REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CV. A No. 132 of 2000
CV. A No. 65 of 2004

BETWEEN

THE SAWMILLERS CO-OPERATIVE SOCIETY LIMITED

Applicant/Appellant

AND

THE DIRECTOR OF FORESTRY

AND

THE MINISTRY OF AGRICULTURE, LAND AND MARINE RESOURCES

AND

LESLIE RAMNARINE, DEBI PERSAD

SEESAHAI RAMSAHAI AND CHANDRABOSE MAHARAJ

Interverners/ Respondents

PANEL:
M . Warner, J.A.
S. John, J. A.
P. Weekes, J.A.

APPEARANCES:

Mrs. L. Maharaj, S. C., and Mr. D. Rambally for the Appellant
Mr. D. Mendes, S.C. and Mr. V Maharaj for the Interveners/ Respondents

Date delivered:

7th December, 2006

Delivered by Warner J.A.

I have read in draft the Judgment of Warner J.A. I agree with it and do not wish to add to it.

S. John
Justice of Appeal

I also agree.

P. Weekes
Justice of Appeal

JUDGMENT

1. These proceedings commenced on the 7th April 2000, when Smith J. granted the appellant leave to move for judicial review in respect of a decision of the first respondent to grant concessions and licences to certain sawmillers to cut timber on state lands in the year 2000. On the 20th April, 2000 Smith J. also granted the interveners leave to intervene in these proceedings.

On the 3rd May 2000, the appellant appealed the order of Smith J. but withdrew it on the 27th November, 2001.

2. By an amended notice of motion dated 5th June 2000, the appellant moved the court for entry of a judgment on admissions, pursuant to Order 27 Rule 3 of the Rules of the Supreme Court 1975. The notice of motion came up for hearing before Archie J. as he then was. The appellant and the first respondent presented to Archie J. a proposed consent order which signified a concession by the first respondent, that the state had breached the terms of an agreement which the Conservator of Forests, acting on behalf of the state had concluded with TANTEAK, a state owned corporation, in the year 1990.

3. By order of the 11th July 2000, Archie J. refused to enter the consent order, and, on 29th March, 2004, he dismissed the appellant's substantive motion for judicial review. These two appeals, which were consolidated on the 24th March 2005, are from those decisions.

4. In this court, counsel for the appellant invoked the provisions of Section 39(2) of the Supreme Court of Judicature Act. She sought to persuade us to make a finding in relation to the joinder of the interveners, to ensure "determination on the merits of the real question in controversy between the parties." This submission is unsustainable. The order of Smith J. is no longer on appeal and the learned judge has already determined the point. With respect, I do not think that section 39(2) can be construed as counsel urges.

5. Counsel for the interveners contended that the first respondent's decision was not reviewable and that important questions arose in these proceedings, which directly affected them. After the judge refused to make the order, the first respondent took no active part in the proceedings, and as a result, without the consent order, the appellant and the interveners were compelled to adopt an adversarial approach as the case proceeded to trial. The first respondent had initially appealed the order, refusing leave to enter the consent order, but that appeal was withdrawn on the 10th November 2001.

Jurisdiction

6. The question arises whether there remains any controversy between the appellant and the first respondent regarding the judge's refusal to enter the consent order. What, then, is the impact of the state's decision to withdraw its appeal?

7. In the event that the refusal to enter the order does remain a live issue, I make at this stage, the general observation, that although, as counsel for the appellant contends, it is highly unusual for the court in judicial review proceedings not to make the

order sought, it is significant to state that in this case, a third party, the interveners, vigorously oppose the relief sought by the appellant. The interveners contend that the manner in which the first respondent distributed coupes for the year 2000, was not ultra vires.

8. Counsel for the appellant also contended that the judge, having refused to enter the consent order was functus officio and accordingly, he had no jurisdiction to continue hearing the application for judicial review after a notice of appeal was filed. Further, that he erred when he adjourned the notice of motion for judgment, for mention on the 2nd October 2000. Reliance was placed on the case of **McKnight -v- McKnight (1983) 44 WIR 349.** This also remains a live issue.

Those, then, are the jurisdictional aspects of the appeal.

9. **The parties**

The appellant, sometimes referred to in this judgment as" the appellant society" is a co-operative established under the Co-operative Societies Act Chap. 81:03. The interveners complained about the authority of the appellant to initiate these proceedings. However, the objection was never followed through by an application to strike out, so that I find it unnecessary to pronounce on the issue. Suffice it to say however, that several members of the appellant society opposed the application for judicial review.

