Michaelmas Term
[2025] UKPC 50
Privy Council Appeal No 0020 of 2023

JUDGMENT

The Corporation of Hamilton (Appellant) *v* Attorney General of Bermuda and another (Respondents) (Bermuda)

From the Court of Appeal for Bermuda

before

Lord Reed
Lord Lloyd-Jones
Lady Rose
Lady Simler
Dame Janice Pereira

JUDGMENT GIVEN ON
8 October 2025

Heard on 11 and 12 December 2024

Appellant
Sir Jeffrey Jowell KC
Lloyd Barnett
Ronald Myers
Tom Lowenthal
Weiden Daley
(Instructed by Marshall Diel & Myers Limited (Bermuda) and Sinclair Gibson LLP (London))

Respondents
Delroy Duncan KC
Ryan Hawthorne
Lauren Sadler-Best
(Instructed by Charles Russell Speechlys LLP (London))

LORD REED, LORD LLOYD-JONES, LADY ROSE, LADY SIMLER AND DAME JANICE PEREIRA:

1. Introduction

1. In these proceedings the Corporation of Hamilton challenges the compatibility of certain provisions of the Municipalities Act 1923 ("the 1923 Act") with the Constitution. That Act has been amended by successive Municipalities Amendment Acts over many years and further amendments have recently been proposed and debated by the Bermudian legislature. The appeal raises important issues about the proper interpretation of the Constitution, which of its provisions can be enforced by the Corporation in the courts, and whether the Corporation's rights have been or are likely to be infringed.

2. The Corporation has a long and complex history and its governance, the powers it can exercise and the duties it must perform have evolved over the centuries since it was founded in the 1790s. In recent years, the relationship between the Corporation and the central Government of Bermuda has become a turbulent one, giving rise not only to this litigation but to other proceedings. The Board has not been invited in this appeal to express any view about the reasons for this turbulence and has not formed any view about the rights and wrongs of the sources of friction that have arisen. The Board's task in this appeal is to consider the wording of the Constitution and apply it to the factual position of the Corporation as established by evidence which is largely uncontroversial.

3. The alleged infringement of the Constitution is said to arise from legislation which will, in effect, transfer control of the Corporation from its current elected members to Ministers in central government or to new members who have been appointed by such Ministers rather than elected to office by the voters of Hamilton. The Corporation alleges that the existing provisions and proposed amendments to the 1923 Act will thereby expropriate its property without payment of compensation and will interfere with the right of the residents of Hamilton to freedom of expression by removing their current rights to vote for the Corporation's members.

4. The Corporation brought a challenge under section 15 of the Constitution in March 2019. That challenge was dismissed by the Hon Chief Justice and by the Court of Appeal. The Corporation now appeals to the Board.

2. The Corporation and the Municipalities Acts

(a) The foundation of the Corporation and the Municipalities Act 1923

5. The following account draws on the evidence of Mr Charles Gosling who is currently the Mayor of the Corporation of Hamilton and who filed affidavits in support of the Corporation's application and of Ms Rozy Azhar who, as Permanent Secretary at the Ministry of Home Affairs with responsibility for the municipalities, filed affidavits in opposition to the Corporation's application.

6. The earliest enactment concerning the municipality of Hamilton was the Hamilton Act 1790. That Act created as from 1 January 1798 an area of land comprising 145 acres at the west end of the island for "a collection of trade to be effected" for "the township of Hamilton". The town took its name from Henry Hamilton who arrived as governor of the island in October 1788. Henry Hamilton was a man with a plan, namely to move the seat of governance of the island from St George to a more central location. The St George's and Hamilton Act 1793 provided for "the freeholders of Hamilton to meet and assemble at some convenient place therein … and then and there by pleurality of voices or votes then met to elect and choose out of the freeholders of the said town, one person as Mayor, three as Aldermen, and five as Common Council". A customs house warehouse and a town hall were completed by June 1794 and the first meeting of the freeholders and the election of the first Mayor, Aldermen and Councillors were held on 8 January 1795.

7. There were other enactments relating to the town during the 19th century. The Hamilton Corporation Act 1894 was enacted, according to its preamble, to increase the value of the real estate that the Corporation was capable of holding from the value of £1,200 set in 1868 to £5,000 "by reason of the increased demands on the Corporation's funds for new wharves and other public improvements". Three years later an Act conferred on the town the style and title of "the City of Hamilton" in celebration both of the "progress and improvement" of the town and of Queen Victoria's Diamond Jubilee.

8. The 1923 Act is the principal Act with which this appeal is concerned. The more recent statutory provisions which have governed the relationship between the Corporation and the central Government have largely been introduced by way of amendment to the 1923 Act. The 1923 Act provides for the geographical extent of the City of Hamilton, for its constitution and legal status, for the conduct of municipal elections and for the tenure of its officers. Section 8 of the 1923 Act provides as follows:

> "**Legal status of Corporations etc.**

> The Corporations of Hamilton and St. George's and their successors in office shall be bodies corporate under the names of 'The Corporation of Hamilton' and 'The Corporation of St. George's' respectively, and shall have perpetual succession, with power to sue and liability to be sued under the aforesaid names and to have and use common seals respectively, with power to renew, vary or change the same as either such Corporation may from time to time determine."

9. By section 20, the 1923 Act confers on the Corporation power "to purchase, take, hold, receive and enjoy, and to give, grant, release, demise, assign, sell, mortgage or otherwise dispose of and convey by deed under the seal of the Corporation, any land in Bermuda, in fee simple or for a term of life or lives or years or in any other manner".

10. The following Amendment Acts are the main Acts referred to in this judgment:

(a) The Municipalities Amendment Act 1978 ("the MAA 1978")

(b) The Municipalities Reform Act 2010 ("the Reform Act 2010")

(c) The Municipalities Amendment Act 2013 ("the MAA 2013")

(d) The Municipalities Amendment (No 2) Act 2015 ("the MAA(2) 2015")

(e) The Municipalities Amendment Act 2018 ("the MAA 2018").

11. The powers conferred by the current provisions of the 1923 Act include the following:

(a) By section 22, the Corporation is to have the same powers as are conferred on the Government compulsorily to take up any land within its municipality if required for the purposes of road widening.

(b) By section 23, a general power is conferred to levy and collect rates on valuation units within the limits of the Corporation for various purposes including to maintain security guards, for sanitation and health purposes, for improving and maintaining street lighting and for off street parking. Section 23(1)(f) which has been the subject of proceedings between the

Corporation and the Government provides that the purposes for which rates may be used include "such municipal purposes, being purposes of an extraordinary nature, as the Minister may in any particular case approve".

(c) By section 31, a power to levy and collect wharfage is conferred on the Corporation in respect of all goods imported into and exported from the Port of Hamilton, save in respect of exempt goods. Exempt goods include goods imported by the Government of Bermuda and by the Corporation itself.

(d) By section 32, the Corporation has power to levy port dues in respect of every ship lying at or moored to any Corporation wharf or loading or unloading goods or taking on or disembarking passengers.

(e) By sections 36 and 37, it has power to borrow any sums which must not exceed $30 million at any one time.

(f) By section 38, it has power to make ordinances for a wide range of specified purposes provided that any ordinance must be submitted in draft to the Minister and the Attorney General for their approval. Ordinances which levy port dues or wharfage, or other fees and charges, are subject to the affirmative resolution procedures and all others are subject to the negative resolution procedure.

(g) Sections 39 onwards confer supplemental powers and duties on the Corporation, for example to employ officers and staff and to build landing places at the wharf for public use.

(b) The governance of the Corporation under the current provisions of the 1923 Act

12. The main provisions of the 1923 Act which govern the appointment of the members of the Corporation and who can vote for them are as follows:

(a) Section 7 of the 1923 Act provides that the Corporation shall consist of a Mayor and eight Councillors.

(b) Sections 9 and 9A to 9I then provide for the holding of elections and specify those eligible to vote.

(c) Section 17 deals with tenure of office by the Mayor and Councillors and section 18 with the qualification and disqualification of those seeking nomination for office.

13. The MAA 1978 repealed and replaced earlier versions of sections 9 to 19 of the 1923 Act. Those provisions as substituted provided for elections for the Mayor, Aldermen and Councillors of the Corporation to take place every three years and made detailed provision for the registration of the electorate and the holding of elections. A significant innovation was that the First Schedule to the MAA 1978 gave a vote in municipal elections to any kind of business entity occupying a valuation unit in the municipality including corporations, partnerships and associations of persons corporate or incorporate. A "valuation unit" was defined, broadly, as any land or building capable of being occupied as a separate unit. The entitlement of business ratepayers to vote for the members of the Corporation was removed by the Reform Act 2010 but was reintroduced in the MAA 2013.

14. Currently, occupiers and owners of a valuation unit liable to pay Corporation rates are eligible to vote and must nominate an individual to cast that vote. Mr Gosling, the current Mayor of Hamilton, explains the justification for the grant of a vote to business entities as follows:

> "…a vote for businesses who largely fund the City by their payment of rates, and to whom the state of the City is of the utmost importance, surely cannot be seen to be unfair in some way. One man one vote simply isn't fair when businesses are taxed but have no vote. Persons who are resident in the City are entitled to vote in both municipal and in national elections - at the moment businesses can only vote in municipal elections."

15. Ms Azhar describes the effect of introducing business voters in greatly increasing the number of electors. She states that in the elections in 2012, when there were no business voters, 197 ballots were cast. In 2015, after the entitlement of businesses to vote was reinstated, 567 ballots were cast. The total population of Bermuda in 2015 was about 63,000 individuals.

16. During the course of 2015, significant amendments were made to section 7 (as substituted by the MAA 2013). The MAA(2) 2015 amended section 7 by:

(a) Inserting subsection (10A) which empowered the Minister to attend or authorise a representative to attend, be heard at and receive the minutes of meetings of the Corporation, though not to vote at those meetings.

(b) Inserting subsections (11A) and (11B) which provided that no resolution decided upon by the Corporation after 7 May 2015 shall have effect unless and until it is approved by the Minister or his representative in writing.

17. The MAA(2) 2015 also inserted sections 7AA and 7AB into the 1923 Act. These were amended further by the MAA 2018. Section 7AA empowers the Minister to give directions to the Corporation if he considers it to be in the best interests of Bermuda for him to do so and further requires the Corporation to carry out such directions: section 7AA(1). An amendment introduced in the MAA 2018 deems anything required to be done by, or in fact done by, the Corporation in compliance with a Ministerial direction to be for a municipal purpose and to be a function of the Corporation: see section 7AA(1A). This provision is discussed further below as the Corporation alleges that it contravenes the right conferred by the Constitution to the protection of the law and other common law constitutional principles.

(c) The proposed 2019 Reform Bill

18. The Bill at the centre of the current appeal was entitled the Municipalities Reform Act (No 2) 2019 ("the 2019 Reform Bill"). It would have substantially revised important aspects of the governance of the Corporation. Ms Azhar described the policy aim of the Bermuda Government in bringing forward the Bill as being "to create a governance system for the Corporation of Hamilton whereby the many challenges to the provision of public services in Bermuda may be dealt with in an orderly way upon establishing a more closely cooperative relationship with central government." Mr Gosling describes the Bill in different terms: "The Government now wishes to disenfranchise all electors, whether residential or business, by the enactment of the Municipalities Reform Bill 2019. The intent of this can only be to ensure that members of the Corporation will now be responsible only to, and therefore under the complete control of, the Government, and not directly to the people and ratepayers of the City."

19. The 2019 Reform Bill was approved by the House of Assembly on 13 March 2019 by a substantial majority, but it did not pass a vote in the Senate. It may only be presented to the Legislature again under certain conditions under the Constitution. The Minister has indicated publicly that it is the Government's intention to table the Bill again and the appeal before the Board has proceeded on the basis that that Bill, or something like it, will be introduced in due course. The 2019 Reform Bill contains the following principal provisions.

20. As regards the appointment of the Mayor and the Councillors of the Corporation, clause 2 would provide that no municipal elections would be held in future. Clause 6

would have repealed the provisions of the 1923 Act dealing with elections including those determining eligibility to vote and the registration of those eligible to vote.

21. Clause 7 would insert sections into the 1923 Act which would provide that the current elected members of the Corporation would cease to hold office as at 13 May 2019 (new section 17A) and that the Minister would appoint the Mayor and eight Councillors whose appointments would take effect on 14 May 2019. The Fourth Schedule to be inserted by the 2019 Reform Bill into the 1923 Act would have made further provision for these appointments. According to that Schedule, the Mayor and four Councillors would have been appointed by the Minister, acting in his discretion, and would have been persons he was satisfied have the skills and experience to carry out the duties of Mayor or Councillor (as the case may be) effectively and efficiently. The other four Councillors would also be appointed by the Minister but on the recommendation of a Selection Committee which would invite nominations from the general public through advertisement and direct invitation.

22. The 2019 Reform Bill would have made further amendments to section 7AA of the 1923 Act, as discussed later in this judgment.

3. The Constitution of Bermuda

(a) Background and principles of interpretation

23. The Bermuda Constitution provides a modern framework for democratic governance based on universal adult suffrage and internal self-government, while also guaranteeing fundamental rights and freedoms. The Bermuda Constitution Order 1968 (BX 182/1968) was made by Her Majesty in Council under the Bermuda Constitution Act 1967. It came into force on 21 February 1968. Schedule 2 to the Order sets out the Constitution. Chapter 1 comprises 16 sections which make up the Protection of Fundamental Rights and Freedoms of the Individual. Subsequent Chapters provide for the office of Governor, for the constitution, powers and procedures of the Senate and House of Assembly, the Cabinet, the Judiciary, the public service and the Ombudsman.

24. In *Minister of Home Affairs v Fisher* [1980] AC 319 ("*Fisher*"), the Board considered the question whether a mother and her children could be required to leave Bermuda on the grounds that the children did not "belong to Bermuda" for the purposes of section 11 of the Constitution. Whilst acknowledging that in many statutes dealing with inheritance and property rights, the word "child" was limited to children born to married parents, Lord Wilberforce, giving the judgment of the Board, held that the word did not bear the same meaning in a constitutional instrument. He said that the Constitution is an instrument with "certain special characteristics" and that Chapter 1 is "drafted in a broad and ample style which lays down principles of width and generality". The form of Chapter

1 thus called for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to": p 328.

25. In light of that, Lord Wilberforce said: (p 329)

> "A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

26. The origins of the Bermuda constitution were described by the Board more recently in *Attorney General for Bermuda v Ferguson* [2022] UKPC 5; [2022] 3 LRC 579 ("*Ferguson*"): see in particular para 16 of the judgment of the majority and para 126 of the dissenting judgment of Lord Sales.

27. The provisions of Chapter 1 are based in part on the European Convention on Human Rights 1950 ("the ECHR"). The United Kingdom registered a declaration on 23 October 1953 under what is now article 56 of the ECHR extending its application to Bermuda as a territory for whose international relations the United Kingdom is responsible. There are, however, important differences between the provisions of the ECHR and those of the Constitution, some of which are highlighted later in this judgment. Despite those differences, Lord Wilberforce in *Fisher* described the Constitution as having been "greatly influenced" by the ECHR (p 328). In *Ferguson*, Lord Hodge and Lady Arden described the relationship between the Bermuda Constitution and the ECHR in the following terms:

> "16. … The fact that constitutions were individually negotiated and vary reinforces the view of the Board that its task is to interpret the Constitution of Bermuda according to its own special combination of provisions and in the light of the conditions in Bermuda and its history. Some provisions from the Convention found their way into the Bermudian Constitution, but others did not.

> 17 In view of the 'antecedents' discussed in *Fisher*, which, as explained, include the Convention, and in the light of the application of the Convention at the international level (which may have implications for Bermuda in its domestic affairs) the starting point (subject, as explained above, to any countervailing arguments) is that the rights conferred by the Constitution which merely echo Convention rights should be read and applied in accordance with the jurisprudence relating to the Convention. …"

28. It is clearly established, therefore, that the Constitution must be interpreted according to its own special combination of provisions and in the light of the conditions in Bermuda and its history.

29. The various issues raised by this appeal focus on different provisions of the Constitution. The text of the relevant provisions is set out in the sections of this judgment which address their scope and application directly. Here a summary of the principal provisions is sufficient:

> (a) Section 1, the opening section of the Constitution, is headed "Fundamental rights and freedoms of the individual". One of the principal issues in this appeal is whether this section confers free-standing rights which are separately enforceable or whether it operates as a preamble to the rights which are conferred by later sections. Two of the rights expressly mentioned in section 1 are the right to the protection of the law (section 1(a)) and the right to protection from deprivation of property without compensation (section 1(c)).
>
> (b) Section 9 is headed "Protection of freedom of expression". It provides in subsection (1) that no person shall be hindered in the enjoyment of his freedom of expression, including his freedom to hold opinions. Subsection (2) provides a qualification to the right, providing that nothing contained in or done under the authority of any law contravenes the right to the extent that the law is reasonably required for various purposes listed there, unless the thing done under the authority of the law is not reasonably justifiable in a democratic society. The Corporation alleges in these proceedings that the changes proposed by the 2019 Reform Bill, by depriving the electors of Hamilton of their right to vote for the Corporation's members, interferes with their freedom of expression contrary to this section.

