

**REPORT  
OF  
THE COMMISSION OF ENQUIRY INTO THE EXTRADITION REQUEST  
FOR CHRISTOPHER COKE**

The Commission of Enquiry was appointed by the Governor General Sir Patrick Allen O.N., GCMG, C.D. on October 19<sup>th</sup>, 2010. The three Commissioners appointed were:

Hon. Emil George Q.C. O.J. – Chairman  
Hon. Anthony Irons O.J.  
Mr. Donald Scharshmidt Q.C.

**TERMS OF REFERENCE**

1. To enquire into:
  - (a) The issue relating to the extradition of Christopher Coke by the Government of the United States of America;
  - (b) The manner and procedure in which the said extradition request was handled by the Government of Jamaica and the role and conduct of the various public officials who handled the extradition request;
  - (c) The circumstances in which the services of the law firm Manatt, Phelps & Phillips were engaged in relation to any or all of the matters involved, by whom were they engaged and on whose behalf they were authorized to act;

(d) Whether there was any misconduct on the part of any person in any of these matters and, if so, to make recommendations as the Commission sees fit for the referral of such persons to the relevant authority or disciplinary body for appropriate action.

2. The Commission shall make a full and faithful report and recommendations concerning the aforesaid matters and transmit the same to the Governor General on or before February 28, 2011.

3. The provisions of the Commission of Enquiry Act shall be applicable for the purposes of this enquiry.

4. The Commission may hold public and private hearings in such manner and in such locations as may be necessary and convenient.

## REPRESENTATION

Our first sitting was Monday, December 6, 2010, at the Jamaica Conference Centre in Kingston and the following counsel appeared for named parties:

They were:

- |                               |  |
|-------------------------------|--|
| a) Mr. Garth McBean           | -Legal Counsel to Commission             |
| Mrs. Symone Mayhew            | “ “ “                                    |
| Mr. Stewart Stimpson          |  |
| b) Mr. Patrick Bailey         | -Representing Dr. Robinson, former Min.  |
| Ms. Kathryn Phipps            | of State, Ministry of Foreign Affairs &  |
| Ms. Audrey Betholdi           | Foreign Trade &                          |
| Mr. Hugh Small, Q.C.          | -Representing the Prime Minister         |
| Ms. Sherrie-Ann McGregor      | The Honourable Bruce Golding             |
| c) Senator K.D. Knight, Q.C.  | -Representing the Peoples National Party |
| Mr. Leonard Green             |  |
| Senator A.J. Nicholson, Q.C.  |  |
| Ms. Valerie Neita-Robinson    |  |
| d) Mr. Patrick Atkinson, Q.C. | -Representing Dr. Peter Phillips         |
| Ms. Deborah Martin            |  |
| e) Dr. Lloyd Barnett          | -Representing Senator Dorothy            |
| Dr. Adolph Edwards            | Lightbourne                              |

- |    |   |  |
|----|---|--|
| f) | Mr. Frank Phipps, Q.C.<br>Ms. Marion Roberts                              | -Representing the Jamaica Labour Party<br>" " " "              |
| g) | Mr. John Vassell, Q.C.<br>Mrs Julianne Maise-Cox<br>Ms. Cindy Lightbourne | -Representing Senator Dwight Nelson                            |
| h) | Mr. Winston Spaulding Q.C.<br>Mr. Oliver Smith                            | -Representing Solicitor General Douglas<br>Leys                |
| j) | Lord Anthony Gifford, Q.C.<br>Ms. Paula Llewlyn, Q.C.                     | -Representing Jeremy Taylor, Deputy DPP                        |
| k) | Mr. R.N.A Henriques, Q.C.<br>Ms. Daniella Silvera                         | -Representing Mr.Lackston Robinson<br>Deputy Solicitor General |

## LIST OF WITNESSES

1. AMBASSADOR EVADNEY COYE
2. MRS. HEATHER COOKE
3. MR. HERMAN LaMONT
4. MR. HAROLD BRADY
5. MR. JEREMY TAYLOR
6. MRS. LISA PALMER-HAMILTON
7. MR. DARYL VAZ
8. REAR ADMIRAL HARDLEY LEWIN
9. MR. DOUGLAS LEYS
10. MAJOR GENERAL STUART SAUNDERS
11. LT. COL. PATRICK COLE
12. DR. RONALD ROBINSON
13. MR. KARL SAMUDA
14. DR PETER PHILLIPS
15. SENATOR DWIGHT NELSON
16. MR. LACKSTON ROBINSON
17. SENATOR DOROTHY LIGHTBOURNE
18. MRS. MARCIA BEVERLEY
19. MRS. VERNA McGAW
20. HON . BRUCE GOLDING

## NOTES ON PROCEDURE

At our meeting on the 6<sup>th</sup> of December, 2010 we issued directions as to the manner in which the Commission would operate.