10. All the members of the appellant society are engaged in the sawmilling industry and it is expected that the society would seek to promote the economic welfare of its members, in accordance with the provisions of the Co-operative Societies Act.

11. The first respondent, the Director of Forestry (hereinafter referred to as "the Director"), was formerly known as the Conservator of Forests. (See now sec. 3 of the Forests Amendment Act 1999). By rule 2 of the State Lands Produce Rules, (formerly the Crown Land Produce Rules), he is authorized to grant concessions and licences to cut and extract timber on state lands. The Director's duties are prescribed by the Forests Act Chap. 66:01, the Sawmills Act Chap. 66:02 and the State Lands Act. Chap. 57:01.

12. The interveners are also members of the appellant society, but as I have indicated, they claim that their interests in this application diverge from the appellant's, in material respects. The appellant did not pursue its claim for relief against the Minister of Agriculture, Lands and Marine Resources.

13. The Trinidad and Tobago Forest Products Company Ltd. (TANTEAK) a state owned corporation, although not a party to these proceedings, played an important, but silent, role in the dispute. The appellant contends that the first respondent breached the terms of an agreement (the agreement), which TANTEAK entered into with the state in the year 1990. It is of relevance that TANTEAK is no longer in operation.

14. Clearly, no privity of contract existed between the appellant and TANTEAK. However, I can quite quickly dismiss the suggestion that, for the purposes of bringing an application for judicial review, the appellant did not have a sufficient interest in the matter to which the application relates. **(See R v IRC ex p. National Federation of Self Employed and Small Businesses [1982] AC 617])**. It is trite law that the technical restrictions on locus standi are now relaxed. The appellant did have a genuine and legitimate interest in obtaining a decision. That is not to say however, that it was guaranteed a favourable outcome.

15. The affidavit in support of the application for judicial review was filed by Keith Mahabir, the President of the appellant society. In reply, an affidavit was filed by Narine Lackhan who held the post of Director of Forestry at the material time. Another senior official of the Forestry Division, Mr. Anthony Ramnarine also filed an affidavit. Finally, several interveners filed affidavits setting out their case for an equitable distribution of coupes. The burden of their case was that in the past, the distribution of coupes was inequitable but that in the year 2000 they had been allocated coupes and had expended monies in reliance on their contracts with the state, or in some instances, the undertaking to grant them contracts.

16. **Background**

The background facts are comprehensively set out in the judgment of Archie J., and I shall refer to the judge's summary from time to time.

17. Teak and Pine plantations were established by the state in certain areas of the island in order to utilize degraded forested lands and ultimately, to improve their economic value. Coupes (permission to harvest teak and pine in a designated area) were made available for sale from those areas, which had to be clearfelled, or thinned at intervals, to ensure sustainable yields. In 1988, the Forestry Division produced two documents to guide the Forestry Division in identifying coupes, which were to be clearfelled, or thinned.

18. On the 24th August 1990, the Conservator of Forests entered into an agreement with TANTEAK for the felling of teak and pine trees plantations in 31 forested areas in Trinidad. The duration of the agreement was for a period of eight years, unless previously terminated under the provisions of the agreement.

The appellant maintains that the first respondent was obliged to offer to TANTEAK first choice of all teak and pine within the concession area covered by the agreement. The judge held otherwise.

19. The parties have identified the following clauses of the agreement as relevant to the dispute.

> ***"(3) <u>Trees to be felled</u>***
>
> ***Only Teak and Pine trees in the Concession Area which have been marked by the Forestry Division of the Ministry of Food Production, Marine Exploitation, Forestry and the Environment for Thinning or earmarked for clearfelling will be available to the Concessionaire. The Ministry of Food Production, Marine Exploitation, Forestry and the Environment in marking or earmarking such Teak and Pine trees will be guided by the Projected Annual Output as contained in Scheduled II. The property in all timber shall pass to the Concessionaire when the timber has been measured for Royalties and released to the Concessionaire.***
>
> ***(a) The Conservator shall within eighteen (18) months after the commencement of this agreement in the first instance and thereafter annually cause to be reviewed the system of releasing Teak and Pine logs and may cause alterations to the said system that appear to him to be required.***
>
> ***(4) <u>Logging Schedule</u>***
>
> ***The Conservator or his Agent will notify the Concessionaire, at least three (3) months in advance of coupes that are marked and to be offered to the Concessionaire for Thinning or clearfelling shall submit to the Conservator for approval a Logging Schedule for the twelve (12) month period. The Conservator or his Agent shall make Coupes available as per approved Logging Schedule.***
>
> ***(5) <u>Refusal by Concessionaire of Offered Coupes</u>***
>
> ***The Conservator or his Agent reserves the right to dispose by way of sale or otherwise of any timber from Coupes which may be refused by the Concessionaire (i.e. Coupes not listed in the logging schedule) and/or coupes in which no extraction has commenced within three (3) months of an undertaking to do so given in the Logging Schedule."***