(c) Section 13 is headed "Protection from deprivation of property". It provides that no property shall be compulsorily taken possession of or acquired unless it is for various purposes listed in subsection (1)(a), provided also that various conditions are met, including for the prompt payment of compensation. The Corporation alleges that the effect of the recent and proposed changes to the governance of the Corporation amount to an unlawful deprivation of the Corporation's property contrary to section 13.

(d) Section 15 is headed "Enforcement of fundamental rights". It provides that any person who alleges that any of the aforegoing provisions of the Chapter has been, is being, or is likely to be contravened in relation to him, may apply to the Supreme Court for redress.

30. Unlike some other constitutions of jurisdictions in the Caribbean, the Bermuda Constitution does not have a savings clause for pre-existing law. Instead, section 5 provides that existing laws must be read and construed "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution."

4. The dispute and the proceedings below

31. The originating summons issued by the Corporation on 20 March 2019 sought an order declaring that the Reform Act 2010 and the other Amendment Acts, as well as the 2019 Reform Bill if enacted, would contravene sections 1 and 13 of the Constitution.

32. A hearing took place before Chief Justice Hargun on 24 and 25 February 2021. He handed down his judgment on 31 March 2021. At the start of his judgment, the Chief Justice acknowledged that the 2019 Reform Bill was controversial and had "generated highly emotive debate in the community": para 6. Referring to the importance of the separation of powers between the legislature, the executive and the judiciary, he emphasised that the court was only concerned with the legal challenge to the Amendment Acts and to the Bill. The court did not express any view as to their merits since that was a matter for political debate and to be decided upon by the legislature.

33. The Chief Justice first addressed the question whether section 1 of the Constitution is directly enforceable by the Corporation as asserted in their originating summons. He described the judgments which had considered this issue both in the Bermudian courts and in the courts of other jurisdictions with similarly worded Constitutional provisions. These are considered by the Board in section 6 below. He concluded at para 76 that he was bound to accept the position that section 1 of the Constitution does not provide the Corporation with freestanding rights.

34. He then addressed the separate question of whether, even if section 1 is not directly enforceable in its entirety, the part of section 1 that confers the right to the protection of law is separately enforceable. He noted that recent cases had recognised that the specific provision in Chapter 1, section 6, dealing expressly with protection of the law was narrow in scope, dealing only with the protection of the law in the context of civil and criminal proceedings: para 78. He took the view that the right to the protection of law at common law was wider than the terms of section 6 but he dismissed the Corporation's claim that, in the circumstances of this case, there had been breach of the right to the protection of law by the enactment of the legislation itself.

35. The Chief Justice then turned to the alleged breach of section 13 which provides for protection against deprivation of property without compensation. He held that there had been no "taking" of the Corporation's property, given that the Corporation accepted that the Amendment Acts and the proposed 2019 Reform Bill did not purport directly to transfer either property or property rights to the Government.

36. He therefore dismissed the Corporation's claim for a declaration that the Amendment Acts and the proposed Reform Act be declared null and void.

37. The Corporation appealed to the Court of Appeal. Shortly before the hearing in November 2021, the Corporation applied to raise an additional point of law that had not been raised before the Supreme Court, namely that the 2019 Reform Bill infringed section 9 of the Constitution. The Corporation asserted that that Bill was "an unjustifiable and disproportionate violation of the right to free expression, in that its purpose and effect are to stifle the opinions of the electors of the Corporation of Hamilton, by removing their longstanding opportunity to express their views through regular elections of Members of the Corporation." The Court of Appeal heard the parties' submissions on that issue *de bene esse* on the basis that if the Court came to the conclusion that further evidence was needed, they would decline to hear it: para 198.

38. The Court of Appeal handed down judgment on 18 March 2022 ([2022] CA (Bda) Civ 6) dismissing the Corporation's appeal. The judgment was given by the President of the Court, Sir Christopher Clarke with Bell and Gloster JJA concurring. Like the Chief Justice in the Supreme Court, the President stressed at the outset of his judgment that the court was not concerned with the political decisions involved, or whether the legislation at issue is, or is not, wise or appropriate, but only with whether or not it is unlawful as being contrary to the Constitution or the common law.

39. The Court of Appeal addressed first the issue whether section 1 of the Constitution is directly enforceable. Clarke P described the many previous authorities on this issue and considered whether their conclusion was part of the ratio of those cases or only *obiter dicta* which were not binding on the Court. The Court upheld the Chief Justice's

conclusion that later Privy Council cases had not undermined the authority of the earlier decisions of the Bermudian Court: paras 75 and 97. He also rejected the submission that the right to protection of law in section 1(a) could be directly enforced: para 107.

40. The President turned to the alleged breach of section 13 at para 146 of his judgment. He accepted at para 183 that the cumulative effect of the statutory provisions was that "to the extent that the Minister chooses to do so, he may restrict the Corporation from acting, or require it to act, in a particular way in relation to its property." However, that did not mean that the Minister was to be regarded as in effect taking possession of the property of the Corporation or acquiring the rights of the Corporation in or over that property.

41. The President then turned to the new point on section 9 and freedom of expression. He recorded that the Corporation had made clear that it does not assert that the Constitution confers a right to local government or a right to democratic election of a local government corporation. But the Corporation contended that the removal of an extant democratic mechanism was "a classic example of suppression of political speech": para 209. The President did not accept that those two stances were reconcilable: if there is no constitutional right to municipal elections then legislation which abolishes the democratic vote cannot be invalid as a contravention of the right of the electors to freedom of expression. If it were otherwise, it would appear to follow that any change to the composition of the electorate would be unlawful. That was not the effect of section 9.

5. The issues raised by the appeal before the Board

42. A number of issues were set out in the Statement of Facts and Issues agreed by the parties to the appeal. In addition, the Board has considered a further issue as to the standing of the Corporation to bring this challenge under the Constitution.

43. This issue arose in the following way. The Attorney General's written case referred to the decision of the Bermuda Court of Appeal in *Corporation of Hamilton and Attorney General v Centre for Justice* [2017] CA (Bda) 4 Civ ("*Centre for Justice*"). In that appeal the then President of the Court of Appeal had cited a passage from the judgment of Laws J in *R v Somerset County Council, Ex p Fewings* [1995] 1 All ER 513, 524 ("*Fewings*") in which Laws J had contrasted the relationship that public bodies have with the law on the one hand and the relationship between the law and private persons on the other. Laws J had stressed that a public body "enjoys no rights properly so called" but exists solely to fulfil the duties which, according to the statute which created it, it owes to others.

44. The Attorney General's written case in the present appeal cited further decisions of the courts in Bermuda emphasising the limited nature of the Corporation's powers as a public body. Although these cases were cited in the context of the Attorney General's

case on the assessment of whether there had been a deprivation of property, it appeared to the Board that that case law gave rise to a more fundamental point about the status of the Corporation under the Constitution.

45. The Board therefore informed the parties shortly before the hearing that the parties should address this issue and the parties provided short submissions. In light of the oral submissions made at the hearing, the Board invited the parties to provide further submissions on the issue following the hearing. In particular, the Board sought the parties' assistance on the following questions:

> (a) Is there any case law on constitutional claims by public bodies comparable to the Corporation?
>
> (b) What are the characteristics or what is the nature of a body which gives it standing under Chapter 1 of the Constitution?
>
> (c) Are there any indications in the legislation establishing the Corporation as to its possession of any relevant characteristics?
>
> (d) Is there any judicial or non-judicial commentary on what was said by Laws J in *Fewings*?

46. The Board is grateful to the parties for their assistance on this point. This issue as to the Corporation's status under the Constitution is considered at section 8 below.

47. The issues raised by the appeal can be summarised as follows:

> **Issue 1** is whether section 1 of the Constitution creates rights which can be enforced pursuant to section 15 independently of the subsequent provisions. If it is independently and directly enforceable, do the legislative measures in contention contravene section 1? This issue is discussed in section 6 below (paras 48 to 89).
>
> **Issue 2** is whether the current and proposed provisions empowering the Minister to give directions to the Corporation to do any act if he considers it to be in the best interests of Bermuda, and which deem the Corporation's action in compliance with such a direction to be for a municipal function, are contrary to the right to the protection of the law. This raises the question first, whether section 1(a) of the Constitution is directly enforceable (even if section 1 more generally is not), secondly, whether those provisions contravene other constitutional principles

conferring the protection of the law and/or the separation of powers and thirdly, whether it is premature for the Board to determine this, in the absence of any exercise or planned exercise by the Minister of the power to give directions. This issue is discussed in section 7 below (paras 90 to 127).

Issue 3 is the status issue, namely whether the Corporation is a "person" of a kind which can rely on the fundamental rights and freedoms guaranteed by Chapter 1 of the Constitution. This issue is discussed in section 8 below (paras 128 to 157).

Issue 4 is whether the legislative measures in contention amount to the deprivation of property contrary to section 13. This raises a preliminary question whether the meaning of section 13 is influenced by section 1, even if section 1 does not have independent force. This issue is discussed in section 9 below (paras 158 to 198).

Issue 5 is whether the 2019 Reform Bill by replacing the existing electoral process with a system whereby the Minister appoints the members of the Corporation contravenes the rights of the existing electors to freedom of expression under section 9. This issue is discussed in section 10 below (paras 199 to 225).

6. Issue 1: whether section 1 of the Constitution confers directly enforceable rights

48. The question whether section 1 (the opening section) of the Constitution and others with similar wording or introductory provisions confer free standing rights has been the subject of considerable debate in Bermuda and in other jurisdictions. While comparisons may be made with other constitutions, the court's task (and that of the Board) is to construe the Constitution of Bermuda as a whole with due regard to its own structure, context and relevant background in accordance with the well-established principles applicable to constitutional interpretation. There is common ground between the parties on these principles. The judgments of the Chief Justice and the Court of Appeal discussed previous decisions of the Bermuda Court of Appeal as well as decisions of the Board on appeal from that Court and from other jurisdictions with similarly worded constitutions. In this section the Board primarily focuses on its previous case law.

49. The key sections of the Constitution relevant to this issue are section 1 and section 15.

> "**Section 1 Fundamental rights and freedoms of the individual**

Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Section 15 Enforcement of fundamental rights

(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.
>
> (3) If in any proceedings in any court established for Bermuda other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Chapter, the court in which the question has arisen shall refer the question to the Supreme Court unless, in its opinion, the raising of the question is merely frivolous or vexatious."

(a) The authorities

50. A useful starting point in reviewing the authorities is the observation of the Board made in *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574; [2000] 1 LRC 167 ("*Grape Bay*"). This is not because it is the earliest, or because it was unnecessary to pronounce on the separate enforceability of section 1, but because of the Board's observations recognising differences in the language used in the opening section or introduction or its equivalent, in many constitutions. The Board fully recognised, applying the well-established principles of constitutional interpretation to the language and structure of different constitutions, that different wording may lead to different results.

51. Lord Hoffmann, giving the opinion of the Board in *Grape Bay* (p 580) observed first the commonality of the basic structure of many constitutions:

> "The Constitutions of certain of the United Kingdom Overseas Territories such as Bermuda and many of the former British possessions, now independent states, have a family resemblance. Typically, they contain a chapter on the protection of the fundamental rights and freedoms of the individual which is introduced by a provision such as section 1 of the Bermuda Constitution, stating those rights and freedoms and their limitations in general terms, followed by a series of

> sections dealing with particular rights and more detailed exceptions and qualifications. Finally, there is an enforcement provision which gives any person who alleges a contravention of some or all of the provisions of the chapter the right to claim constitutional relief from the court."

52. Lord Hoffmann went on to note that the Constitutions of different jurisdictions differed in detail and also on whether the general statement of fundamental rights and freedoms at the beginning of the chapter was expressly included in or excluded from the later provision dealing with how contraventions of the rights conferred were to be challenged in legal proceedings. For example, in *Blomquist v Attorney-General of the Commonwealth of Dominica* [1987] AC 489 ("*Blomquist*") the Board had considered the Constitution of Dominica, which contains a general statement in section 1, followed by particular rights and freedoms in sections 2 to 15. The section dealing with the right to bring an action for contravention of the rights was section 16(1). That provided that a person who alleged that "any of the provisions of sections 2 to 15 (inclusive) of this Constitution" had been contravened in relation to him could apply to the High Court for redress. The fact that section 16 of the Dominican Constitution expressly excluded section 1 from the list of sections referred to in section 16 showed, Lord Hoffmann said in *Grape Bay*, that section 1 was not to be separately enforceable.

53. In contrast, Lord Hoffmann went on, the Constitution of Mauritius has a general statement in section 3, which reads:

> "It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms- …"

54. Unlike the Dominican enforcement section discussed in *Blomquist*, section 17(1) of the Mauritius Constitution provides that "Where any person alleges that any of sections 3 to 16 has been ... contravened in relation to him," he may apply for constitutional relief. Thus, the Mauritian Constitution makes it clear that section 3 is intended to be separately enforceable. The Board so held in *Société United Docks v Government of Mauritius* [1985] AC 585 ("*Société United Docks*"). In that case Lord Templeman, giving the judgment of the Board, said, at p 599, that "the wording of section 3 is only consistent with an enacting section; it is not a mere preamble or introduction. … A Constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies."

55. The Board in *Grape Bay* agreed with the conclusion that section 3 of the Constitution of Mauritius is essentially an enacting section and not a preamble. By expressly including the opening section in the later enforcement section, the Board considered, the Mauritian Constitution made clear that section 3, the opening section, was intended to be separately enforceable and not merely preambular. In *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* [1995] 3 LRC 494 ("*La Compagnie Sucriere*") it was similarly recognised that section 3 (the opening section) of the Constitution of Mauritius had separate enacting force: see the judgment of Lord Woolf at p 500. That meant that the part of section 3 which referred to deprivation of property and section 8 which dealt more fully with deprivation of property had to be read together "with the relevant language of each section influencing the interpretation of the other."

56. Another feature of the drafting of the different Constitutions, in addition to whether the opening section is or is not directly referred to in the later enforcement section, is the use of the word "Whereas" as the opening word. The significance of this was discussed by Lord Morris of Borth-y-Gest in the early case of *Olivier v Buttigieg* [1976] 1 AC 115, [1966] 2 All ER 459 ("*Olivier v Buttigieg*"), an appeal to the Privy Council from Malta. The opening section of the Maltese Constitution, section 5, started with the word "Whereas". Lord Morris observed (at p 128 / p 461):

> "It is to be noted that the section begins with the word 'Whereas'. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement—coupled however with a declaration that though 'every person in Malta' is entitled to the 'fundamental rights and freedoms of the individual' as specified, yet such entitlement is 'subject to respect for the rights and freedoms of others and for the public interest'. The section appears to proceed by way of explanation of the scheme of the succeeding sections …"

57. These authorities were reviewed more recently by the Board in an appeal from Jamaica in *Campbell-Rodriques v Attorney General of Jamaica* [2007] UKPC 65; [2008] 4 LRC 526 ("*Campbell-Rodriques*"). The Jamaican Constitution contained an opening section (section 13) which started with the word "Whereas". The enforcement provision (section 25) conferred a right to redress for contraventions of sections 14 to 24 inclusive, excluding that opening section. The Board once more adverted to the differences in language of various constitutions. At para 9 Lord Carswell stated: "… at one end of the spectrum is that of Mauritius considered in *Société United Docks*…" where, based on the language used in the constitution, the opening section was found to be an enacting section and therefore found to be independently enforceable. A constitution "at the other end of the spectrum" was the Constitution of Dominica which bore significant resemblances to

that of Jamaica in that the enforcement section (section 16(1) of the Constitution of Dominica) expressly excluded section 1 (the opening section) from its operation. Lord Carswell in *Campbell-Rodriques* noted that the Board in *Blomquist* held that the power to grant redress under section 16 (the enforcement section of the Dominican Constitution) did not have the wide meaning being contended for. It was limited to the redress provided for in the section which specifically dealt with deprivation of property. The Board, Lord Carswell said "has rejected the argument that s 1 conferred an independent and wider power which was separately enforceable": see para 10 of *Campbell-Rodriques*. It is worth noting that section 1 of the Constitution of Dominica began with the word "Whereas".