1. All parties and all witnesses appearing before the Enquiry have the right to counsel.
2. Each party has the right to have its counsel cross-examine any witnesses who testified.
3. All parties have the right to apply to the Commission to have a witness called whom the Commission had elected not to call.
4. All parties have the right to receive copies of all documents entered in evidence and the right to introduce their own documentary evidence.
5. All hearings will be held in public unless application was made to preserve the confidentiality of information.
6. We ordered that Statements from the witnesses should be in not later than January 7<sup>th</sup>, 2011.
7. Hearings should commence on January 17<sup>th</sup>, 2011.
8. A notice to be published in both the daily newspapers: The Daily Gleaner and the Daily Observer that all persons who were able to give us information should come forward and provide us with a statement. Only two parties gave in statements by January 7,

2011. We got the remainder of the statements within the following weeks.

Accordingly we commenced the hearing on the 17<sup>th</sup> January, 2011. Most witnesses had their Counsel and each witness was subject to cross examination by the lawyers representing the other parties. This procedure lengthened the hearings, especially in some cases, but it enabled us to elicit facts which would otherwise not be available.

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## a) INTRODUCTION

In August 2009 the US Government requested the extradition of Mr. Christopher Coke, who was charged with conspiracy to transport illegal narcotics into the US and with trafficking in illegal firearms. The request was accompanied by an indictment issued by a Judge of the US Southern District of New York.

The Jamaican Government claimed that certain aspects of the request breached Jamaican laws and treaties. This was emphatically denied by the US authorities.

The fact that the request had been made and not complied with became common knowledge in Jamaica, and civil society demanded Mr. Coke's arrest and extradition.

There was much media comment concerning Mr. Coke's alleged leadership of the notorious Shower Posse, situated in Tivoli Gardens, and his reputed affiliation to the Jamaica Labour Party.

As the months passed, and the Government continued to decline to extradite Mr. Coke, citing various issues it said precluded the extradition, it was increasingly suggested in the media, by the Opposition, and by civil society that the Government was deliberately stalling the extradition process to protect Mr. Coke.

In response to the pressure, the Attorney General and Minister of Justice brought proceedings for a declaration, seeking approval of her manner of dealing with the extradition request, and naming the Leader of the Opposition and the President of the PSOJ as Defendants as well as Mr. Christopher Coke. The proceedings failed because it was withdrawn against 2<sup>nd</sup> Defendant and

the 3<sup>rd</sup> Defendant was not served.

Pressure from civil society, the media, the Opposition, and allegedly from the United States, forced the Government to review its position and to comply with the request to extradite Mr. Coke to the United States.

Once the Authority to Proceed was signed, gunmen who had fortified Tivoli Gardens launched a massive attack on JCF stations. The JDF and JCF attempted to arrest Mr. Coke, and were met with sustained armed resistance.

Mr. Coke was finally apprehended and extradited without contest in June 2010.

b) WHO WAS CHRISTOPHER COKE?

SUMMARY

1. Head of the Shower Posse, criminal organization with international operations, based in Tivoli Gardens, West Kingston.
2. "Don" of Tivoli Gardens, wielding such power as to exercise influence across political lines.
3. Construction contractor.

In his evidence, Dr. Peter Phillips, who was Minister of National Security 2001 to 2007, said that intelligence reports regarded Mr. Coke as head of the Shower Posse (pages 52 – 54, Transcript of Enquiry, 15<sup>th</sup> February, 2011). The Shower Posse was a highly organized gang; it had connections in the US, Canada, UK, with linkages in the Caribbean, South America, Central America, including Mexico. Its activities included:

1. Trafficking in illegal narcotics
2. Gun smuggling
3. Money laundering
4. Murder for Hire
5. Extortion
6. Transport of drugs through Jamaica to the United States.

The Shower Posse offered services to other criminal organizations. Its headquarters was in Tivoli Gardens but "the links within other criminal organizations spanned political divisions."

The Prime Minister said that he first met Mr. Coke when he became MP in 2005 for the constituency of West Kingston. He said that Mr. Coke had great influence in the community of Tivoli Gardens, particularly among young people. He said that in many respects, Mr. Coke was a benefactor, and in his occasional meetings with him, he was always concerned about projects that would be initiated to provide employment and opportunities for young people. "He was typical of what is called "dons" in various constituencies, wielding a considerable amount of influence and power, and being held in significant esteem by large numbers of persons particularly in inner city communities and constituencies. (See pages 13 to 15 of the transcript of 18<sup>th</sup> March, 2011)

The Prime Minister also indicated that Mr. Coke had a construction business and that he had certain contracts with the Government. Mr. Knight asked in cross-examination if the Prime Minister was aware that Mr. Coke was involved in construction and he said "yes and that over a period of years many, many contracts were awarded to him by the Government of Jamaica." However, he did not think that Coke's construction company was a major one.