20. I wish, as well, to draw attention to clause 28 of the agreement, which provides as follows:

"(28) Appeals <u>against orders, directions, or assessments of the Conservator of his Agent:</u>

(1) Where the Concessionaire is aggrieved by an order, direction or assessment made by the Conservator or his Agent he may within seven (7) days of the giving of such order, direction or assessment by way of written application appeal to the Minister.

(2) Where an appeal is brought under this Clause from any order, direction or assessment of the Conservator or his Agent, the Minister may allow or dismiss the appeal or may reverse or vary any part of the particular order, direction or assessment, whether or not the appeal relates to that part, and deal with the application as if it had been made to him in the first instance."

21. The agreement made provision for review of the system (clause 3a) and also set out its grievance procedure. (Clause 28)

22. The Ministry's programme was being hampered in 1997, because TANTEAK did not have the capacity to utilize all the trees. This handicap was mitigated when a former Director of Forestry allocated to sawmillers 4 coupes, which could not be utilized.

23. On the 9th September 1997, the responsible Minister took a decision to establish a Committee, comprising the Director of Forestry, the Conservancy Co-ordinator and two representatives of the appellant society to discuss issues relating to the sawmilling industry. This decision was taken at a meeting at which the Minister, officials of the Ministry and members of the appellant society were present.

24. The Committee met regularly over a two-year period. Later, the Minister announced a policy whereby TANTEAK would utilize 60% of the harvestable pine and teak coupes and sawmillers would be allocated 40% to be distributed among members and non-members of the appellant society. This was as a result of the Director's advice and was yet another deviation from the agreement. The criteria of capacity employment, investment and waste recovery were applied.

I pause to point out that the representatives of the appellant society had been present at meetings where the allocation of coupes was discussed. They did not object to the policy whereby the supply to TANTEAK was reduced. There was also uncontroverted evidence, that during the period 1998 to 1999, four sawmillers out of a total of 71 licensed sawmillers were allocated 70.3% of the available coupes.

25. According to the Director, representations were made to the Minister by entrepreneurs who wished to export timber or manufacture goods. As a result, in May 1998, the criterion of equity, which had been raised with the Minister and Director at meetings and in discussions, was adopted. The Minister changed the policy allocations as follows: 60% was awarded to TANTEAK, 30% to the appellant society and 10% to entrepreneurs.

26. In May 1999, the President of the appellant society approached the Minister and requested that members of the Forestry Division accompany members of the appellant society to a Forestry Exhibition in the United States of America. The appellant contends that its members were actively encouraged by the Director and other officials to invest in very expensive, specialized equipment. The Director emphatically denies this. His account was that on his return from the exhibition, he prepared a report for the Minister. Mr. Mahabir requested a copy of the report and he duly complied with that request. As far as the Director was aware, only one person purchased waste recovery and drying equipment. The appellant society also complains that they were not invited to a meeting convened by the Minister (a new Minister) in December 1999 to discuss matters relating to the sale of teak and pine. The Director deposed that invitations were issued to all stakeholders.

27. The Minister and the Director, as well as the President of the appellant society and other stakeholders attended the meetings held on the 20th December 1999. The

participants were informed that the purpose of the meeting was to consult with them in order to ensure equity in the allocation of coupes. In January 2000, the new Minister formulated a new policy for the distribution of coupes. This policy was submitted for Cabinet approval. The new policy recommended that 65% be sold by auction and 35% by lottery system. Cabinet agreed in principle, with the proposals but indicated that they be published for public comment, and that existing arrangements should continue. This new policy was not implemented.

29. In March 2000, the Director began to allocate coupes for the year 2000, based on the recommendations of a committee which he appointed in the year 2000, to advise him on "policy, royalty, rates and distribution."

30. Sixteen sawmillers were allocated coupes in the first tranche. The proceedings for judicial review of the decision were instituted before the Director could make any further allocations.