58. The Board, at para 11 of *Campbell-Rodriques*, expressed the view that in the middle or "intermediate position" come the Constitutions of Malta and Bermuda. Lord Carswell referred to *Olivier v Buttigieg* which, as stated above, addressed the Maltese Constitution. The Board noted that section 5 of the Constitution of Malta, like section 1 of the Constitution of Dominica, was framed in terms identical with those of section 13 of the Constitution of Jamaica in the opening and closing portions of the section – they both started with the word "Whereas". However, section 16 of the Maltese Constitution contained an enforcement provision which neither expressly included nor excluded section 5. It provided only that any person "who alleges that any of the provisions" of the part of the Constitution conferring rights could seek redress (see section 16 of the Maltese Constitution set out at p 127 of *Olivier v Buttigieg*). That case had not turned on the enforceability of section 5, but Lord Morris had regarded it as a preamble, proceeding by way of explanation of the scheme of the succeeding sections.

59. In *Campbell-Rodriques*, the Board had to consider the combined effect of section 13 (the opening section) of the Constitution of Jamaica, commencing with "Whereas", and section 25(1) (the enforcement section), expressly excluding section 13. The Board in *Campbell-Rodriques* concluded, upholding the decisions of the Constitutional Court and the Court of Appeal in the case, that section 13 (the opening section) did not confer any freestanding or independently enforceable rights (para 12).

60. A similar result was arrived at in *Newbold v Commissioner of Police* [2014] UKPC 12; [2014] 4 LRC 684 ("*Newbold*"). In that case the Board was called upon to consider article 15 (the opening section), and article 28(1) (the enforcement section) of the Constitution of the Bahamas. Article 15 also began with the word "Whereas". Article 28(1) in terms excluded that opening section from its ambit, stating:

> "28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

61. The Board in *Newbold* noted at para 27 that article 15 "is phrased as a recital, starting with the word 'Whereas'" and that the "fundamental rights and freedoms summarised correspond with the headings and subject matter of the ensuing articles". Lord Mance, giving the judgment of the Board, referred to *Campbell-Rodriques* noting that the Jamaican provisions had been held not to confer separate and independent or freestanding rights that could be relied on to provide redress not available under the subsequent provisions of the Constitution, including the article protecting against deprivation of property: see para 28. The Board went on to consider whether the reference to "the protection of the law" in article 15 of the Bahamian Constitution might nevertheless have independent effect. This issue is considered under Issue 2 below.

62. Finally, the Board has considered the provisions of the Constitution of Saint Christopher and Nevis, another "intermediate" Constitution in which the opening section starts with "Whereas" but where the enforcement section expressly includes the opening section. In *Brantley v Constituency Boundaries Commission* [2015] UKPC 21; [2015] 1 WLR 2753 ("*Brantley*"), the issue was the constitutionality of a proclamation by the Governor-General purporting to make changes to constituency boundaries shortly before a general election.

63. The Board held that although section 3 was in the nature of a preamble, it was separately and independently enforceable. The Board indeed observed in relation to the ouster provision of section 50(7) which may exclude a challenge under section 96 that "it does not exclude the High Court's jurisdiction under section 18 to enforce the protective provisions of Chapter II including the section 3(a) right to the protection of the law."

64. The earlier case of *Arthur Francis v Chief of Police* [1973] AC 761 ("*Arthur Francis*") concerned the Constitution of Saint Christopher, Nevis and Anguilla. The Board noted at p 769 that a preliminary question arose as to the effect of section 1 (now section 3), which was almost identical to section 5 of the Constitution of Malta considered by the Board in *Olivier v Buttigieg*. The Board expressly approved the passage from Lord Morris' judgment in *Olivier v Buttigieg* which has been quoted at para 56 above. Further, the Board in *Attorney General v Antigua Times Ltd* [1976] AC 16 ("*Antigua Times*") explained at p 26 that the statement of the Board in *Olivier v Buttigieg* concerning section 5 of the Constitution of Malta also applied to section 1 of the Constitution of Antigua and Barbuda. The Board in both decisions approved of the statement in *Olivier v Buttigieg* that the opening section was a preamble and therefore not separately enforceable.

(b) Other decisions

65. The Caribbean Court of Justice took a different approach to the interpretation of the opening section of the Constitution of Barbados in *Nervais v R, Severin v R* [2018] CCJ 19 (AJ); [2018] 4 LRC 545; (2018) 92 WIR 178 ("*Nervais*"). The Caribbean Court

of Justice referred to the decisions of the Board in *Campbell-Rodriques* and *Newbold*, stating at para 22 that the reasoning of those decisions "attributes an unusual meaning to the word 'preamble'" and that section 11 of the Constitution of Barbados (the opening section) "was [not] a preliminary statement at the commencement of the Constitution" but was in a "substantive portion". The Caribbean Court of Justice continued that the Constitution of Barbados contained a preamble before section 1. Consequently, the Court doubted that a substantive chapter of the Constitution of Barbados, namely, Chapter III, entitled "Protection of Fundamental Rights and Freedoms of the Individual", was intended to be a preamble. The Court was fortified in this view because subsection (e) of the Preamble appearing before section 1 of the Constitution of Barbados stated: "the following provisions shall have effect as the Constitution of Barbados". Since section 11 was included in those provisions this must have some relevance to the fundamental rights and freedom it declares (see para 23).

66. The Caribbean Court of Justice explained at para 25 of *Nervais* that "[t]he language of s 11 is not aspirational, nor is it a preliminary statement of reasons which make the passage of the Constitution, or sections of it, desirable". The opening section was in two parts. The first part commences with the word "whereas" and ends with the last word in para (d). The Court stated that the first part "declares the fundamental rights and freedoms of the individual to which every person in Barbados is entitled in clear and unambiguous terms" and that it "is the only place in the Constitution that declares the rights to which every person is entitled". The Court reasoned that the wording of the opening section of the Constitution of Mauritius that was considered by the Board in *Société United Docks,* namely, "it is hereby recognised and declared that" was not intended to have a meaning that differed from the word "whereas", thereby depriving the section of any binding effect (see para 30).

67. The second part of section 11 contains the remainder of the opening section. The Caribbean Court of Justice stated at para 31 that "[t]he plain language of this part must rebut the contention of the Crown and the reasoning of Lord Mance in *Newbold* and the decisions on which he founded his conclusions". It continued:

> "31 … There is no need for linguistic finessing to conclude that the word 'those' which precedes 'rights', and the phrase 'said rights' which are subjected to limitation, must refer to the rights declared in s 11(a) to (d). This means that the provisions in ss 12–23 afford protection for those rights subject to the limitations they authorize. Without the foundation of those s 11 rights, ss 12–23 do not fulfil the aspirations and intentions of the constitutional provisions for the fundamental rights and freedoms."

68. The Caribbean Court of Justice then cited from its previous decisions of *Attorney General of Barbados v Joseph and Boyce* [2006] CCJ 3 (AJ); [2007] 4 LRC 199; (2006) 69 WIR 104; *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ); [2016] 1 LRC 384; and *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ); [2016] 2 LRC 414; (2015) 87 WIR 178, concluding at para 35 that "[r]eviewing s 11 of the Constitution of Barbados through the lens of this evolution we can describe it as an enacting section".

69. In explaining the relevance of section 24 of the Constitution of Barbados (the enforcement section) to the determination of whether section 11 is independently and separately enforceable, the Court explained at para 40 that, although section 11 is not included in the enforcement section, the right to seek redress in the High Court pursuant to section 24 is stated in that section to be "without prejudice to any other action with respect to the same matter which is lawfully available". The Court, following its decision in *Joseph and Boyce,* accepted that "the Court had an implied power or an inherent jurisdiction to grant relief". It therefore concluded at para 42 that section 11 of the Constitution of Barbados was separately enforceable.

70. Anderson JCCJ, dissenting in *Nervais*, did not accept the reasoning of the majority. He stated that:

> "81 What clearly emerges from this underlying structure is that section 11 [the opening section] of the Constitution was not intended to be enforceable independent of the remainder of the Chapter. Section 11 is a preambulatory declaration of the rights and freedoms to which every person in Barbados is entitled. The section explicitly states that the very detailed provisions which follow 'shall have the effect' of affording protection to those rights and freedoms subject to limitations contained in those provisions. The rights and limitations are finely balanced to ensure that rights exercised by one person do not unduly interfere with the rights of another. Section 24 [the enforcement section] was framed on the understanding that only breaches of sections 12–23 would attract a remedy. For this reason, section 11 is omitted from the remedy provisions in section 24. Section 26 saves existing law from being held to be inconsistent with or in contravention of any provision of sections 12–23. The clear implication is that the framers of the Constitution did not intend for section 11 to be independently justiciable and therefore there was no need to save existing law against it."

71. Anderson JCCJ stated at para 82 that these propositions formed the unstated premise of several past decisions of the Board including *Campbell-Rodriques*, *Blomquist* and *Newbold*.

72. The Caribbean Court of Justice's decision in *Nervais* was referred to by the Board in *Jamaicans for Justice v Police Service Commission* [2019] UKPC 12; [2019] 4 LRC 117 ("*Jamaicans for Justice*"). In that case the Board had to consider section 13 of the Charter of Fundamental Rights and Freedoms (the opening section) that had been introduced in Jamaica in 2011. The Board did not refer to its previous decision from Jamaica in *Campbell-Rodriques* or any of its previous decisions from the Commonwealth concerning the scope of the opening section, from *Olivier v Buttigieg* in 1967 to *Newbold* in 2014. Reference was made only to the decision in *Nervais* as follows:

> "22 The Caribbean Court of Justice, in *Nervais v R, Severin v R* [2018] CCJ 19 (AJ), [2018] 4 LRC 545, (2018) 92 WIR 178, when construing s 11 of the Constitution of Barbados, which also begins with the word 'whereas', held that this did not mean that the section was merely 'aspirational [or] a preliminary statement of reasons which make the passage of the Constitution, or sections of it, desirable' (para [25]). It was intended to have the force of law. The court went on to say, of the right to the protection of the law, that it 'affords every person … adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power' (para [45]). This is an echo of the words of the Caribbean Court of Justice in *Maya Leaders Alliance v A-G* [2015] CCJ 15 (AJ), [2016] 2 LRC 414, (2015) 87 WIR 178, para [47], in turn citing *A-G v Joseph* [2006] CCJ 3 (AJ), [2007] 4 LRC 199 at 223, (2006) 69 WIR 104 at 226, para [20]."

73. Without determining whether section 13 was separately enforceable, the Board stated in *Jamaicans for Justice* that:

> "23 It is clear to this Board that the PSC, like the JCF and INDECOM and other organs of the State, must exercise its functions in a manner which is compatible with the fundamental rights of all persons, including the right to life, the right to equality before the law and the right to due process of law, guaranteed by s 13(2) and (3)(a), (g) and (r). As Morrison JA put it, at para [89],
>
> > '… given that all organs of the State are specifically enjoined by the Constitution to take no action which "abrogates, abridges or infringes those rights", it must surely be equally uncontroversial to insist that all such organs are bound to respect and seek to protect the

> fundamental rights and freedoms guaranteed by the Constitution in all aspects of their activities.'
>
> 24 The Board is also disposed to accept that the right to equality before the law, like the right to the equal protection of the law, affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power. These are, in any event, fundamental common law principles governing the exercise of public functions. As there is nothing in the statutory framework governing the PSC to contradict them, they are applicable in this case irrespective of whether or not they have the status of a constitutional right."

(c) The views of the courts below on Issue 1

74. The Chief Justice in the Supreme Court posed the question this way: Does section 1 of the Constitution have independent force and is it therefore directly enforceable regardless of the provisions of the remaining substantive sections?: see para 45. The Chief Justice considered not only the Privy Council authorities which the Board has explored above, but two authorities from the Bermuda Court of Appeal which had arrived at different conclusions as to the enforceability of section 1 of the Bermuda Constitution. In *Farias v Malpas* [1993] Bda LR 18, the Bermuda Court of Appeal had held, purportedly applying *Olivier v Buttigieg* that section 1 was separately enforceable. However, in *Inchcup v Attorney General* [2006] Bda LR 44 ("*Inchcup*") the Court of Appeal, considering the decision of the Board in 2000 *Grape Bay*, decided that *Farias v Malpas* had been wrongly decided and that *Grape Bay* was binding authority for the proposition that section 1 was not enforceable. The same decision to follow *Grape Bay* rather than *Farias v Malpas* was adopted by the Court of Appeal in *Ferguson v Attorney General* [2019] 1 LRC 673.

75. This clash of authorities required the Court of Appeal in the instant case not only to explore the decisions of the Board that have been discussed in the preceding paragraphs but also to explore which of the Court of Appeal's previous decisions contained a ratio decidendi, binding on the Court of Appeal in the instant case, that section 1 either was or was not separately enforceable: see paras 41 and paras 75 to 87. That is an issue which the Board does not have to consider.

76. After a review of authorities emanating from the Bermuda Court of Appeal and the Privy Council in which reference was made to decisions of the Caribbean Court of Justice, the Chief Justice concluded that:

> "the Court is bound to follow the decisions of the Court of Appeal in *Grape Bay*, *Inchcup* and *Ferguson* in relation to the issue whether section 1 of the Constitution is directly enforceable and is bound to accept the position that section 1 does not provide the Corporation with a free standing right."

He went on to say: (para 76)

> "I accept that, assuming the Court is not bound by the earlier decisions, a case can be made out as to why the Bermuda courts should adopt the more expansive interpretation of section 1 for the reasons given by the CCJ in the *Nervais* case. However, it seems to me that given the decisions of the Court of Appeal in *Grape Bay, lnchcup* and *Ferguson,* such a change in the law can only be made by the Privy Council."

77. The Court of Appeal decided to follow *Grape Bay* and *Inchcup* (para 96) and further accepted that its previous decision in *Faria v Malpas* was contrary to subsequent decisions of the Board, for example, in *Campbell-Rodriques* (the appeal from Jamaica) and in *Newbold* (the appeal from the Bahamas).

78. Clarke P observed at para 97, as regards the Privy Council decisions in *Campbell-Rodriques* and *Newbold*:

> " … I regard them both as authority for the proposition that, in the absence of a redress section which in terms applies to section 1 or its equivalent, the language which is to be found in section 1 and, in particular the use of 'Whereas' and the provision that it is the 'subsequent provisions' of the Chapter that 'shall have effect for protecting the rights' which are declared in section 1 'subject to such limitations of that protection as are contained in those provisions', means, as it seems to me that it does, that section 1 is not an independent source of rights. The clear scheme of the Constitution is that the rights expressed in a general manner in section 1 shall obtain their efficacy from the subsequent provisions; and it is those provisions which are to contain the necessary limitations to which the declaration makes reference. To hold that section 1 has independent effect in relation to the rights it declares when it provides that it is the subsequent provisions that shall have that effect appears to me to be a contradiction in terms."

79. The Court of Appeal accordingly concluded, following its previous decisions and decisions of the Board, including *Grape Bay*, that section 1 was not separately enforceable.

(d) The parties' submissions on Issue 1

80. The Corporation puts forward several points in seeking to persuade the Board that section 1 is independently enforceable. It asserts that:

> (a) First, the language of "entitlement" in section 1 is apt to confer rights; and, second, the "aforesaid rights and freedoms", for the purpose of affording protection to which "the subsequent provisions" are to "have effect", are those rights and freedoms set out in paragraphs (a) to (c) and include the right to protection of law and to protection from deprivation of property without compensation.
>
> (b) Section 1 must be read within the wider constitutional context in that only if section 1 were enforceable would the promise of protection against "deprivations" be realised because section 13 is limited only to "taking" or "acquiring".
>
> (c) The Court of Appeal fell into error when it misapplied *Campbell-Rodriques* and *Newbold* in accepting that these decisions of the Board settled that section 1 of the Constitution of Bermuda was unenforceable. The Corporation relies on the fact that section 15 of the Constitution of Bermuda allows redress for contraventions of "any of the foregoing provisions of this Chapter". This is different from the enforcement sections in the constitutions at issue in *Campbell-Rodriques* and *Newbold* which expressly excluded the opening provisions from the right to redress.
>
> (d) Since the word "Whereas" is followed by an assertion of present entitlement, it should not be treated as merely hortatory and without legal effect.
>
> (e) The decision of the Caribbean Court of Justice in *Nervais* is one of the judicial decisions which have not treated the use of the word "Whereas" as a mere preamble but as a statement of rights.
>
> (f) Section 1 provides that section 15, being a "subsequent provision", "shall have effect" for the purpose of affording protection to the "aforesaid

rights and freedoms", namely those set out in paragraphs (a), (b) and (c) of section 1 (including protection from deprivation of property without compensation). Section 15 provides for such protection by giving a remedy for contravention of any of those provisions.

(g) The placement of the language of section 1 within the operative provisions of the Constitution was deliberately done with a view to ensuring its enforceability.

(h) Section 1 must be read in the context of the rights contained in the ECHR, and the jurisprudence of the European Court of Human Rights makes plain that it is not only "takings" but also "deprivations" which attract the protection of the right to property, even where those deprivations do not manifest in the extinction of a proprietary right.