Senator Dwight Nelson said in his evidence that he had been briefed in security briefings about Mr. Coke's alleged criminal activities, and he was aware of the seriousness of the allegations against him. He said the reason for sending Admiral Lewin and Major General Saunders to the PM on 24<sup>th</sup> August, 2009 was that Mr. Coke was in the PM's constituency. (See page 62, transcript of 17<sup>th</sup> February, 2011) It was suggested and denied in cross-examination that Mr. Coke was centrally important to the Jamaica Labour Party.

c) THE INTERCEPTION OF COMMUNICATIONS ACT AND THE  
MEMORANDA OF UNDERSTANDING

**SUMMARY**

Our view is that:

1. Sections 3, 4 and 11 of the Interception of Communications Act provide the only means by which telecommunications may be tapped without such tapping amounting to a breach of Section 22 of the Constitution.
2. The proper construction of the said Sections 3, 4 and 11, and of the Act as a whole, suggests that it was not intended by Parliament for the Act to authorize disclosure of records of telecommunications to foreign governments or their agencies.
3. It follows that the Memoranda of Understanding, upon which the US Government relied, were not in keeping with the Act.
4. Accordingly, nothing done pursuant to or in reliance on the MOUs can be said to have been under the authority of the Act, and was therefore an exception to section 22 of the Constitution.
5. On this view, the supply of Coke's telephone records to the US government agencies was, therefore, a breach of his constitutional rights.

We take the view that Section 3(1) of the Interception of Communications Act provides that intentional interception of wireless telecommunications is unlawful unless carried out in accordance with the terms of that Act.

Section 3(2)(a) provides that:

**“A person does not commit an offence under this section if...the communication is intercepted in obedience to a warrant issued by a Judge under Section 4.”**

Section 4(1)(b) states that:

**“Subject to the provisions of this section, an authorised officer may apply *ex parte* to a Judge in Chambers for a warrant authorising the person named in the warrant...to disclose the intercepted communication to such persons and in such manner as may be specified in the warrant.”**

Section 11 empowers a Judge when issuing a warrant to issue “Such directions as he considers appropriate...” to control and limit the making and dissemination of copies of the communications to be intercepted under the warrant.

### **3.2 The Relevant Facts**

A warrant was issued, permitting the interception of Mr. Coke’s mobile cellular communications. The warrant specified that the communications were to be intercepted and supplied to a restricted group of people. The Judge made no directions as to copies or dissemination thereof.

### **3.3 The Supply of The Intercepted Communications To The United States’ Authorities**

Evidence was given at the Enquiry that the cellular communications of Mr. Coke, intercepted pursuant to the warrant, were supplied to the United States’ authorities. It was apparent from the extradition request that this was so. Evidence was also given that the Government had taken exception to this, and had adopted the position that the disclosure was contrary to Section 4(1)(b) of the Interception of Communications Act. This, it was said, meant that the interception of Mr. Coke’s communications could not have been “under the

authority” of the Interception of Communications Act. It was, in consequence, so the argument continued, not only a breach of the Interception of Communications Act, but also a breach of Section 22(1) of the Constitution.

### **3.4 The Memoranda of Understanding**

In seeking to justify its use of wire-tap evidence in its indictment of Mr. Coke, the Government of the US relied upon Memoranda of Understanding signed by Dr. Peter Phillips when he was Minister of National Security and Justice when the PNP had formed the Government. The Memoranda had been signed in secret, and not disclosed even to the Cabinet or to the Prime Minister at the time, Most Hon. P.J. Patterson, Q.C.

It was said by the US Government that the Memoranda facilitated the sharing of wire tap evidence with the agencies of the US Government; such sharing was therefore permissible, and evidence so shared could properly be relied upon by the US in an indictment. It followed, the US Government said, that such reliance could not validly found an objection to the extradition of Mr. Coke.

The Government of Jamaica rejected the US reliance on the Memoranda. The Memoranda, it said, did not have the force of law, and accordingly could not have amended the Interception of Communications Act, which precluded disclosure of intercepted material, save to persons named in a warrant issued under the said Act.

It is necessary for us to examine these contending positions.