31. **The first appeal**

I shall begin my analysis with two observations:

(i) the appellant seems to have been quite content with the introduction of the 60\40 policy and in fact takes credit for having recommended its adoption to the Committee which the Minister had established.

(ii) if the Director had indeed committed an illegality by breaching the agreement, should the appellant rely on that illegality to demand that it be given the same treatment.

32. The terms of the proposed consent order were as follows -

> ***"(a) That the distribution of coupes of Teak and Pine for the year 2000 is ultra vires the powers of the Director of Forestry under Rule 2 of the State Lands Forest Produce Rules, 1937 and that the decision to***

award coupes for the year 2000 be and is hereby quashed.

(b) The respondents do pay to the applicant costs of the Motion including the costs of the Motion for judgment dated and filed on 5th June 2000, as amended on 15th June 2000 to be taxed in default of agreement certified fit for Senior and Junior Counsel."

33. The learned judge held that nothing in the wording of clauses 3,4 or 5 required that all coupes identified for thinning or clearfelling within the concession area be offered to TANTEAK. Further, that even if the concession agreement were exclusive, the Director could enter into the agreements in the public interest. Counsel for the appellant submitted that there was no overriding public interest.

34. In summary, the appellant's submissions were that –

(i) the proposed consent order was not illegal;

(ii) further, if the court were not minded to grant declaratory relief, it ought to have made suggestions in respect of proposed terms.

35. **Disposal of proceedings without a full hearing**

By the amended notice of motion dated 15th June 2000, the appellant moved the court for judgment on admissions pursuant to Order 27 Rule 3 of the Rules of the Supreme Court. A statement by Advocate Attorney-at-law for the respondents was filed. In the statement, Attorney stated that he could not resist a declaration that the Coupes for 2000 were issued in contravention of the concession agreement. The appellant relies on the general proposition of law expounded in ***Foskett on the Law and Practice of Compromise (5th Edition) para. 10-02*** and dicta in the case of **Arthur J.S.** ***Hall v Simons [1999] 3 WLR 873*** at 888 to the effect that the court cannot decline to enter a consent order or judgment merely because it is suspicious of the terms or disapproves of them, unless questions of jurisdiction or illegality arise.

In the same work, however, at para. 40-15, the authors say –

> ***"Real difficulties are only likely to arise in cases where the defendant is amenable to the grant of certain relief sought by the claimant, but a third party is opposed to that relief being granted. There are numerous instances in which a third party will be more closely interested in the outcome of an application for judicial review than the nominal defendant. A challenge to a planning authority's grant of planning permission to a developer is an obvious example, as are most instances in which judicial review is sought of a decision made by magistrates."……..***

36. In the case of ***R. Wirral Health Authority v Finnegan*** **(Co 202/01 cited in *Foskett)*** a Mental Health Tribunal was willing to discharge a patient who had a long history of violence. The patient objected. The application for release was supported by the then responsible medical officer. Another doctor, Mr. Finnegan, became interested in the case. His view was the patient was unfit to be discharged. Scott Baker J. held that it was not appropriate to make a consent order in the circumstances.

37. In **Phoenix Park Gas Processors Ltd.-v- The District Revenue Officer Couva/Caroni Civil Appeal 13 of 2004, (unreported)** Nelson J.A. cited a passage from Foskett which is also to be found at paragraph 10 – 02 that as a matter of practice, the court will not make a binding declaration of right by consent.

38. I think that on basis of the joinder and objections lodged by the interveners, Archie J. was correct when, he in effect, took the decision to determine the matter on its merits. Apart from the fact that the consent order would not have bound the interveners, (See observations of Chief Justice de la Bastide in **(McLarnon v Ramdass CvA No. 90 of 1999 (unreported) at page 3.)** without access to trial, the case would have been decided in derogation of the interveners' right to be heard. The Judge accordingly made a textual analysis of the concession agreement and concluded that while TANTEAK

may have enjoyed a monopoly on teak and pine from state lands, as a matter of policy, nothing required that all coupes identified be offered to TANTEAK.

39. **The Law**

A fundamental canon of construction is that every contract is to be construed with reference to its object and the whole of its terms. The whole context must therefore be considered in endeavouring to collect the intention of the parties even though the immediate object of the inquiry is the meaning of an isolated word or clause.

40. It is not open to the court to interpolate words into a written instrument of whatever nature unless it is clear that words have been omitted. **(See Chitty's on the Law of Contracts Vol 1 paras 12 - 063 to 12 - 072)**.