81. The respondents urge the Board to conclude that on a proper construction of Chapter 1 of the Constitution, section 1 is not independently enforceable because, in summary:

(a) The Bermuda Constitution is materially in the same terms as the Constitutions of Malta and St Christopher and Nevis. In the context of the Constitution of Malta the Board has consistently held over the last 50 years that the equivalent of section 1 of the Bermuda Constitution is not directly enforceable.

(b) The fact that the Caribbean Court of Justice has taken a different approach in *Nervais* should not affect the Board's considered and consistent interpretation of the equivalent of section 1 of the Bermuda Constitution. The fact that the Caribbean Court of Justice has departed from the reasoning of the Board is not a sufficient reason for the Board to change its guidance and position on the question of constitutional interpretation.

(c) The Board should consider the natural meaning of section 1 in the context of Chapter 1 as a whole. The predominant criterion of enforceability is not the redress clause but the proper construction of section 1.

(d) On consideration of many of the decisions of the Board, those decisions provide guidance on the interpretation of section 1 and there is no authority that casts any doubt on the reasoning in *Olivier v Buttigieg*. Subsequent decisions of the Board rely on *Olivier v Buttigieg*.

(e) The reasoning of the Caribbean Court of Justice in *Nervais* adds nothing to the analysis of *Newbold* in construing section 1 of the Bermuda Constitution.

(f) While the redress provision in section 15 refers to "foregoing provisions" and so does not expressly exclude any particular section including section 1, when Chapter 1 is read as a whole, the reference to "foregoing provisions" in section 15 must be a reference only to the "subsequent provisions", being sections 2-14, referred to in section 1. The Board has considered section 1 and the equivalent provisions in other constitutions that are worded similarly in a material way: for example, the Constitution of Malta (considered in the same category as Bermuda (in *Campbell-Rodriques*) and the Constitution of St Christopher and Nevis (in *Brantley*).

(e) The Board's conclusions as to the applicable principles for Issue 1

82. Having reviewed the cases considered by the Board spanning over half a century, what emerges is that the Board has taken a consistent approach to the interpretation of the opening section and the enforcement section of the constitutions in Commonwealth countries. The wording of the various opening sections sometimes differs and therefore it is not surprising that interpretation may yield different results.

83. In the main, however, some general principles may be distilled from the decisions of the Board as follows:

(a) Where the opening section begins with the word "Whereas", it is in the nature of a preamble or recital and is an introduction to the Chapter dealing with the Fundamental Rights and Freedoms: see *Olivier v Buttigieg* (at p 128); *Arthur Francis* (at p 769); *Antigua Times* (at p 26); *Blomquist* (at p 500); *Grape Bay* (at p 582; *Campbell-Rodriques* (at para 12); *Newbold* (at para 28); and *Brantley* (at para 28). The word "Whereas" begins the "first part" of the opening section which ends with the enumeration of the rights: (a) to (c).

(b) Where the opening section does not begin with "Whereas", as is the case in the Constitution of Mauritius, it would be considered as an enacting section: *Société United Docks* (at p 599); *La Compagnie Sucriere* (pp 500-501).

(c) The first part of the opening section is a declaration of entitlement to the fundamental rights which are then stated in general terms but subject only to "respect for the rights and freedoms of others and for the public interest".

(d) The second part of the opening section begins from the words "the subsequent provisions" to the end of the section. The rights to which each person is entitled are protected, not by the opening section, but by the "subsequent provisions". In other words, the other provisions of the Chapter are the ones that actually give protection to the fundamental rights and freedoms.

(e) In consideration of a, b and d above, the opening section is not regarded as independent and separately enforceable: *Olivier v Buttigieg* (at p 128); *Arthur Francis* (at p 769); *Antigua Times* (at p 26); *Blomquist* (at p 500); *Grape Bay* (at p 582); *Campbell-Rodriques* (at para 12); and *Newbold* (at para 28).

(f) If the opening section is expressly included in the enforcement section this would be an indicator, though not conclusive, that it is to be separately and independently enforceable: *Brantley* (at paras 28 and 29; *Société United Docks* (at p 599); and *La Compagnie Sucriere* (pp 500-501).

(g) If the opening section is not included in the enforcement section, this is a strong indicator that it is not meant to be separately and independently enforceable: *Blomquist* (at p 500); *Campbell-Rodriques* (at para 12); and *Newbold* (para 28).

(f) The interplay between provisions

84. An important feature of the interpretation exercise is checking the opening section against other provisions of the constitution itself, for anomalies or inexplicable inconsistency. This too provides an indicator in determining whether section 1 (the opening section) is independently enforceable.

85. To construe section 1 (the opening section) of the Bermuda Constitution as having independent enforceability can give rise to difficulties. Section 1 simply provides that the rights or entitlements which it declares are subject to the general limitations of being "subject to respect for the rights and freedoms of others and for the public interest." Section 1 does not itself refer to the specific limitations, qualifications and exceptions as these are set out in the detailed specific rights set out in the subsequent provisions. For

example, section 1(a) says in effect that every person is entitled to the right to life, liberty, security of the person and the protection of the law subject only "to respect for the rights and freedoms of others and for the public interest". However, section 2(1) immediately following section 1, which details the specific protection of the right to life says "No person shall be deprived intentionally of his life." But the word "intentionally" does not appear in section 1(a). This poses the difficulty of how the treatment of an unintentional deprivation of life under section 1(a) is to be reconciled with that of an intentional deprivation of life under section 2(a), subject to the specific qualifications provided in section 2(2).

86. Another example is found in section 16(2) of the Constitution which exempts anything done under disciplinary law in respect of a member of the disciplinary force from the provisions save for section 2 (right to life), section 3 (protection from inhumane treatment) and section 4 (protection from slavery and forced labour). However, section 1, if treated as separately enforceable, is not so excepted, again giving rise to difficulty in reconciling the language and scope of application. These anomalies highlight difficulties which can and may arise in future. They provide an indicator towards the view that section 1 of the Constitution does not confer free standing rights.

87. The Board notes that in *Nervais* the Caribbean Court of Justice has taken a different approach to the interpretation that the Board has consistently given to the interpretation of the opening section. As the Board explained at para 68 in *Chandler v State of Trinidad and Tobago* [2022] UKPC 19; [2023] AC 285 ("*Chandler*"), the Caribbean Court of Justice has the right to develop its own jurisprudence for the countries that are subject to its jurisdiction and it is not bound to follow the Board's precedents. The holding by that Court in *Nervais* that section 11 of the Barbadian Constitution has legal effect is at odds with the consistent jurisprudence of the Board for the last 50 years as outlined above. While the Board at para 22 in *Jamaicans for Justice* referred to the decision in *Nervais*, this cannot be taken as an endorsement of its approach to the interpretation of the opening section. The Board in *Jamaicans for Justice* stated at para 24 that concepts such as due process of law were fundamental common law principles governing the exercise of public functions and apply irrespective of whether they are mentioned in the constitution.

88. The Board is not persuaded to depart from its interpretation of the opening section of these constitutions. In this appeal, the Board has not been asked to overrule or depart from its existing authorities concerning the opening section. Had the Board been invited to do so, the Board would have repeated what was said in *Chandler*:

> "61 Further, the court has recognised that there is less scope for reconsidering a decision on a question of statutory interpretation than there may be in relation to a decision involving a judicial exposition of the common law. Respect must be given to the words and purpose of the statutory

> provision and, where a court of final appeal has given an authoritative interpretation of such a provision, it will normally be for Parliament to change the law if that interpretation is thought to be incorrect. *In R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966, Lord Reid stated that it should only be in rare cases that the court should reconsider questions of statutory construction. …"

89. Having regard to the summary of the established jurisprudence of the Board, the Board in this appeal entertains no doubt that section 1 of the Constitution of Bermuda is a preamble and is therefore not separately or independently enforceable. The enforcement section, found in section 15(1) of the Constitution of Bermuda, does not have the effect of altering the character of section 1 as a preamble or introduction.

7. Issue 2: the lawfulness of the Minister's power to direct the Corporation

90. The Corporation's arguments concerning its right to the protection of the law focus on the power of the Minister under section 7AA of the 1923 Act to direct the Corporation as to "any act or thing" to be done and the obligation on the Corporation to give effect to any such directions.

91. Section 7AA, as amended in particular by the MAA 2018, provides as follows:

> "Minister may give directions to Corporation
>
> 7AA (1) The Minister may give written directions to a Corporation, whether of a general or of a specific character, if he considers it to be in the best interests of Bermuda for him to do so, and the Corporation shall carry out any such directions.
>
> (1A) Any act or thing required to be done, or done, by a Corporation in pursuance of directions given under subsection (1)—
>
> (a) shall be deemed to be for municipal purposes; and
>
> (b) is a function of the Corporation.

(2) Before the Minister gives directions to a Corporation under subsection (1), he shall consult the Corporation with respect to the content and effect of the directions.

(3) Without prejudice to the generality of subsection (1), the Minister may direct a Corporation—

(a) to do anything that appears to the Minister necessary to secure that the Corporation's functions are exercised and performed in the most efficient manner;

(aa) to do any acts or things that the Minister, acting under the general authority of the Cabinet, requires the Corporation to do;

(b) to give to the Minister, whether periodically or not, such information relating to the activities of the Corporation as the Minister may specify in the directions;

(c) to discontinue or restrict any of its activities; or

(d) to give effect to anything required of the Corporation in pursuance of this Act,

and the Corporation shall give effect to any such directions.

(4) Forthwith after carrying out any directions, the Corporation shall inform the Minister in writing that the directions have been carried out."

92. The Corporation contends that the deeming provision in subsection (1A), as expanded by subsection (3), deprives the Corporation of the protection of the law because it purports to exclude the possibility of the Corporation challenging a Ministerial direction on the grounds that the direction is not for a municipal purpose. It also precludes a legal challenge based on an argument that the Minister has directed the Corporation to do something which is outside its functions and hence is ultra vires. This, the Corporation argues, is a contravention not only of the right conferred by section 1(a) of the Constitution but of the common law principles of the separation of powers and the rule

of law. It contravenes the former principle because it purports to confer on the Minister an unfettered power to expand the purposes for which the legislature has determined that the Corporation as a statutory body may act. It contravenes the latter principle because it purports to oust the jurisdiction of the courts to determine whether the Corporation has exceeded the powers conferred on it by the legislature – it appears to make it impossible for any action by the Corporation to exceed its statutory powers if the Minister has directed it to take that action.

93. The Court of Appeal rejected the Corporation's arguments. Having held that section 1 as a whole did not confer directly enforceable rights, the Court held that it would be "illogical to hold, absent any indication in the wording of the section, that one sub-section of it (expressed in the most general of terms and without any expressed qualification, exception or conditions) is, alone, directly enforceable": para 107.

94. As to whether section 7AA(1A) contravened common law constitutional principles, Clarke P referred at para 121 to *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; [2020] AC 491 ("*Privacy International*"). In that case Lord Carnwath expressed the opinion, obiter, at para 144 that there was "a strong case" for holding that consistently with the rule of law, a statutory provision which purports wholly to exclude the supervisory jurisdiction of the High Court could not be given effect.

95. The President said, however, at para 141 that there was no need for the Court to declare that section 7AA(1A) does not permit the Minister to do anything which offends against the Constitution since that was both obvious and accepted by the Attorney General. He added that the proper time to make a challenge is if and when the Minister purports to give a direction under section 7AA which is claimed to be unlawful for any reason: para 132. The Corporation had, the President said, the protection of law given that it could challenge any direction that the Minister may be minded to give, by way of judicial review on common law principles or on the grounds that it offends the Constitution. The position was, he said, *a fortiori* in relation to directions which, if complied with, would offend a person's constitutional rights.

96. The issue before the Board in the Corporation's appeal therefore raises the following questions:

> (a) Does section 1(a) of the Constitution confer free-standing rights to the protection of the law?
>
> (b) If it does, does the current wording of section 7AA, or the wording as it would have been if the 2019 Reform Bill had been enacted, contravene those rights or other constitutional rights upholding the rule of law or the separation of powers? Should those rights rather be exercised in relation to

a specific exercise of the power conferred on the Minister rather than in relation to the statutory power itself?

(a) Does section 1(a) of the Constitution confer an independently enforceable right to the protection of the law?

97. Section 1(a) of the Constitution provides "Whereas every person in Bermuda is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right ... to … the protection of the law." The only provision appearing later in the Constitution that relates to the protection of the law is section 6 which, although it is headed "Provisions to secure protection of the law" relates almost exclusively to the conduct of criminal proceedings. Section 6 provides as follows:

> (a) Subsection (1) provides that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial tribunal established by law.
>
> (b) Subsections (2) and (3) provide for certain rights for a person charged with a criminal offence, such as the presumption of innocence, time for the preparation of his defence, the provision of an interpreter and a copy of the record of the proceedings.
>
> (c) Subsections (4), (5), (6) and (7) deal with non-retrospective application of criminal law, double jeopardy for crimes and the right not to give evidence at the criminal trial.
>
> (d) Subsection (8) provides that a court for determining the existence or extent of any civil right or obligation must be established by law and be independent and impartial.
>
> (e) Subsections (9) and (10) provides that proceedings for the determination of civil rights must be in public, subject to the exclusion of people where that is justified for reasons of public safety etc.
>
> (f) Subsection (11) provides for various exceptions to the rights conferred by the earlier subsections.

98. The Corporation relies on the decision of the Board in *Newbold* as support for the proposition that the protection of law clause in section 1(a) can confer a directly

enforceable right even if the rest of section 1 is not enforceable. *Newbold* concerned a challenge to the legality of the interception of the appellants' phone calls pursuant to a Bahamian statute which predated the adoption of the Bahamas Constitution and so was protected from challenge by a saving for existing law in article 30 of that Constitution. That saving for existing law, by its terms, did not apply to article 15 of the Constitution which was an opening section in similar terms to section 1 of the Bermuda Constitution. Mr Newbold therefore relied on article 15 as conferring independent rights in addition to the more specific right under other articles: article 21 (freedom from unreasonable search) and article 23 (freedom from interference with correspondence) of the Bahamas Constitution.

99. As discussed in the previous section of this judgment, *Newbold* therefore addressed directly the question whether article 15 of the Bahamas Constitution provided a general source of protection of human rights overlapping with the substance of all the rights provided by subsequent specific articles. As explained earlier, Lord Mance rejected the submission that article 15 as a whole was separately enforceable or conferred direct rights.

100. However, Lord Mance recorded that counsel for Mr Newbold relied on three cases as indicating a different conclusion as regards protection of the law. One of those, *Thomas v Baptiste* [2000] 2 AC 1; [1999] 2 LRC 733 (an appeal from Trinidad and Tobago), Lord Mance regarded as distinguishable because the provision invoked was on any view an enacting provision. The other two cases were *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 ("*Lewis*") and *Attorney General v Joseph* [2006] CCJ 3 (AJ); [2007] 4 LRC 199 (an appeal before the Caribbean Court of Justice from Barbados) ("*Joseph*").

101. Those two cases require some more detailed consideration. *Lewis* concerned the construction of section 13 of the Constitution of Jamaica which was in similar terms to section 1 of the Bermuda Constitution. Section 20 of the Jamaican Constitution was in similar terms to section 6 of the Bermuda Constitution, that is to say it conferred protections focused on criminal proceedings and trials determining civil rights. The issue in *Lewis* was whether the appellant, a convicted murderer, had a constitutional right to have his application to the Inter-American Commission of Human Rights considered and determined before the sentence of death passed on him was carried out. Was that part of his right to protection of the law or was it not because that protection was limited to the domestic court process?

102. In the Court of Appeal in Jamaica (*Lewis v Attorney General of Jamaica (No 3)* (1999) 57 WIR 220), Forte JA said at p 227 that section 13 declared rights which existed at common law before the Jamaican Constitution came into being. He noted that it had been argued that the "protection of the law" provision was exhausted by section 20 which dealt solely with domestic or municipal law. That was not correct. He said: "The expression 'protection of the law' must be directed at a more widely applied concept than

the provisions of s 20 address". Langrin JA, dissenting in the result but not on this point, accepted at p 270 that section 13 conferred a right of procedural fairness by the protection of the law clause in addition to the right conferred by the more detailed section 20.

103. When the *Lewis* case was heard on appeal to the Board ([2001] 2 AC 50), Lord Slynn of Hadley giving the judgment of the majority, noted that all three judges in the Court of Appeal in *Lewis* had agreed that section 13 of the Constitution conferred a broader right of procedural fairness than that set out in the more specific later provision: see p 70B. At p 84H Lord Slynn said that their Lordships:

> "… agree with the Court of Appeal in *Lewis* that 'the protection of the law' covers the same ground as an entitlement to 'due process'. Such protection is recognised in Jamaica by section 13 of the Constitution and is to be found in the common law."

