act entered into operation;
- ii. that, consequently, the complaint by Mr. Lennox Linton made in his letter to the Commission dated the 2nd day of September 2008 does not pertain to a matter that the Commission is empowered to deal with under the Act and is, therefore, rejected by the Commission as provided by section 32(1)(b) of the Integrity in Public Office Act, 2003;
- iii. that having rejected the complaint, the person against whom the complaint was lodged has the right to institute legal proceedings against the complainant in accordance with the provisions of section 32(2) of the Act; and
- iv. that in keeping with the decision of the Commission taken on the 23rd October 2008, this decision of the Commission will be communicated to the person in public life against whom the complaint has been made.

The complainant made forceful submissions regarding some moral and ethical aspects of the law in relation to his complaint. He urged that attention should focus not only on

an examination of the strict provisions of the law but to take these wider aspects into consideration.

The Commission, nevertheless, is constrained to consider and apply the provisions of the Integrity in Public Office Act, 2003 as enacted by our sovereign Parliament.

Dated this 19th day of FEBRUARY, 2009

(Sgd.) J.N. Johnson

.....
JULIAN N. JOHNSON
CHAIRMAN

(Sgd.) Kelvin E. Felix

.....
ARCHBISHOP KELVIN E. FELIX
MEMBER

(Sgd.) A. Lazare

.....
ALICK LAZARE
MEMBER

(Sgd.) P. Inglis

.....
PATRICIA INGLIS
MEMBER

(Sgd.) G.E. Williams

.....
GEORGE E. WILLIAMS
MEMBER

(Sgd.) G. Smith

.....
GERALD SMITH
MEMBER

(Sgd.) B. Alleyne

.....
Sir BRIAN ALLEYNE
MEMBER