41. In my view, if the parties had intended the concession to be exclusive, then that ought to have been clearly and unambiguously expressed in the agreement. I agree with the conclusions of Archie J that in Clause 3 the use of the word **"only" as opposed to "all'** and the phrase **"to be offered to the concessionaire"** indicate that not all coupes, which were identified, were to be offered to TANTEAK.

42. Counsel for the interveners highlighted the effect of the relief sought by the appellant. The objectives of the appellant society were to promote the interests of its members. It was therefore surprising that it would construe the agreement, as requiring that all coupes should go to TANTEAK, with none to its members.

43. I make the observation that it was open to TANTEAK to invoke the provisions of Clause 28 and lodge an appeal to the Minister, if it considered that a right had been violated. There is evidence that although there was some initial objection by TANTEAK, it subsequently agreed to the 60/40 allocation.

44. **Was a change of policy permissible under the agreement, or otherwise?**

The major focus of the appellant's case has been that the 60/30/10 allocation breached the agreement. Clause 3(a) however, made provision for "yearly reviews, which might lead to alterations as required". In the exercise of his discretion, it is to be expected that the Director would take into account the competing interests.

45. The balancing and weighing of the relevant considerations, however, were matters for the public authority and not the courts.

This principle was exemplified in the case of R **(Alconbury) v Secretary of State (2001) 2 All ER 929, (a planning case.)**

46. In a conjoined application for judicial review, the real question for determination was whether the decision-making processes were compatible with section 6(1) of European Convention for the Protection of Human Rights and Fundamental Freedoms, which dealt with a right to a fair hearing. However, the House of Lords embarked upon a detailed consideration of the scheme of planning legislation. At page 997 Lord Clyde had this to say –

> ***"The general context in which this challenge is raised is that of planning and development. The functions of the Secretary of State in the context of planning may conveniently be referred to as 'administrative', in the sense that they are dealing with policy and expediency rather than with the regulation of rights. We are concerned with an administrative process and an administrative decision. Planning is a matter of the formation and application of policy. The policy is not a matter for the courts but for the executive. Where decisions are required in the planning process they are not made by judges, but by members of the administration. Members of the administration may be required in some of their functions to act in a judicial manner in that they may have to observe procedural rules and the overarching principles of fairness. But while they may on some occasions be required to act like judges, they are not judges and their determinations on matters affecting civil rights and obligations are not be seen as***

> ***judicial decisions…. <u>Moreover the decision requires to take into account not just the facts of the case but very much wider issues of public interest, national priorities.</u> Thus the function of the Secretary of State as a decision-maker in planning matters is not in a proper sense a judicial function, although certain qualities of a judicial kind are required of him…***
>
> ***Planning and development of land are matters, which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National Planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems"…***
> **<u>Emphasis added</u>**

47. Quite apart from the effect of clause 3(a), broadly speaking, the function exercised by a decision maker in a planning context, in my view, does have some similarity with the Director's functions, albeit that planning legislation is far more complex.

48. By the year 1997, the tenets of equality and the need to apply them to allocations of coupes had become of major concern to the Forestry Division. This was discussed at meetings at which influential members of the applicant society were present.

49. The reasoning in **<u>Alconbury</u>** is useful in the present context, so that I would apply some of the guiding principles espoused in that case. The decision lies in the general area of social and economic policy. The forestry resources were limited and required skilful management.

50. Another public law principle of central relevance is that a public authority cannot bind itself to exercise a discretion if to do so, would prevent it from fulfilling the primary purpose for which it is created. **(<u>See dictum of Lord Birkendale</u>** in the case of **<u>Birkdale District</u>**

Electricity Supply Co. Ltd. v Southport Corporation 1926 A.C. 355 at 364). The discretion to grant licences lay with the Director, and he could not enter into any contract which was incompatible with the due exercise of his powers. The weight of existing authority leads to the conclusion that the Director could change the licensing régime provided that there was no "bad faith, improper motive or manifest absurdity" attached to his decision.

51. I therefore conclude that:

(i) the agreement contemplated that the Director could review his orders;

(ii) the Director acted reasonably in the exercise of his powers to manage the forestry reserves.

52. **Whether the judge was functus officio after he made the first order**

After the appellant and the first respondent had settled the terms of the proposed consent order, the appellant moved the court to obtain a judgment by admissions pursuant to Order 27 Rule (3). The judge's note of the 11th July 2000 indicates that judgment was handed down and adjourned to 27th July for parties to consider their positions and to address on costs.