That meant, the Board held, that when Jamaica acceded to international Conventions and allowed individual petitions, the appellant "became entitled under the protection of the law provision in section 13" to complete the petition process and to a stay of execution until that process was completed.

104. *Joseph* (an appeal from Barbados before the Caribbean Court of Justice) also concerned the issue whether the exercise of the prerogative of mercy was subject to procedural fairness reviewable by the courts, and the effect on that of a petition by the appellant to the Inter-American Commission on Human Rights. *Joseph* discussed the opening section, section 11, of the Barbados Constitution which is in similar terms to section 1 of the Bermuda Constitution. At para 59, De La Bastide P and Saunders J contrasted on the one hand the relationship between some of the rights declared in section 11 and the subsequent more detailed provisions dealing substantively with those rights and on the other hand the right to protection of the law and the only subsequent detailed provision in section 18 (corresponding to section 6 of the Bermuda Constitution).

105. They said at para 59, that sections 12 to 23 of the Barbados Constitution, which they referred to as "the detailed sections", "contain specific provisions for the enforcement of rights which either correspond exactly with those enumerated in s 11 or may be regarded as corollaries or components of them". They gave as examples the right to life or the right not to be deprived of property. It was not surprising therefore, that the power of the court to adjudicate allegations of breach was "limited to cases which involve a contravention of one or other of the detailed sections". The question was whether the same was true in respect of the relationship between the reference to the protection of the law in the opening section and the detailed provision in section 18.

106. The Court in *Joseph* held that the protection of the law was different. It was clear that the subsequent provision in section 18 did not provide, nor did it purport to provide, an exhaustive definition of what that right involves or what the limitations on it are. The fact that there was no mention in section 18 of the protection of the law was "in itself an indication that s 18 is not intended to be an exhaustive exposition of that right." The Court went on:

> "Indeed, the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed. Section 18 deals only with the impact of the right on legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right to the protection of the law is, as we shall seek to demonstrate, much wider in the scope of its application. The protection which this right was afforded by the Barbados Constitution would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of s 18."

107. Returning to the judgment of the Board in *Newbold*, Lord Mance did not cast doubt on the distinction drawn in those earlier cases between the lack of separate enforceability of most of the opening section of the relevant constitution and its enforceability in respect of rights to the protection of the law. Instead, the Board in *Newbold* held that *Lewis* and *Joseph* did not assist the appellants in *Newbold* since the appellants there were not relying on the asserted protection of law right. Lord Mance said that those cases did not assist because they:

> "32 … are emphatically not authority for any proposition that art 15 of the Bahamian Constitution operates as and provides a general source of protection of human rights, overlapping with the substance of all the rights provided by the subsequent specific articles. They address a completely different subject matter to the present and at best support the view that the concept of 'protection of the law' can extend to matters outside the scope of art 18 of the 1973 Constitution [*the equivalent of section 6 of the Bermuda Constitution]*."

108. The Corporation in the present appeal argues that the unique enforceability of section 1(a) of the Bermuda Constitution – even if the remainder of the provision is not directly enforceable – has been further confirmed by the Board in *Brantley*, para 28. That, as discussed earlier, was an appeal from Saint Christopher and Nevis concerning the validity of a proclamation issued by the Governor-General. Lord Hodge referred at para 28 to section 3(a) of the Constitution as entitling every person to the protection of the law. He described this declaratory provision as having "in the main the nature of a Preamble … but on authority appears to extend to matters outside the more limited scope of section 10: see *Newbold* … at [32]". Section 10 referred to there is in similar terms to section 6 of the Bermuda Constitution.

109. In the present appeal, the respondents' written case did not invite the Board to hold that section 1(a) is not independently enforceable: para 39 of their case. The Attorney General prefers to rely instead on the argument that the Corporation has not met the evidential burden placed on them by section 15 of the Constitution because it has not shown that any right under the Constitution "has been, is being or is likely to be contravened in relation to him". This prematurity point is discussed below.

110. In the Board's judgment, the decisions in *Lewis* and *Newbold* cannot lightly be dismissed as illogical. The concern expressed by the Board in those earlier decisions was that the only subsequent provision in the respective constitutions which might be seen as putting flesh on the bones of the opening reference to the protection of the law is a very limited provision in terms similar to section 6 of the Bermuda Constitution. The absence of any more detailed provision conferring a broader entitlement to protection of the law is what prompted Lord Mance in *Newbold* to distinguish, rather than disagree with, what had been said in *Lewis* and *Joseph* when contrasting other elements of the equivalent to section 1 with the protection of the law provision. It is also what led the Caribbean Court of Justice in *Joseph* to describe the Constitutional right to the protection of the law as "a very poor thing indeed" if the only such protection given was that set out in a provision similar to section 6.

111. The Board therefore does not conclude that the earlier cases are wrong in so far as they indicate that section 1(a) of the Bermuda Constitution may confer directly enforceable rights to the protection of the law additional to those rights more specifically spelled out in section 6. The Board, instead, turns to examine whether the Corporation has established that the Amendment Acts and the 2019 Reform Bill are likely to contravene such rights to the protection of the law and to enforce such other constitutional rights as the Corporation has to enforce common law constitutional principles.

(b) Section 7AA of the 1923 Act and constitutional principles

112. Before the Board, the Attorney General's primary case on this issue was that the Corporation's challenge to the power purportedly conferred on the Minister by the current and proposed wording of section 7AA was premature given that there has been no actual or proposed use of that power to direct the Corporation to do anything. It was an essential building block in the Attorney General's case on prematurity that the exercise of the powers conferred by section 7AA are and would be subject to the normal public law constraints imposed on a statutory body with limited powers. That was why he argued that it is premature to treat the provision itself as unlawful. There may be future directions which fall well within the scope of the Corporation's municipal functions and which are entirely unobjectionable on public law grounds. If the Minister directs the Corporation to do something which the Corporation or another affected citizen regards as beyond the scope of the Corporation's functions, a future court will need to determine the legality of section 7AA and of any direction made pursuant to it in the context of a challenge to the lawfulness of that direction, as and when the Minister gives it.

113. The mischief of which the Corporation complains is that the wording purports to entitle the Minister to expand the scope of the term "municipal purposes" at will, subject only to an obligation to consult the Corporation. The scope of that phrase "municipal purposes" was considered by the Board in *Mexico Infrastructure Finance LLC v The Corporation of Hamilton* [2019] UKPC 2 ("*Mexico Infrastructure*"). That case concerned whether the grant by the Corporation of a guarantee to support borrowing by a private developer of a luxury hotel and car park was *ultra vires* and unenforceable as it was not for a "municipal purpose" within section 23(1)(f) of the 1923 Act.

114. Lady Arden (with whom Lord Reed and Lord Briggs agreed) noted at para 16 that unlike a commercial company, the Corporation has no objects clause setting out the purposes for which it was incorporated. Guidance on what comprises "municipal purposes" could be derived from the Corporation's powers to make ordinances under section 38 of the 1923 Act. Those powers concerned the provision of services or facilities which would benefit the whole or part of the inhabitants of Hamilton by the provision of some facility or service, such as a water system and highways: para 48.

115. Lady Arden stressed that the test for whether a purpose is municipal is objective: "The purpose must actually be municipal". That was an important safeguard for ratepayers: "Express wording would be needed if the question whether an activity was for a municipal purpose was simply to depend on the opinion of the councillors who approve it." The Board held further that the need to limit rate levying to purposes falling fairly within section 23(1)(f) was not avoided by pointing to the need for the Corporation to obtain ministerial consent for such extraordinary expenditure. That was obviously an additional safeguard, but the inhabitants elect the councillors and are entitled to hold the councillors to account for the proper use of the rate-raising power.

116. Lord Sumption (with whom Lord Lloyd-Jones agreed) dissented. He described the scope of "municipal purposes" as "purposes calculated to benefit the current and future residents, permanent or temporary, of Hamilton in their capacity as such. That is the relevant limitation." Where he differed from the majority was that he did not limit those purposes to the direct provision of services or facilities to the residents but would have extended them to the promotion of the city's economic development which benefits the residents less directly: see para 64. However, Lord Sumption also emphasised that the term construed as he proposed was not unlimited:

> "66. None of this means that the Corporation has power to engage in free-standing business activity for the purpose of earning profits with which to meet its expenditure, which was the perceived vice of the swap transactions held to be ultra vires in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1. But the issue of a guarantee to assist a development thought to be in the broader economic interest of the city does not appear to have been a free-standing business activity, let alone an independent source of earnings."

117. Section 7AA was not in issue before the Board in *Mexico Infrastructure* but one can assume that the term "municipal purposes" must mean the same when used in section 7AA as it means in section 23(1)(f).

118. In its submissions in the present appeal, the Corporation describes section 7AA as an "astonishing" provision which empowers the Minister to direct the Corporation to carry out an ultra vires action if he considers that it is in the "best interests of Bermuda for him to do so". The Corporation rejects the Court of Appeal's conclusion that any challenge to the provision is premature in advance of an arguably ultra vires direction being given. They point out that the supposed constraint on which the Court of Appeal relied, namely the ability of the Corporation to bring a judicial review challenge against any ultra vires direction made by the Minister, is illusory. If the 2019 Reform Bill comes into effect, the members of the Corporation will have been appointed by the Minister – they are unlikely to mount such a challenge and may simply be removed from office if they attempt to do so. The Corporation submits that section 7AA "should … be eviscerated before it can do damage to fundamental public law principles".

119. The Attorney General's submissions are in effect that the wording of section 7AA does not mean what it appears to say. In their written case before the Board, just as before the Court of Appeal, the respondents unreservedly accept that "any direction by the Minister in section 7AA(1A) has to be in accordance with the Constitution". Importantly, the Attorney General submits that "As a matter of interpretation, the Minister cannot exercise his power to direct the Corporation in a way that breaches common law principles". As to the Corporation's point that future Government appointees are unlikely

to bring a challenge, the respondents say that if the Corporation fails to step forward, individual citizens affected by the allegedly unlawful direction will do so.

120. One of the submissions which Clarke P records Mr Duncan KC as having made to the Court of Appeal was (para 128):

> "Under section 7AA the Minister has a power to give directions. The section does not confer on the Minister the ability to confer on the Corporation powers that it does not by statute possess, or to direct it to do an act or thing that the Corporation is not already empowered to do. He can only direct it to do something in accordance with those powers. Thus the Minister could not, in reliance on section 7AA(1A) direct the Corporation to sell land without the approval of the Cabinet and the Legislature (as required by section 20(1A); or to borrow in terms that would circumvent the restrictions set out in section 37, namely a limit of $30 million in the absence of authority from the Legislature."

121. The President said at para 131 that he regarded that point, and the other points made by the Attorney General as "well founded".

122. Before the Board, the respondents' case referred to established principles applicable to interpreting powers provided for in parliamentary enactments and the interaction between those powers and fundamental rights. These include a presumption that the Minister will not exercise his power in a manner which conflicts with a constitutional requirement and that general words in a statute are impliedly limited on the basis that the ordinary rules and principles of the common law will apply to the express provisions. The power of the Minister to give a direction must, the respondents argue, be exercised in conformity with the statute as a whole and the common law. That was established by Simmons J in *Schurman v The Minister of Immigration* [2004] Bda LR 21 where he said:

> "that notwithstanding the apparent wide ambit of the Minister's discretion, the discretion is not unfettered and is itself subject to review by the court if it is exercised unreasonably, or contrary to the spirit or letter of the Act, or for offending any other legal principle."

123. The respondents note that the Bermuda Supreme Court described Simmons J's statement as "most instructive" and applied it in *Sharifi v Minister of Home Affairs* [2015] SC (Bda) 60 at para 19. The oral submissions of Mr Duncan before the Board therefore

reiterated the respondents' understanding of the effect of section 7AA(1A) whether in the context of the present appeal or of any future challenge to the vires of a Ministerial direction.

124. The Court of Appeal did not in terms refer to the changes that the 2019 Reform Bill would have made to section 7AA if it had been enacted as then proposed. Clause 5 of the Bill would amend section 7AA so that subsection (1A)(a) would read: (amendment underlined)

> "(1A) Any act or thing required to be done, or done, by a Corporation in pursuance of directions given under subsection (1)—
>
> (a) <u>where it is not for municipal purposes, shall</u> be deemed to be for municipal purposes; and
>
> (b) is a function of the Corporation."

125. Clause 5 would also insert a new subsection (3A) which would provide that directions given to the Minister under subsection (3)(aa) would be subject to the negative resolution procedure.

126. The Explanatory Memorandum published with the 2019 Reform Bill states that the proposed amendment to section 7AA was intended to disapply the decision in *Mexico Infrastructure* by broadening the scope of "municipal purposes" as that phrase is used in section 7AA rather than in section 23. Section 23 itself would not be amended by the Bill. The mechanism used by the drafter to achieve this was not to expand the meaning of "municipal purposes" either generally or as it is used in section 7AA but rather to deem anything that the Minister directs the Corporation to do as then done for a "municipal purpose" even if it would not otherwise fall within the meaning of that phrase. That appears to go considerably further than Lord Sumption and Lord Lloyd-Jones would have gone in *Mexico Infrastructure*.

127. The Board's preliminary view is that the concessions made by the respondents as to the meaning and effect of section 7AA either before or after the proposed amendment by the 2019 Reform Bill are correct. The Board is, on that basis, therefore content to leave the question of how far the term "municipal purpose" as used in section 7AA extends beyond the scope delineated by the Board in the *Mexico Infrastructure* decision to the court before which the lawfulness of a Ministerial direction, or the Corporation's conduct in complying with such a direction is challenged.

8. Issue 3: does the Constitution confer rights on the Corporation?

128. As the Board has described in paras 43 to 46 above, shortly before the hearing of the appeal, the Board raised with the parties the question whether the Corporation enjoys constitutional rights under the Constitution and whether it has the capacity to bring proceedings for infringement of such rights. As the parties needed time to consider this further issue, the Board invited the parties to make written submissions on the issue of the Corporation's standing following the hearing. In those further submissions the respondents adopted the point and the appellant challenged it. The Board has been assisted by the parties' written submissions on this issue.

129. Although this issue was touched on tangentially in the courts below in the context of section 13(3) of the Constitution, it was not raised squarely or fully argued. On the contrary, the Court of Appeal appears to have assumed that the Corporation does have such capacity. Thus, Clarke P observed (at para 142) that the Corporation enjoys the protection of the law afforded by the common law "since it may challenge any direction that the Minister may be minded to give, by way of judicial review on common law principles or on the ground that it offends the Constitution". As a result, the Board has not had the benefit of the reasoned views of the Supreme Court or the Court of Appeal on this issue.

130. The appellant fairly makes the point that the Board's usual practice is not to allow parties to raise for the first time on an appeal a point of law which has not been argued below. See, for example, *Maharaj v Prime Minister (Trinidad and Tobago)* [2016] UKPC 37 per Lord Kerr of Tonaghmore at paras 21-23, citing *Baker v R* [1975] AC 774, 788 where the Board said that its normal practice:

> "… is not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending on an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it."

131. In these circumstances and in light of the fact that the Board has come to clear conclusions on the other issues on this appeal, the Board does not express a concluded view on the Corporation's standing. Nevertheless, it is an issue of importance on which the Board proposes to express its provisional views.

132. In the result, the Board seriously doubts that the Corporation as a public body has the capacity to enjoy constitutional rights under the Constitution or to bring these constitutional proceedings.

133. Although the Constitution is modelled on the ECHR it contains no express provision equivalent to article 34 ECHR denying public bodies like the Corporation the benefits of rights under Chapter 1 or the necessary standing to enforce them. However, this omission could not give rise to an inference that it was intended that public bodies such as the Corporation would enjoy constitutional rights. The issue must be approached as a matter of principle and constitutional interpretation.

134. Section 15 of the Constitution, set out at para 49 above provides that "If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress". In considering whether the Corporation is a "person" within this provision, the Board notes the following:

> (a) The Corporation is a body corporate "and shall have perpetual succession, with power to sue and liability to be sued" (the 1923 Act, section 8).
>
> (b) The Corporation is expressly empowered
>
> "(a) to purchase, take, hold, mortgage, pledge, deal with and dispose of, at [its] own will and pleasure, all manner of goods, chattels and other personal property; and
>
> (b) to purchase, take, hold receive and enjoy, and to give, grant, release, demise, assign, sell, mortgage or otherwise dispose of and convey by deed under the seal of the Corporation, any land in Bermuda, …" (the 1923 Act, section 20(1)).

(See, generally, *Mexico Infrastructure*)

135. The Corporation is clearly, therefore, a legal person with the capacity to sue and to be sued. The question is, however, whether it is a person capable of enjoying and enforcing its own constitutional rights pursuant to section 15 of the Constitution.