53. It is significant that when the appellant filed its notice of appeal dated 17th July 2000, one of the grounds of appeal against the judge's refusal to enter the consent order was that the refusal would ***'now'*** compel and or force the parties to engage in further and prolonged and unnecessary litigation with the burden of further costs. It is therefore inconsistent to submit that the judge was functus officio, yet assert unequivocally that further litigation would be costly.

54. The judge's note of the 27th July 2000 reads as follows –

"The court indicates that it is prepared to hear other grounds and regarded its judgment as being in relation to the June motion for judgment by consent although words in judgment could possibly be construed otherwise."

The court ruled that it was not functus.

55. At no stage of the proceeding did the court dismiss the substantive notice of motion for judicial review dated 15th April 2000, which sought other relief, including ***'damages'***.

56. It seems to me therefore that from the course the litigation took, that all parties recognized that the matter would have to be determined on its merits, and that the trial had not yet come to an end. The argument that the judge was functus officio, in my view, is not sustainable.

57. The case of ***McKnight v McKnight*** does not assist the appellant. In that case, the judge recalled his order and purported to change it after the notice of appeal had been filed.

In the result I would dismiss the first appeal.

58. **The second appeal**

The grounds of appeal may be grouped in the following manner :–

Illegality and irrationality

The appellants contend that the judge erred when he failed to hold that the Director had not exercised his own discretion, but had abdicated his function to a Committee.

Legitimate expectation

Breach of procedural legitimate expectation – that the judge failed to appreciate that the appellants were entitled to expect genuine and meaningful consultation based on past practice.

Constitutional

Breach of the equality provision, by implementing a policy decision to redress a perception of equality.

59. **The judgment**

The judge analysed the evidence and concluded as follows –

(i) that the allocation of coupes was intended to be within the framework of existing policy albeit with an additional objective – that objective was the redress of past inequities by giving priority to sawmillers who had not benefited in the past. (no irrationality)

(ii) there was nothing in the draft policy nor of the approach to the 2000 coupe allocations which is inconsistent with previously stated objectives and criteria nor with the statutory obligations of the Director. (no illegality).

(iii) there was no evidence that the Director ever wrote to the appellant promising that no new allocations would be made until the new policy was in place. (no legitimate expectation)

(iv) there was no breach of the equality provisions of the Constitution.

60. Finally, he found that the Director's exercise of discretion was in pursuit of a legitimate objective within the parameters of what might reasonably have been done in pursuit of that objective.

61. **Irregularity and Irrationality**

A public body's basic statutory functions, powers and duties are inalienable. It must own its functions and actions. Bodies are not entitled to surrender or ignore their

powers and duties by over-committing themselves to a particular course of action **(See Fordham's Judicial Review Handbook, 4th Edition, paragraph 50.1)**

62. The 'no fettering' rule however is employed as a means of keeping open the possibility of meaningful participation in the decision making process. **(See De Smith Woolf and Jowell's Principles of Judicial Review paras 10.001-003)**

63. I can find no reason why the Director could not appoint a committee or committees to examine and advise him on matters relating to the management of forests, provided of course, that in exercising his discretion he gave effect to ministerial policy. In fact, a public authority has a duty to equip itself with the information necessary to make an informed decision **(See Secretary of State for Education and Science -v- Tameside Metropolitan Borough Council 1977 AC 1014 at 1065 B)** Indeed, the affidavit of the Director sets out what the ministerial policy was, the fact that the Minister approved the setting up of committees, and above all, the formulation of policy and allocation in accordance with policy.

64. At no time did the Director surrender his independent judgment or abdicate his functions. There is no force in the argument that the Director's decision was not his effective decision.

65. **Legitimate expectation**

In this court, the argument on the principle of legitimate expectation, focused more narrowly on the right to be consulted. Counsel for the appellant took the position that the appellant's society was seeking no benefit for itself, but only a declaration to the effect that the Director acted illegally, in that there was no authority vested in him, to change policy.

66. It is unnecessary to review the rapidly developing jurisprudence which confirms the existence of the concept of substantive jurisprudence as explained in the case of **North and East Devon Health Authority ex parte Coughlan (2000) 2 WLR 622**.

This case was cited by the appellant in the court below. A promise of housing for life" as long as she chose" was made to a tetraplegic by a local authority. It was held that the authority as a matter of fairness could not resile from its promise unless there was an overriding justification in the public interest to do so, and that would be for the court to decide.

67. Lord Woolf identified three categories of legitimate expectation: -

(i) where the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more before deciding whether to change course;

(ii) on the other hand, where the promise or practice induces a legitimate expectation of, for example being consulted before a particular decision is taken, unless there is an overriding reason to resile from it;

(iii) where the court considers that a promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will decide whether to frustrate the expectation is unfair.

Lord Woolf continued

" ***The court having decided which of the categories is appropriate, the court's role in the case of the second and third categories is different from that in the first. In the case of the first, the court is restricted to reviewing the decision on conventional grounds. The test will be rationality and whether the public body***

has given proper weight to the implications of not fulfilling the promise. <u>In the case of the second category the court's task is the conventional one of determining whether the decision was procedurally fair</u>.

In the case of the third, the court has when necessary to determine whether there is sufficient overriding interest to justify a departure from what has been previously promised."… **<u>Emphasis added.</u>**

68. For the purposes of the appeal, the appellant's argument falls within Lord Woolf's second category. The obligation to consult arises out of the past practice in that the appellant society was represented at the monthly committee meetings held at the Forestry Division in 1998 and 1999. It is to borne in mind that the Director is under no statutory duty to consult. However, there was a practice in which the Forestry Division had been consulting with stakeholders so that if it was embarked upon, it had to be carried out in the proper manner. (**<u>See Coughlan at para. 108</u>**)

69. In the instant case, a detailed account of consultation, which took place between 1997 and 2000, is to be found in the Director's affidavit and evidence proffered by the applicant. In fact, in December 1997, at a joint meeting between the appellant society and the Director, the society put forward proposals to ensure equitable allocation. Further, discussions were held in 1998 and in 1999 and on all occasions the issue of equity was discussed.

70. The judge held that the appellant society was indeed afforded the opportunity to make representations and that fairness did not require that the appellant society be given some special consideration apart from that which was afforded to other stakeholders.

71. Therefore, the appellant society cannot take refuge in the fact that no formal invitation was sent to it, when its members, including the President participated in the discussions.

72. I think that the requirement of openness referred to by Lord Mustill in the Secretary of State for the Home Department ex parte **Doody (1993) 3 WLR 154 at 169** applies to the appellant as well as to the respondent.

73. It is significant to state that legitimate expectations do not create binding rules of law: a decision maker could act inconsistently with a legitimate expectation he had created, provided he gave those afforded an opportunity to put their case **(See Fisher v Minister of Public Safety (No. 2 P.C.) [2000] 1 AC 434)**

74. For these reasons, in my view, the alleged breach of legitimate expectation of further consultation has not been proven.

75**. Constitution - whether there was breach of the equality provision**

The burden of the appellant's case under this head was that by surreptitiously selecting a few sawmillers for favourable treatment to the detriment of others, the respondent attempted to deprive the appellant of the right to have equal opportunity of access to coupes.

76. The appellant contends that the judge erred in concluding that section 4(d) of the Constitution could be equated with section 15(1) of the Canadian Charter and or the 14th Amendment of the American Constitution which permitted affirmative action.

77. Section 4(d) of the Constitution guarantees-

> ***"the right of the individual to equality of treatment from any public authority in the exercise of any functions."…….***

78. Section 15(1) of the Canadian Charter of Rights provides –

> ***"Every individual is equal before and under the law and has the right to the equal protection and equal benefit***

of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."…….

79. Part of the fourteenth Amendment to the United States Constitution provides that–

"no state shall … deny to any person within its jurisdiction the equal protection of laws". …….

The terms are not identical, but they are all intended to ensure that a state must treat with an individual in the same manner as others in similar conditions. The policy of affirmative action in both the United States and Canada was developed in the main to protect minority groups who were historically disadvantaged. Section 4(d) was not drafted against that socio-cultural background. I prefer to approach the inquiry by focusing on whether the appellant has discharged the burden of showing that it has been unequally treated.