136. It is clear that some artificial legal persons may, in certain circumstances, enjoy and enforce in their own right certain fundamental rights under Chapter 1 of the Constitution. This will depend, in part, on the nature of the right concerned. By its nature, an artificial legal person cannot enjoy protection of the right to life under section 2 or protection from torture, or inhuman or degrading treatment or punishment under section 3. On the other hand, an artificial legal person may be able to enjoy and enforce other rights under Chapter 1 such as the right to protection from deprivation of property under section 13. In *Corporation of Hamilton v Minister of Home Affairs* [2015] SC Bda 22 Civ (19 March 2015) the Supreme Court of Bermuda (Kawaley CJ) observed (at para 44):

> "It is well settled that bodies corporate (artificial persons) can invoke some constitutional rights including fair hearing rights."

137. In its decision *Attorney General v Antigua Times Ltd* [1976] AC 16, the Board considered similar provisions in the Antigua Constitution. The claimant there was an incorporated company registered in Antigua which carried on the business of newspaper publication. It maintained that legislation was ultra vires the powers of the Antiguan legislature as repugnant to section 10 of the Antigua Constitution which provided for protection of freedom of expression. The Board rejected a preliminary objection to the standing of the claimant on the ground that it was not a "person" within section 15 of the Antigua Constitution (p 29B). It observed that the nature and extent of the rights and freedoms protected must depend upon the provisions of the sections protecting them. Some clearly could not apply to corporations but others could and did apply (p 27A-B).

138. However, it does not follow that all artificial legal persons are entitled to the protection of Chapter 1 of the Constitution. The essential issue here is whether such protection is compatible with the character of the Corporation as a public authority.

139. The Corporation was established as a body corporate by the St George's and Hamilton Act 1793 to benefit the citizens of Hamilton. The 1923 Act repealed many of those provisions but the Corporation was not reconstituted with wholly different functions or powers. Its powers and functions are all directed at the provision of services or facilities for the benefit of residents of Hamilton. They are municipal or public powers and include the power to levy rates, create ordinances and compulsorily acquire property. To the extent that it owns land and can use it for profit or sell it, those powers are clearly conferred to enable the Corporation to exercise those powers and functions. They are not conferred for the Corporation's own personal or other independent purposes. Unlike shareholders in a company or an executive director with a right to benefit from the profits of the company, the Mayor and the counsellors have no private interests in the Corporation. They control and manage it in the interests of the residents of Hamilton.

140. *Mexico Infrastructure* has been described earlier: see paras 113 onwards above. It concerned the power of the Corporation to guarantee a bridging loan to a developer. Lady Arden, delivering the judgment of the majority, considered the powers of the Corporation. She observed (at para 20):

> "As to land, the Corporation has power to buy land and to use it in various ways for profit (section 20(1) of the 1923 Act). Provisions for the approval of the Legislature and the Cabinet of sales and similar transactions were inserted by the 2013 Act. The Corporation also has power to construct any building on any land it owns 'where such works are calculated to facilitate or is conducive or incidental to the discharge of any function of the Corporation.' (section 20(2))".

However, she went on to qualify this (at para 22):

> "The Board considers that the powers in section 20 are clearly to enable the Corporation to carry out its functions and that they are not conferred for the purposes of some separate and independent business of investing or trading in land."

141. The Board considers that powers are conferred on a public authority to enable it to perform its functions and to discharge its duties. Such rights as it may have are conferred on it not for its own benefit but for the public benefit.

142. This principle was admirably expressed by Laws J in *R v Somerset County Council, Ex p Fewings* [1995] 1 All ER 513 at p 524:

> "Public bodies and private persons are both subject to the rule of law; nothing could be more elementary. But the principles which govern their relationships with the law are wholly different. For private persons, the rule is that you may do anything that the law does not prohibit. It means that the freedoms of the private citizen are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other

> purpose. I would say that a public body enjoys no rights properly so called; it may in various contexts be entitled to insist that this or that procedure be followed, whether by a person affected by its decision or by a superior body having power over it; it may come to court as a judicial review applicant to complain of the decision of some other public authority; it may maintain a private law action to enforce a contract or otherwise protect its property … But in every such instance, and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performance of the duties for whose fulfilment it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which defines its purpose and justifies its existence."

143. The Corporation clearly has legal personality and the capacity to sue and to be sued. It may acquire, own and dispose of real and personal property but its assets are all public assets and can only be used for public purposes. It may enjoy private law rights including the right to bring and defend private law proceedings. It may, depending on the circumstances, have the right to bring public law proceedings such as an application for judicial review, for example where this is appropriate to resolve a jurisdictional dispute with another public body. (See, for example, *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 ("*Bromley*"). In this regard the Board notes the public law proceedings brought by the Corporation listed in *Corporation of Hamilton v Minister of Home Affairs* at para 24. But in all these instances, it enjoys and exercises these rights and powers not in its own right or for its own benefit but for municipal purposes.

144. These considerations point strongly to the conclusion that the Corporation does not enjoy constitutional rights of its own. In particular, its powers to own, dispose of and deal with property are only conferred on it and are only capable of being exercised in order to enable it to carry out its municipal functions.

145. Reliance was placed by the Corporation on section 13(3) of the Constitution. This subsection creates an exception to the protection from deprivation of property, conferred by section 13 (discussed further in the next section of this judgment) in certain closely defined circumstances:

> "(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision for the compulsory taking of possession in the public interest of any property, or the

> compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds."

146. On behalf of the Corporation, it was submitted that this provision gives rise to an inference that public bodies otherwise enjoy a constitutional right to the protection of their property under section 13. In the Board's view, however, this is too slender a basis for drawing such an inference (and provides even less of a basis for drawing inferences as to the enjoyment by public bodies of other constitutional rights beyond section 13). It seems that the subsection simply identifies a specific situation which falls outside the protection of section 13. The exception created by subsection 13(3) does, however, leave intact constitutional protection for the property rights of private investors who have invested in a public body authorised to accept private investments.

147. The Court of Appeal considered (at para 196) that there was insufficient evidence to find that the Corporation was "a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds" within section 13(3). On the appeal before the Board, the Corporation drew attention to the fact that this conclusion has not been appealed. In this regard, the respondents submitted at the oral hearing that the Corporation is not capable under the 1923 Act of receiving private investment, in the sense of being able to offer private persons any stake in or return from the Corporation. The Corporation, on the other hand, pointed to section 37(1A) of the 1923 Act which provides that, where the Minister of Finance considers it appropriate, the Corporation has capacity to raise money by the issue of bonds. (In *Mexico Infrastructure*, Lady Arden drew attention (at para 19) to this power and observed that the Corporation has a power to borrow money and execute guarantees, but that the purposes for which it may do so are not set out in section 37(1), which is a significant omission.)

148. There was before the Board no evidence as to whether the Corporation had exercised its powers to raise money by the issue of bonds, nor any further evidence as to how the Corporation has in fact been funded. The Corporation did, however, claim that the only funding it had received from central government was an ex gratia grant for approximately three years. In these circumstances, the Board is in no position to interfere with the Court of Appeal's conclusion that there is insufficient evidence to determine whether the Corporation falls within section 13(3), even if that conclusion had been appealed. The Board considers, in any event, that while private investors may enjoy property or constitutional rights in respect of their investment, the Corporation itself does not enjoy constitutional protection for any property it holds for municipal purposes.

149. The extensive citation of authorities on behalf of the Corporation does not assist it. The cases cited fall into the following categories.

150. First, several authorities relied upon address the meaning of "person" in various Commonwealth constitutions. *Antigua Times* has been considered above. *Smith v L J Williams Ltd* (1982) 32 WIR 395 and *Attorney General of Jamaica v Southern Trelawny Environmental Agency* [2024] JMCA Civ 24; [2024] 5 LRC 206 do not support the Corporation's case on standing because they concerned respectively a company and a non-governmental organisation incorporated as a company. *New Patriotic Party v Attorney-General* [1999] 2 LRC 283 concerned a political party registered as a body corporate. While certain artificial legal persons may enjoy certain constitutional rights, it does not follow that a public authority may do so. Similarly, *Spencer v Attorney General* [1999] 3 LRC 1 and *Seychelles National Party v Government of Seychelles* [2001] 2 LRC 178 concerned the interest in constitutional claims of an individual politician and a political party respectively.

151. Secondly, the Corporation relies on a line of authority starting with *Attorney General v Mayor of Brecon* (1878) 10 ChD 204 ("*Mayor of Brecon*"). (*See Attorney-General v Mayor of Swansea* [1898] 1 Ch 602; *The Magistrates and Council of Leith v The Commissioners for the Harbour and Docks of Leith* [1899] AC 508*; Brooks, Jenkins & Co v Mayor & C of Torquay and Newton Abbott Rural District Council* [1902] 1 KB 601; *Attorney-General v Thomson* [1913] 3 KB 198.) In the *Mayor of Brecon* case, Sir George Jessel MR held (at p 216) that "the ordinary rights of corporations in defending themselves against attack, whether by action at law or by bill in Parliament, or otherwise, should be reserved to them". The appellant places particular emphasis on the observation (at pp 217-218) that:

> "the right of a corporation to defend itself from an attack of this kind extends not merely to property – not merely to the existence of the corporation in the smallest sense, that is, to the continued existence of the corporation as such, but to its existence also in the larger sense, that is, to the existence of the corporation with all its rights and privileges; and that an attack on a substantial portion of its privileges, rights, and duties, is as much within the purview of the authorities as an attack on its property or its mere existence."

152. Despite the breadth of this formulation, the case was actually concerned with the power of a municipal corporation to incur expenses in defending itself where a bill was presented to Parliament which threatened its powers and property. It is remote from the issue whether a public corporation may enjoy constitutional rights in its own right.

153. Thirdly, the Corporation relies on authorities concerning the power of public authorities to bring civil proceedings including judicial review proceedings (*Nottingham City Council v Zain (A Minor)* [2001] EWCA Civ 1248; [2002] 1 WLR 607; *Central Bedfordshire Council v Housing Action Zone Ltd* [2009] EWCA Civ 613; [2010] 1 WLR 446; *Mayor of London (on behalf of the Greater London Authority) v Hall* [2010] EWCA Civ 817; [2011] 1 WLR 504; *City of London Corpn v Samede* [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039; and *Bromley*. These cast no light on the present issue.

154. Fourthly, the Corporation relies on three US decisions in which municipal authorities were able to bring constitutional challenges: *Washington v Seattle School District No 1* 458 US 457 (1982); *United States v 50 Acres of Land* 469 US 24 (1984) and *City of Asheville v State of North Carolina* 369 NC 80 (2016); 794 SE2d 759. In *Washington* standing is not addressed at all, although it appeared to be assumed that the school district had the right to bring this constitutional claim. In *50 Acres of Land* standing is not addressed beyond the discussion of the words "private property" in the Fifth Amendment to the US Constitution encompassing the property of the city of Duncanville, Texas. In *City of Asheville* standing had been in issue below but was not appealed to the Supreme Court of North Carolina.

155. Fifthly, the Corporation relies on the decision of the Supreme Court of Canada in *City of Toronto v Attorney General of Ontario* [2021] SCC 34. There, the Supreme Court of Canada allowed the City of Toronto to bring a claim based on the right to freedom of expression under the Canadian Charter of Rights and Freedoms, in response to legislation introduced during a municipal election campaign which reduced the number of wards. When the case was before the Court of Appeal for Ontario (*City of Toronto v Attorney General of Ontario* 146 OR (3d) 705 (2019)), the majority (at paras 24-29) had expressed concern that the private persons who represented the candidates and voters within the City had dropped out of the proceedings, leaving alone the City whose standing had not been separately questioned in the lower court. The majority noted that the City did not assert private interest standing on its own behalf. However, the issues on appeal were serious and given that the City's role in the litigation prior to the appeal was never challenged, allowing the City to step into the shoes of the settling parties and argue the appeal in their stead was a reasonable means of ensuring that the decision below was properly reviewed by the Court of Appeal. The Court of Appeal expressly stated (at para 29) that the decision "should not be taken as an expression of support for the City's standing to have brought the application in the first place". On appeal to the Supreme Court of Canada, standing was not challenged.

156. There seems, therefore, to be a dearth of authority in support of the Corporation's case on standing.

157. Finally, the Board observes that if the Corporation were to enjoy a constitutional right protecting its property in its own right as it maintains, absurd consequences might follow. Would the Corporation be able to challenge legislation passed by Parliament reorganising local government on the ground that it interfered with the Corporation's right to the protection of its property? Would this involve the payment of compensation by one public body to another, for example by the Government of Bermuda to the Corporation? In the event of the outright abolition of the Corporation, how and to which body would compensation be payable? Must the present arrangements for local government be retained in perpetuity? It is difficult to escape the conclusion of Clarke P in the Court of Appeal in the present proceedings (discussed further in section 10 below) that it is for the legislature to create, change or abolish municipal authorities: see paras 189 and 216.

9. Issue 4: deprivation of property

158. Section 13 of the Constitution provides as follows:

> "**Section 13 Protection from deprivation of property**
>
> (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—
>
> (a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such manner as to promote the public benefit or the economic well-being of the community; and
>
> (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
>
> (c) provision is made by a law applicable to that taking of possession or acquisition—
>
> > (i) for the prompt payment of adequate compensation; and

> (ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and
>
> (d) giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.
>
> […]
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided from public funds."

159. Issue 4 concerns the issue of alleged deprivation of property. The Corporation accepts that neither the various Amendment Acts nor the 2019 Reform Bill purport directly to transfer property rights or property from the Corporation to the Government but contends that deprivation of management and control can amount to an interference with property rights. The Corporation submits that every decision it makes will have to be approved either by the Minister or the Cabinet and that, under the 2019 Reform Bill, the Mayor and councillors will be appointed by the Minister or by a committee selected by the Minster. Accordingly, the effect of the Amendment Acts and 2019 Reform Bill (whether individually or cumulatively) is that effective management of the Corporation now lies and will continue to lie indirectly with central government rather than the independent management consisting of the Mayor and Corporation elected by the voters of the City of Hamilton. This will deprive the Corporation of management and control of its property without compensation, contrary to section 1(c) and/or section 13(1) of the Constitution.

160. In his judgment on this issue, the Chief Justice described the legislative provisions which the Corporation contended deprived it of property without compensation contrary to sections 1 and 13 of the Constitution. These included:

> (a) the provisions of the Reform Act 2010 which had abolished the business ratepayer vote and repealed the Corporation's power to level and collect wharfage and port dues without compensating them with a grant commensurate to the previous revenue.
>
> (b) The provisions of the MAA 2013 which, broadly, increased government oversight of the Corporation's affairs by, for example, requiring the Corporation to obtain Government approval for selling land or leasing land for 21 years or more, or requiring Ministerial approval for Corporation ordinances.
>
> (c) The provisions of the MAA(2) 2015 which confers powers on the Minister to approve Corporation resolutions, and to assume temporary control of the Corporation's finances and governance in certain circumstances.
>
> (d) The provisions of the MAA 2018 which empower the Minister to give the Corporation mandatory and binding directions which are deemed to be for municipal purposes and a power to take over the Corporation under stewardship provisions which are no longer restricted to being on a temporary basis.
>
> (e) The provisions of the 2019 Reform Bill which abolish elections and replace elected members with those appointed by the Minister.

161. He held at para 115 that there was binding authority for the proposition that mere loss of control, even total loss of control does not amount to deprivation of property: "There must be '*taking*' by reference to loss in the value of identifiable property". The Corporation in the instant case as a legal entity continued to own the assets as before and there was no suggestion that there has been any diminution in value of those assets.

162. The Court of Appeal considered the Corporation's case that the degree of control transferred to the Government by the legislative measures amounted to an acquisition or taking contrary to section 13(1) at paras 181 to 191.

163. In summary, Clarke P reasoned that even having regard to the cumulative effect of the legislative measures, the Corporation remains the owner and in day-to-day control of its property. The powers given to the Minister enable him to direct the Corporation as to how it shall use the property, and property rights, which it owns and possesses (including its disposition), but that does not involve any taking of possession or acquisition of property or of what loosely corresponds to rights of the Corporation in or over its property.

164. That is because, as the Court of Appeal explained, the management of the Corporation remains with the Corporation, but is subject, so far as resolutions are concerned, to the approval of the Minister, who may also give directions and may take control of its governance (temporarily or otherwise) if he considers that the statutory conditions for doing so are satisfied (mismanagement etc) until such time as he is satisfied that such control is no longer necessary. In other words, the ability of the Minister to control the management of the Corporation is by no means absolute, and is subject to conditions, as well as the need to comply with classic public law principles (para 184). The members of the Corporation no longer have the same degree of control over Corporation owned property, but that does not mean the Minister has taken any of the Corporation's property or acquired any rights in or over it. The same is true of changes in the composition of the Corporation.

165. Clarke P recognised that, in certain circumstances, the imposition of restrictions or controls can amount to a (constructive) taking of possession but held those circumstances did not arise here. Clarke P drew a distinction between private individuals or businesses whose property is entirely their own and who can dispose of it without regard to any public interest considerations, and statutory corporations which do not have the same rights. As Clarke P observed, in the latter case questions may arise as to what control, if any, the executive should have in relation to local government in the public interest, and at para 189, "A statutory change which increases the control of the Executive over local authority corporations because the Legislature has agreed to it on the basis that the Minister is to take control when he regards it as in the national interest, should not readily merit the conclusion that there has been a constructive taking of possession or acquisition of an interest in or over the Corporation's property."

166. Without deciding the point, Clarke P inclined to the view that the impugned legislation falls within the regulatory exception and is not to be treated as confiscatory (para 190).

167. There are two preliminary points to note before addressing this issue. First, the Board's conclusion (subject to what has been said as regards protection of the law) that section 1 of the Constitution has no independently enforceable effect means that the Corporation cannot succeed in its deprivation claim based on reliance on section 1(c) alone. It was not suggested by the Corporation that section 1(c) could be independently

enforceable if section 1 as a whole was not. Rather, in those circumstances, the Corporation relied on it as an aid to the construction of section 13, as discussed below.

168. Secondly, underlying the right not to be deprived of one's property without compensation are the requirements that some public interest is necessary to justify the taking of private property for the benefit of the state, and when such taking is required, the loss should not be borne only by the person whose property has been taken but should be borne by the public as a whole. As the Board has discussed above, the Corporation is a public body whose powers derive from the 1923 Act (as amended). While that may not inevitably disqualify it from all protection under Chapter 1 of the Constitution, it is plainly a relevant feature when considering the section 13 claim.

169. The Corporation is a public body whose existence is wholly regulated by statute. It has "no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose ....It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility …": see the passage quoted from the judgment of Laws J in *Fewings* at para 142, above. This is significant context in a claim for compensation by one branch of the state in relation to the alleged taking of public property by another branch of the state (here, central government). Moreover, any assessment of whether there has been any taking of property must be considered in light of the limited powers of the Corporation. Unlike a private body, the Corporation cannot use or enjoy its property however it chooses; it can only do so to the extent that it is empowered by the 1923 Act and no more.

(a) Influence of section 1(c) on the proper construction of section 13(1)

170. The questions that remain to be addressed in relation to this aspect of the Corporation's case are the proper construction of section 13(1) and in particular, the stipulation that "no property shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired" without compensation; and whether there was any compulsory "taking" or "acquisition" of the Corporation's property rights on the facts of this case.

171. The Corporation submits that even if section 1 has no independent force, to the extent possible, section 13(1) must be read in light of section 1(c) which is in wider terms (referring to "protection for the privacy of his home and other property and from deprivation of property without compensation") and in a way that promotes the purpose identified in section 1(c) of providing protection from "deprivation" which is a wider concept than merely taking of legal ownership. To read section 13(1) in isolation without reference to its purpose as set out in section 1 would contradict basic principles of constitutional interpretation. The Corporation also relies on Strasbourg case law

concerning article 1 Protocol 1 interferences which makes it clear that not only taking but also deprivations attract protection even if the property rights are not extinguished. The Strasbourg Court will "look behind the appearances and investigate the realities of the situation complained of" whether or not formal legal ownership has been disturbed: *Belvedere Alberghiera Srl v Italy* (Application No 31524/96) (unreported) 30 May 2000, para 53.

172. Accordingly, the Corporation submits that even if section 1 is unenforceable, to read section 13(1) as limited to taking or acquiring in the literal sense of the word (in other words, to a transfer of legal ownership or title), would permit deprivation of property short of "taking" or "acquiring" without compensation or limitation and cannot have been intended.

173. Given that section 1 is not independently enforceable but provides an introductory declaration as to the nature of the rights referred to in the subsequent sections, the Board does not accept that the description in section 1(c) can be relied on to alter or distort the meaning of section 13(1).

174. It is of course the case that a constitution concerned to protect fundamental rights and freedoms should be generously construed, but that does not mean that section 13(1) can be construed by reference to section 1(c) in order to create or expand rights or protections which it does not contain: see *Matadeen v Pointu* [1999] 1 AC 98, 117-118. In any event, it would be surprising if the words in section 1(c) were used to mean rights of a radically different kind from those that are dealt with in detail in section 13(1).

(b) Taking, acquisition and deprivation of property: the authorities

175. It is necessary therefore to consider what is the proper interpretation of the protection offered by section 13 of the Constitution.

176. The starting point is that even when generously construed, section 13(1) is limited to protecting property and property interests from interference which in a broad sense involves some form of compulsory taking of possession or acquisition of property or of what loosely corresponds to a right over property. The property or interest in property must be sufficiently identifiable to be capable of being taken possession of or acquired in this way. Once property to which section 13(1) applies is compulsorily taken or acquired, then the section is contravened unless its other requirements are fulfilled (compensation for one) or one of the exceptions applies.

177. The question of what constitutes taking or acquisition of property or interests in property has been considered in a number of authorities, including by the Board. There is

a detailed discussion of these authorities by Chief Justice Hargun and by the Court of Appeal in the judgments below. The Board will not repeat that careful exercise. It is sufficient for current purposes to refer briefly to the following authorities from which a number of clear principles emerge.

178. A restrictive interpretation of section 13(1) appears to have been adopted by the Bermuda Court of Appeal in *Inchcup* (discussed in a different context at paras 74 to 78 above). In that case the court drew a distinction between the concept of "deprivation" (in section 1) and "taking into possession" or "acquisition" (in section 13) in language clearly suggesting that the court's view was that in order for there to be a "taking into possession" or "acquisition" there had to be either a direct appropriation of the property or an ouster of possession, and a transfer or change of ownership or possession from one person to another person for the purposes of section 13(1) of the Constitution. However, the Board's consideration will start with *Campbell-Rodriques* where a broader view of the scope of this provision was taken by the Board.

179. In *Campbell-Rodriques* the Jamaican government replaced an inadequate public road and bridge with an improved road and a new bridge financed by the payment of tolls charged to users of the road and bridge rather than by taxpayers. Although there was a suitable alternative route available free of charge, residents of communities in the area objected to the tolls, asserting that unrestricted access to their homes was indispensable, and claiming that their constitutional right to "enjoyment of property" was breached by the new arrangements. They relied on section 18(1) of the Jamaican Constitution which provided that "No property…shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that (a) prescribes the principles on which and the manner in which compensation therefor is to be determined…". They argued that the word "property" in section 18(1) should be given a wide meaning and that the right to obtain access to one's property without any economic burden was a protected property right.

180. Giving the judgment of the Board, Lord Carswell confirmed that there could as a matter of principle be a taking which did not involve the direct physical appropriation of property or an ouster of possession. Nor was it necessary to show that there had been a transfer or change of ownership or possession from one person to another person or body (para 15). Lord Carswell recognised that taking might encompass regulation of the use of land which adversely affects the owner to a sufficiently serious degree and that regulation cases provided a persuasive analogy (para 17). However, taking by regulatory control has limits, as he explained:

> "18. … They [the cases on regulation] establish clearly that there are limits to the concept of taking property and that some types of state action which could linguistically be so regarded are not to be regarded as justiciable. It is well established that

> measures adopted for the regulation of activity in the public interest, such as planning control or the protection of public health, will not constitute the taking of property, notwithstanding the fact that they may have an adverse economic effect on the owners of certain properties. So too in the Jamaican appeal of *Panton v Minister of Finance (No 2)* (2001) 59 WIR 418 the Board held that the assumption under statutory powers by the Minister of Finance of the temporary management of certain companies whose affairs were under investigation did not constitute a taking of the appellants' property. It is the respondent's case that the replacement of an existing highway by an improved road on which a toll is charged is governed by the same principle."

181. The Board concluded accordingly that it could not be said that the construction of the new road and the charging of a toll for its use constituted a taking or acquisition of any property or proprietary right capable of coming within section 18 of the Jamaican Constitution.

182. This "regulatory exception" was discussed earlier in *Grape Bay* where a McDonald's fast food franchise was prevented from opening a restaurant in Bermuda by legislation which prohibited the operation of new restaurants or groups of restaurants that also operated outside Bermuda. The claimant failed to establish any deprivation of property within the meaning of section 13 of the Bermuda Constitution. Lord Hoffmann explained (at p 583C):

> "The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others."

183. The Corporation relies on three cases for the proposition that changes in management and control of an enterprise can amount to the taking of property or interests in property. They are *Attorney General v Lawrence* [1985] LRC (Const) 921 ("*Lawrence*"), *Panton v Minister of Finance* [2001] UKPC 33; [2001] 5 LRC 132 ("*Panton*") and *Paponette v Attorney General of Trinidad & Tobago* [2010] UKPC 32; [2012] 1 AC 1 ("*Paponette*"). *Lawrence* is plainly distinguishable and was not concerned with mere loss of control or management rights. It concerned legislation removing the managing director (who was also chairman and a shareholder) of a bank from office without compensation, resulting not only in his loss of control of the bank, but also the loss of his right to a percentage of the annual profits of the bank. Without compensation, removal of the right to acquire profits amounted to a taking of property attracting constitutional protection.

184. By contrast in *Panton* temporary management of companies whose affairs were under investigation was assumed by the Minister under the impugned legislation (which made no provision for compensation). This was held not to amount to a taking of property of the shareholders in the companies. The shareholders lost total control of the companies to the Minister, and the regulation of the companies was in the hands of the Minister. The Board held that this did not mean that they had had any property taken away from them. Their shares would have qualified as property but had not been taken away and they remained shareholders. At para 22 the Board distinguished *Lawrence* as follows:

> "But that case concerned the removal from office of one who was not only a shareholder but a managing director who drew a percentage of the profits from the business. In that case a taking of property could be identified. In the present case no one has been dismissed and nothing has been taken. The shareholders remained holding their shares. The statutory provisions were, as the Court of Appeal recognised, of a regulatory not a confiscatory nature, and no obligation for compensation arises."

185. *Panton* must be read in light of the subsequent decision of the Board in *Paponette*, discussed below. Without doubting the correctness of the decision in *Panton* itself, the Board does not rule out the possibility of a case where the total loss of control of an asset could amount to "taking" even where there is no reduction in the value of the asset itself. Put another way, the Board does not accept that total loss of control is never enough if it falls short of a legal transfer of property rights.

186. *Paponette* is also a very different case. It concerned a constitutional challenge to newly introduced legislation which made changes to the way taxi-drivers could carry on their trade, based on their right under section 4(a) of the Constitution of the Republic of Trinidad and Tobago not to be deprived of the enjoyment of their property. Section 4(a)

of the Constitution is a separately enforceable provision which refers to the right to "enjoyment of property and the right not to be deprived thereof except by due process of law" and is different to the constitutional protection in Bermuda afforded by section 13(1) which contains no reference to a right not to be deprived of a right to "enjoyment of property".

187. Lord Dyson delivered the majority judgment of the Board in *Paponette*. The Board, departing from the view of the Court of Appeal, held that although the new law did not deprive the applicants of their businesses altogether, that was not necessary. However, it was necessary for the interference to reach a certain level of seriousness in terms of its adverse consequences on the rights interfered with. The Board relied on authority of the Strasbourg Court to the effect that to engage the protection of the right to enjoyment of property set out in article 1 of the First Protocol, the infringement must "reach a certain level of significance". In other words, there would be no interference at all with the relevant right set out in section 4(a) unless a certain level of intrusion upon the business interests in issue had occurred.

188. The Board in *Paponette* held that the interference with the applicants' businesses did amount to a substantial interference with them which was sufficient to amount to an infringement of their rights under section 4(a): first, they had previously managed and controlled their own business affairs but were now subject to the control and management of their competitor; secondly, pursuant to the authority conferred by the regulations, the competitor charged them a fee for every exit journey; thirdly, under the regulations the competitor decided whether they were "fit and proper" persons to be granted a permit to use the facility at all.

(c) Taking of property on the facts of the present case

189. Applying the principles established by these cases, the Corporation contends that properly construed, the Government has "taken" or "acquired" the Corporation's property without the prompt payment of adequate compensation, in violation of section 13, and that the courts below erred in law in rejecting that submission. The Corporation relied on the following matters in summary:

> (a) The new statutory regime imposed or threatened is far-reaching in its actual or potential impact on the Corporation's proprietary rights and interests. The degree of control present in the challenged legislative measures introduced in Bermuda will provide a level of domination or control which will destroy or severely diminish the basic characteristics of the Corporation's property ownership.

(b) There is no reasonable doubt that to remove the Corporation's right to level wharfage for the use of its own property and to replace it with a tax payable to the Government is a deprivation or taking of property.

(c) All the Corporation's assets are now entirely and completely subject to the control of the Government.

190. The Board does not accept the Corporation's submissions that the Court of Appeal fell into error in reaching the conclusions it did and concludes, in agreement with the Chief Justice and the Court of Appeal, that there has been no breach of the Corporation's rights under section 13(1) of the Constitution in this case. The reasons can be shortly stated as follows.

191. First, and to repeat the point made earlier, any assessment of the Corporation's section 13 claim must be considered in light of the limited rights and powers of the Corporation in relation to property owned by it. There are no private ownership rights affected nor any other private interests that are interfered with. The Corporation's property is not its own to "enjoy" or to do with as it pleases without regard to the municipal or public interest considerations that apply to the exercise of all its powers. It can use and enjoy its property only to the extent it is empowered to do so by the 1923 Act.

192. Secondly, the Corporation continues to own and have day to day control over the lands and property it owns. The "taking" relied on by the Corporation is solely based on the control exerted by central Government over the affairs of the Corporation pursuant to the Amendment Acts and the 2019 Reform Bill (by means, for example, of the requirement for approval of resolutions by the Corporation, the Minister's power to give it directions that must be complied with, and the Minister's power to take control of its governance in prescribed circumstances). Subject to these powers, the management of the Corporation otherwise remains with the members of the Corporation. It is clear that the Minister's ability to restrict or control the management of the Corporation is not in any sense absolute and is subject to important statutory conditions and to well established public law duties which control and constrain the exercise of these powers. The only impact of the 2019 Reform Bill is that the composition of the Corporation will change.

193. Thirdly, the Board accepts that there can be a taking in section 13 which does not involve a transfer or change of ownership or possession from one person to another person or body. As Clarke P put it, the imposition of restrictions or controls, if they go beyond a certain point, can amount to a (constructive) taking of possession or acquisition of an interest in or over property within the meaning of section 13. Whether legislation or the exercise of administrative powers that restrict or control the use or enjoyment of property or property rights do amount to a taking of property depends on establishing that the

interference reaches a certain level of seriousness in terms of its adverse consequences on the rights with which it interferes. Depending on the facts, this may involve establishing a substantial (or even a total) restriction on the ability to control use and enjoyment of the property and/or adverse effects on the goodwill or value of the property or property rights involved.

194. Fourthly, it is well-established that measures adopted for the regulation of activity in the public interest such as planning control or the protection of public health, will not constitute the taking of property, notwithstanding the fact that they may have an adverse economic effect on the owners of certain property.

195. Fifthly and for the reasons given above, including the limited extent to which the Corporation can use or enjoy its property together with the limited nature of the legislative restrictions imposed on the Corporation's ability to manage its property, the interference posed by the impugned legislation in this case does not reach the necessary level of seriousness to amount to a taking within the meaning of section 13(1). The allegations of control (and their consequences) made by the Corporation are significantly less serious than those made in *Panton* (where there was a complete takeover of management) and those made in *Paponette* (where there were substantial financial and other consequences). In the Board's view, the statutory measures are a legislative response to conduct by the Corporation and constitute oversight as opposed to control of the management of the Corporation. So far as the loss of wharfage levy is concerned, the removal of that power is not a taking of property. The Corporation had a statutory power to levy wharfage but that is not a property right and, in any event, just like its lands, the levy would not have been the Corporation's private property to use as it pleased.

196. Sixthly, the Board agrees with Clarke P that a statutory change which increases the control of the executive over local authority corporations because the legislature has agreed to it on the basis that the Minister is to take control when he regards it as in the national interest to do so, should not readily merit the conclusion that there has been a constructive taking of possession. Here, although the Amendment Acts are not directed to the general public, they are directed to the Corporation, a public body empowered by the 1923 Act which was enacted for the public benefit, in respect of the municipalities of Bermuda and the manner in which their affairs should be conducted on behalf of members of the public who are inhabitants of Hamilton. The Corporation must act for municipal purposes and in the present context, these are to be equated with public purposes. The Amendment Acts are legislative measures adopted for the regulation of the Corporation's activity in the public interest. Properly viewed the Amendment Acts and the 2019 Reform Bill fall within the regulatory exception and are not to be treated as confiscatory.