80. The factors which the Director took into account are expressed in his affidavit as follows: -

"***In applying the existing policy which used the 60:30:10 formula and in an attempt to create a measure of equity in the allocation of coupes to sawmillers the first persons who were considered for coupes were those who had not received material or very little material within the past two (2) years. There are 1200 hectares of teak and pine plantations available to sawmillers including TANTEAK for harvesting, that is, clear felling and thinning. The 30% available to sawmillers is approximately 360 hectares. However, backlog coupes as well as the Victoria Plantations can increase this area.***
On 22nd March, 2000 I took the decision to begin allocating the pine and teak coupes for the year 2000 (hereinafter referred to as the "coupes"). The coupes are to be allocated in tranches based upon the recommendations of a Committee I had appointed on 1st March 2000 to advise me on policy, royalty rates and proposed distribution. The members which were Mr Antony Ramnarine, Mr Kenny Singh and Mr Seuram Jhilmit hereinafter referred to as "the 2000 Coupe Committee". The

first tranche was allocated between 29th March 2000 and 6th April 2000 and represented approximately 545 hectares which can include backlog coupes and coupes from the Victoria Plantation of the teak and pine plantations and was distributed among 16 sawmillers. Mr. P. Maharaj and Seebalack Sawmilling Company Limited who were new sawmillers were amongst the sawmillers who were allocated coupes for the year 2000 in the first tranche in accordance with the basis which is stated in paragraph 20 of this affidavit.

The timber sales agreements were dated either 22nd March or 28th March, 2000 since they are prepared from a standard form which is on a diskette and would bear the date on which they are printed and not the date on which they are actually signed by the parties.

Based upon the recommendation of the Committee mentioned in paragraph 21, I was in the process of preparing to allocate the second tranche of the coupes when this application for leave for judicial review was filed in which the Applicant S.C.S. asked the Court inter alia for a stay of all timber sales agreements and/or coupe allocations of pine and teak for the year 2000 as well as an order prohibiting the Director of Forestry from granting any further coupe allocations of and/or entering into timber sales agreements for teak and pine for the year 2000 until the hearing and determining of this matter.

Previously timber sales agreements were given for a period of 6 months but the experience in the Forestry Division has been that persons to whom coupes have been allocated frequently asked for one or more extensions. As a result I decided that timber sales agreement should be for a period of 1 year instead of 6 months in order to prevent the sawmillers having to make so many requests for extensions of their contracts."

81. The effect of the Director's decision was that the allocations for the year 2000 coupes would have been delivered in two tranches. In the first tranche 16 sawmillers received allocations, a further 16 were identified to receive allocations in the second tranche. However, as a result of the stay of the proceedings, no further allocations were made. Of the 32 sawmillers who were identified for allocations in the year 2000, twenty-four were members of the appellant society.

82. It is not in dispute that the appellant society has never made application for the allocation of coupes, so that it is clear that the appellant society cannot establish a

violation of the equality right. The proceedings have never been amended to identify the individuals who it was contended, were affected by the decision. Had the appellant society been able to mount a case for discrimination, it would have borne the burden of identifying a comparator who was similarly circumstanced. This test is still appropriate. It was recently applied in **Privy Council Appeal No. 45 of 2003 Mohanlal Bhagwandeen -v- The Attorney General** where a police officer who had been suspended from duty was not recommended for promotion. He brought a constitutional motion claiming discrimination. This court held that the chosen comparator and the appellant were not similarly circumstanced. The Privy Council agreed.

84. Their Lordships held that a claimant who alleges inequality of treatment must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons described by Lord Hutton in **Shamoon -v- Chief Constable of the Royal Ulster Constabulary (2003) 2 ALL ER 26 at 71** as actual or hypothetical comparators. In Shamoon, a female Chief Inspector about whom complaints had been made was unable to show that the two male counterparts were valid comparators because no complaint had been made about them. She was unable to prove that she was treated less favourably on account of her sex.

85. In the instant case, the interveners were a disadvantaged group, not on par with those to whom allocations had been made previously.

86. Had the appellant been able to prove its case, there are at least two factors which would have influenced this court not to grant relief – the state had withdrawn its appeal and the relief sought could be of no practical significance since TANTEAK is no longer operational.

87. I conclude that the Director's attempts to apply evenhandedness could not be challenged as illegal, irrational or unconstitutional. I would therefore dismiss the second appeal.

88. We have been told that coupes for the year 2000 are still standing and can be identified. The Director may yet be able to carry out his decision.

89. **Costs**

As regards costs in the court below, counsel for the interveners has not answered the appellant's contention that only one advocate attorney (not senior counsel) appeared on the respondents' behalf in the first appeal. I would therefore vary that order to costs fit for one counsel.

90. The appellant will pay the interveners' costs on both appeals, fit for two counsel.

Margot Warner,
Justice of Appeal