197. In these circumstances and absent a finding that there has been a taking within the meaning of section 13(1) there is no place for any proportionality analysis as contended for on behalf of the Corporation. The Corporation relies on S*uraj v Attorney General of*

Trinidad and Tobago [2022] UKPC 26; [2023] AC 337, para 58. But the proportionality test confirmed in *Suraj* is applied only where an interference with the relevant right is established. Below the threshold level of intrusion necessary to establish an interference, there is no interference at all, and no need for justification will arise. (See, for example, *Paponette* at para 23).

198. In the light of the Board's conclusion that there was no taking of the Corporation's property without compensation in breach of section 13(1) of the Constitution it is not necessary for us to decide whether section 13(3) disapplied the operation of section 13(1) in this case and the Board does not wish to burden an already lengthy judgment by doing so. This should not be taken to signify the Board's agreement with the views expressed on this question, either by the Chief Justice (at paras 122 to 128) or the Court of Appeal (at paras 192 to 197).

10. Issue 5: freedom of expression under section 9 of the Constitution

199. The Corporation argued that the 2019 Reform Bill will stifle the opportunity for political expression by the current electors of Hamilton. This issue was not raised by the Corporation before the Chief Justice but the Court of Appeal heard argument on the point *de bene esse* and gave leave for two corporate electors and one municipal resident and elector to be joined to the proceedings to resolve any potential difficulty as to standing: see para 243 of the Court of Appeal's judgment.

200. Section 9 provides:

> "Section 9 Protection of freedom of expression
>
> (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
>
> (a) that is reasonably required—

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or

(b) that imposes restrictions upon public officers or teachers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

201. It is in similar though not identical terms as article 10 of the ECHR and there is a corresponding provision in many other constitutions.

202. Further provision is made by the Council of Europe in article 3 of the First Protocol to the ECHR ("A3P1"). Article 3 provides:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

203. There are corresponding provisions in the Bermuda Constitution:

(a) Section 28 (as amended) provides:

"The House of Assembly shall consist of thirty-six members who, subject to the provisions of this Constitution, shall be elected in the manner prescribed by any law in force in Bermuda."

(b) Section 51 provides:

> "51(1) A general election of members of the House of Assembly shall be held at such time within three months after every dissolution of the Legislature as the Governor shall appoint by proclamation published in the Gazette."
>
> (c) Section 55 provides for the qualifications and disqualifications of electors.

204. The Corporation accepted before the Court of Appeal and accepts before the Board that citizens do not have a constitutional right to the establishment of democratic municipal authorities. There is no right to a particular form of local government or to the setting up of a particular forum for expression of political opinion. The key point on which it relies, therefore, is the proposition that once a forum in which a citizen can vote is brought into being, then the state cannot take away the right to vote unless that action is justified under section 9(2).

205. The Court of Appeal accepted that voting is to be regarded as a form of political expression, citing the decision of the Canadian Supreme Court *City of Toronto v Attorney General of Ontario* [2021] SCC 34 as authority for that proposition: see para 210. However, they inferred from the adoption of A3P1 that the High Contracting Parties to the ECHR did not consider that the right to freedom of expression under article 10 of the ECHR meant that there had to be regular elections; otherwise there would be no need for the Protocol.

206. Clarke P held further that the scope of A3P1 did not extend to an obligation on the High Contracting Parties to hold elections to municipal authorities. That was confirmed by the jurisprudence of the Strasbourg Court. Clarke P said at para 215 that he found it impossible to reconcile the Corporation's acceptance that there is no constitutional right to a democratic election for the Corporation with the proposition that the abolition of the democratic vote is constitutionally invalid because it contravenes the right of the electors to freedom of expression. Since municipal authorities are entirely the creature of statute, it was for the legislature to decide whether to create, change or abolish them. He went on to reject the argument that the statutory purpose of the Corporation was currently to reflect the views of its constituent electors. If that were the case any change in the composition of the electorate would enable those deprived of their vote to assert that the change was unconstitutional.

207. Clarke P went on to state that if, contrary to that conclusion, the 2019 Reform Bill did hinder freedom of expression, the question of justification would arise under section 9(2). The Government had not had an opportunity to address that question in evidence, given that the point had been raised late in the day. It would be "unfair and undesirable"

for the Court of Appeal to consider the question of justification so the matter would have been remitted to the lower court: paras 238 and 239.

208. The Corporation argues before the Board first that the act of voting amounts to "expression" for the purposes of section 9; secondly, that the Court of Appeal erred in failing to recognise that there is an important distinction between the withdrawal of an existing forum for free expression and a failure to create that forum in the first place; and thirdly that the lack of justification for the measure was so evident that the Board could decide the matter without remitting to the lower court to permit the Government to present evidence on that point.

(a) Voting as "expression" for the purposes of section 9

209. There is no doubt that the term "expression" used in article 10 of the ECHR has been given a wide meaning. It includes the conduct of a member of the opposition party who removed part of a wreath laid by the President as part of Independence Day celebrations to express her opinion that the person named on the ribbon she removed could not properly be called the President of Ukraine (*Shvydka v Ukraine* (Application No 17888/12) (unreported) 30 October 2014, paras 37-38); and a "political performance" which involved hanging dirty laundry on a Parliament building (*Tatár v Hungary* (Application Nos 26005/08 and 26160/08) (2014) 59 EHRR 8).

210. The question whether deprivation of the right to vote amounts to an interference with a person's article 10 rights has been the subject of many judgments of the Strasbourg Court and the European Commission on Human Rights.

211. The point was addressed more directly by the Commission in an earlier case on admissibility in *X v The Netherlands* (Application No 6573/74) 19 December 1974. That case concerned a man who was deprived of the right to vote "as a consequence of a conviction for uncitizenlike behaviour". The Commission's view was that article 10 did not guarantee the right to vote as such so that article 10 was not applicable to the application.

212. The Commission went on to consider whether the applicant could complain of discrimination amounting to a breach of article 14 in conjunction with A3P1. The Commission recalled that a previous ruling had held that an undertaking by the Contracting Parties adhering to the Protocol to hold "free elections" implies the recognition of universal suffrage. That meant that any disqualification from voting must not be arbitrary. The Commission considered the laws in several countries which prevented persons who, in wartime, had grossly misused their right to participate in public life from misusing their political rights in the future. There was therefore no violation of article 14 in conjunction with A3P1.

213. In the Board's view this not only shows the limits of article 10 and A3P1 but also provides the answer to one of the points made in submissions by the Corporation. The Corporation argued that the limited view taken by the Court of Appeal of the scope of article 10 and A3P1 would appear to mean that a government could legislate to remove the right to participate in national or municipal elections from certain ethnic or other minority groups. The *X* case shows that does not follow. A "victim" of such legislation would be able to argue that the claim fell within the ambit of A3P1 and was a breach of article 14 in conjunction with A3P1. The victim would not need to establish that the legislation was itself a breach of A3P1. The respondents accept that analysis, arguing section 9 does not contain a right to vote but that where a right to vote exists independently of section 9, then section 9 may be relevant to how that right to vote is exercised. That is not the issue in the present appeal.

(b) Municipal elections

214. The Corporation argues before the Board that the Court of Appeal was wrong to conclude that the right to vote, such as it is, does not apply to municipal elections.

215. An analogous point arose in *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901 in a challenge to the statutory ban on convicted prisoners voting in the Scottish independence referendum. One of the issues raised was the application of A3P1 and article 10. The majority held that A3P1 was limited to an obligation to hold periodic elections to a democratically elected legislature and did not include a right to vote in referendums: paras 8 and 10. They held further that the right to freedom of expression in article 10 did not confer any wider right to vote than was conferred by A3P1 so that the petitioners' claims under the ECHR failed.

216. On this point Lord Hodge (with whom Lord Neuberger of Abbotsbury, Baroness Hale of Richmond, Lord Clarke of Stone-cum-Ebony and Lord Reed agreed) said at para 20:

> "20 The European Commission on Human Rights and the Strasbourg court have repeatedly held in decisions on admissibility that article 10 did not protect the right to vote or other rights already secured by A3P1 as the lex specialis. See, for example, *Liberal Party v United Kingdom* (1980) 4 EHRR 106, paras 14—16, and the other cases to which the Lord Ordinary referred 2014 SLT 213, para 37. This is consistent with the wording of article 10 and with the approach to construction of the ECHR which considers an individual article in the context of the Convention as a whole. In any event, there is nothing in the Strasbourg jurisprudence to suggest that a

> claim under article 10, if admitted as in *Hirst v United Kingdom* 42 EHRR 849, would confer a wider right of political participation by voting or standing for election than that protected by A3P1: *Hirst*, para 89; *Anchugov and Gladkov* given 4 July 2013, paras 113—116; *Ždanoka v Latvia* (2006) 45 EHRR 478, para 141. The claim under article 10 therefore fails."

217. Lord Neuberger in his concurring judgment referred to the judgment in *McLean and Cole v United Kingdom* (Application Nos 12626/13 and 2522/12) (2013) 57 EHRR SE95 (judgment of 26 June 2013). That case concerned a further challenge by convicted prisoners to their disqualification from voting in a range of franchises including local government elections. The Strasbourg Court noted that local authorities in the UK, like those in other countries:

> "are the repositories of powers which are essentially of an administrative nature and concern the organisation and provision of local services. These powers are granted by statute or other subordinate legislation which defines closely and restrictively their field of application."

The Court held that local government bodies do not form part of the "legislature" for the purpose of A3P1: paras 26 to 30. The applications were dismissed as inadmissible. There was no reference to article 10 in the judgment.

(c) The power of the legislature to change voting rights

218. In light of the case law discussed above, it is very doubtful whether there is a right to vote in elections in relation to municipal authorities. However, the respondents do not invite the Board to go as far as deciding that the right to vote in local elections is not an aspect of the right to free expression of political opinion. Rather, they invite the Board to dismiss this challenge by upholding the reasoning of the Court of Appeal that any such right does not prevent the legislature from abolishing elections or voting rights for municipal bodies that the legislature has created.

219. Whether that is right depends on whether the Court of Appeal erred in failing to recognise the important distinction between the removal of the right to vote for a forum which currently exists and the failure to create a forum to which elections can be held. The Corporation relied on various authorities that indicate, it submits, that the removal or abolition of a forum for freedom of expression may contravene a person's rights even if the absence of or failure to create such a forum is not of itself a contravention. Thus, in *United States v Grace* 461 US 171 (1983) the United States Supreme Court considered

legislation which purported to ban picketing and leafletting on the public sidewalks around the Supreme Court building, as well as in the Supreme Court building itself. The Supreme Court held that those sidewalks had historically been public forums so that the challenged legislation "results in the destruction of public forum status that is at least presumptively impermissible": p 180. The legislation was struck down as unconstitutional under the First Amendment as there was no compelling governmental interest in extending the ban to the sidewalk.

220. Similarly in *Perry Education Association v Perry Local Educators' Association* 460 US 37 (1983), there was a challenge to the grant of exclusive access to means of communication to one union. The US Supreme Court said: "The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school" (p 44). The Court noted at p 45 that "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place."

221. One of the cases cited by the Supreme Court in *Perry* in support of that proposition was *Southeast Promotions Ltd v Conrad* 420 US 546 (1975). That concerned the lawfulness of a decision in 1975 by the directors of a privately owned theatre in Chattanooga, Tennessee that staging the controversial rock musical "Hair" would not be in the best interests of the community. A footnote to the judgment records that in other cities, the promoters of the musical "had encountered similar resistance and had successfully sought injunctions ordering local officials to permit use of municipal facilities." The board of directors, it was said, preferred to limit productions in the theatre to those which were "clean and healthful and culturally uplifting". The Supreme Court held that this "prior restraint" was unconstitutional in breach of the First Amendment because there were inadequate procedural safeguards in place. The Corporation relies on this case as showing that although there could have been no obligation on the municipality to build a theatre, once the theatre was built, it could not restrict access to it in breach of the First Amendment.

222. Those cases are very far both on the facts and on the law from being authority supporting the Corporation's argument that to abolish elections amounts to an interference with the right to freedom of expression. More pertinent is the recent decision of the Board in *Maharaj v Cabinet of the Republic of Trinidad and Tobago* [2023] UKPC 17; [2023] 1 WLR 2870. There the Board was considering legislation which extended the term of office of elected members of the legislature from three years to four. The measure was part of an extensive package of reforms to the Municipal Corporations Act 1990, changing the internal structure of local government. At para 19 the Board recorded that the Court of Appeal of the Republic of Trinidad and Tobago had deduced from the fact that the constitution contained no express reference to local government elections that there was no constitutional right to participate in elections for local government assemblies. The Board, however, concluded that it was unnecessary to decide the issue on so fundamental a basis as it was satisfied that a change in the length of term for future

members could not amount to a contravention of the Constitution. The main issue before the Board was whether, on its true construction, the provision extending the term applied to incumbent officials or only to those elected after the provision came into effect. It was in that context that the Board expressed its views on the importance of the right to vote and of limiting the term of office of elected representatives.

223. In *Maharaj*, the Board, disagreeing with the Court of Appeal, held that the statutory provision applied only to future councillors and aldermen and not to the incumbents. Lord Briggs and Lord Kitchin, dissenting, would have construed the relevant provision as applying to extend the term of the incumbents. They rejected the proposition which they said lay at the heart of the appeal, namely that to extend the term of office beyond the term for which they were elected "is such an inroad into democracy that it should only be concluded that Parliament really intended to do it by the use of the clearest language": para 79. Whilst recognising that the provision involved some element of an inroad into the democratic process, they did not regard it as surprising that Parliament should legislate to that effect: "This is so even if the right to vote in local elections is an aspect of the right of free expression of political opinion which is protected in general terms by the Constitution" (para 53).

224. The Board has concluded that the same principle applies in the instant case. The Board therefore agrees with the Court of Appeal's conclusion at para 216:

> "The method of constituting municipal authorities, and even whether there should be such authorities, is a matter for the Legislature, and is untouched in the Constitution. Such authorities are entirely the creature of statute; and it is for the Legislature to decide whether to create, change or abolish them. The right of freedom of expression which is here invoked is the right of freedom of expression in municipal elections and, if such elections may be abolished, as, in my view, they can, the right is no longer relevant, unless it can be said that there is a right to those elections, which there is not. Any right to freedom of expression of opinion as to who should be on an elected council cannot subsist if the council ceases to be an elected one. There is a right to an election now, because that is what the Legislature has ordained; but that ordinance is not perpetual; and that which the Legislature has ordained it can also revoke."

225. The Board concludes that there has been no contravention of the electors' rights to freedom of expression under section 9, nor will there be if provisions similar to those proposed in the 2019 Reform Bill are enacted. In the light of that, there is no need to consider the issue of justification.

11. Conclusions

226. The Board's conclusions on the issues raised by the appeal can be summarised as follows:

> **Issue 1** Having regard to the established jurisprudence of the Board, the Board holds that section 1 of the Constitution of Bermuda is a preamble and does not confer separate or independently enforceable rights. The enforcement section, found in section 15(1) of the Constitution of Bermuda, does not have the effect of altering the character of section 1 as a preamble or introduction.
>
> **Issue 2** On the question of whether section 1(a) confers a separate and independently enforceable right to the protection of the law, the Board notes the earlier case law of the Board which strongly suggests that such a provision can have independent effect even where the opening section of the relevant constitution does not in general confer separate and independently enforceable rights: see in particular *Newbold* and the other authorities discussed at paras 98 to 108 above. However, the Board notes further the clear acceptance on the part of the Attorney General that the wording of section 7AA of the 1923 Act either in its current form or if amended in terms such as those proposed in the 2019 Reform Bill would not in future preclude a court from considering the legality of section 7AA and the compatibility of any direction given by the Minister pursuant to section 7AA with the Constitution or with other public law principles. In the light of that concession, which the Board regards as correctly made, the Board considers that the Corporation's challenge to the legality of section 7AA is premature.
>
> **Issue 3** On the question whether the Corporation is a "person" upon which rights are conferred by the Constitution, the Board does not express a concluded view.
>
> **Issue 4** There has been no breach of the Corporation's rights under section 13 to protection against deprivation of property without compensation. The Board concludes that:
>
> > (i) The reference in section 1(c) of the Constitution to "deprivation of property" does not expand or alter the protections conferred by section 13(1).

(ii) There has been no breach of the Corporation's rights under section 13(1) because the legislative provisions which the Corporation alleges contravene its rights do not amount to a taking of property within the meaning of that section.

Issue 5 The changes made to the 1923 Act and proposed in the 2019 Reform Bill do not contravene the current electors' rights to freedom of expression under section 9 of the Constitution.

227. The Board will humbly advise His Majesty to dismiss the Corporation's appeal.