Before us, Mr. Atkinson Q,C. who represented Dr. Phillips contended that the Memoranda dealt with the sharing of intercepted conversations between law

enforcement agencies of the US and Jamaica. He argued that the MOUs made it clear that any such conversations must have been intercepted in accordance with Jamaican law. He said that the Memoranda referred to telephonic communications intercepted in compliance with the Interception of Communications Act. Mr. Atkinson also argued that:

“The MOUs are clearly a non-issue and their injection into the controversy at the Enquiry was no more than a distraction from the real issue – a mere red herring.” He also said that: “it is clear that they were merely operational.”

Also, Mr. K.D. Knight, QC, added that “the MOUs do not permit interception, they simply provide for how intercepted information obtained in accordance with Jamaican law can be used in the cooperative effort of the parties involved. It should be noted that both the US and the UK authorities are a part of the investigative process insofar as drug trafficking and organized crime financial or violent”. We do not agree.

### **3.5 Memorandum of Understanding 1 (“MOU 1”)**

MOU 1 provides that the DEA of the USA is to be a recipient of wire tap records and permits him to disseminate it to anyone involved in the investigations, even foreign intelligence services not disclosed to a Jamaican Court at all.

### **3.6 Memorandum of Understanding 2 (“MOU 2”)**

MOU 2 provides that the Jamaican Narcotics Division will supply to the DEA of the USA the product from the Jamaica Narcotics Division link in a format that the DEA can use as evidence in the US Courts.

MOU 2, however, also says that any interception of communications through

the JND link will be carried out strictly in accordance with the requirement of Jamaican law and that such product "as they obtained through the use of the JND link will be held and, if appropriate, passed on by them strictly in accordance with the requirements of Jamaican law".

The US authorities may have thought that the MOUs were part of the laws of Jamaica as they were signed by a Minister of Government. The fact is, however, that the MOUs could in no way amend the Interception of Communications Act, as they were not a part of Jamaican law.

### **3.7 Construction of the Interception of Communications Act in relation to the MOUs**

It seems to us that neither Section 11 nor the Court Orders made thereunder permitted disclosure to a foreign agency or government or person and we think that the Section and therefore the orders must be construed as not granting a discretion to the authorised persons to make disclosures to foreign agencies or authorities. This follows as a consequence of the general presumption that general words in a statute will be construed so as to have effect within the jurisdiction of the Parliament that passed it, unless there are indications to the contrary in the statute. This also follows as a reasonable conclusion to be drawn from applying ordinary rules of statutory construction to the interpretation of the Interception of Communications Act. A number of factors would be taken into account in that process of construction:

If intercepted information is disclosed abroad and abused there, such as being onwardly disseminated or used without further Court orders, such abuse would be beyond the reach of the criminal sanctions of Section 3 of the Interception of Communications Act, as our criminal laws do not have extraterritorial reach. It would be unreasonable to presume that Parliament intended to give to the

authorised officers the discretion to decide who it is that may receive information purely upon such person's own assessment as to whether such intended recipient's involvement in an investigation justified the disclosure.

Further, it appears to us that the word "investigation" in Section 11 of the Act is most reasonably construed as applying to investigations within Jamaica conducted by our security forces and not including investigations abroad even if it is one with which the Jamaican authorities may be co-operating.

It should also be noted that at the time of the passage of the Interception of Communications Act there already existed a facility for a foreign agency to obtain assistance from Jamaican authorities in getting evidence about intercepted communications. The Mutual Assistance (Criminal Matters) Act (MACMA) as well as the treaty to which it gave statutory force, the Mutual Legal Assistance Treaty (MLAT), affords facilities for that assistance to be registered and given after compliance with the procedures set out therein. Mr. Jeremy Taylor at page 50-57, transcript for February 2<sup>nd</sup>, 2011, confirms that the MLAT had been used to obtain evidence about intercepted information. Nothing is said there about the Interception of Communications Act, therefore the reasonable assumption to be made is that Parliament intended that a foreign agency which desires to obtain evidence of local interceptions would apply pursuant to MLAT or MACMA.

There is one final, but important point on the question of the proper construction of the Interception of Communications Act. Section 16(9) specifically contemplates the supply of communications data (as opposed to telephonic communications with which we are concerned) obtained under the Act to foreign governments or agencies. But, most importantly, the section shows that when the statute intends a foreign disclosure take place it does so by

express words. In the statute the express words are used only in respect to "communication data" and not to telephonic communication which is what we are concerned with.

It follows that the intent of the MOUs that communications intercepts are to be shared with the DEA, and any sharing of such intercepts purportedly pursuant to them, do not seem to us capable of being "under the authority" of the Interception of Communications Act. If they were not under such authority, it follows that they would be in breach of the Constitution.

We have come to this conclusion with much reluctance because Dr. Phillips' obvious intention was to bring the narcotics dealers and gun runners to justice. His intention should now be implemented by amendment to the Act, which we understand from Senator Nelson, Minister of National Security, is now being done. However, we note that Dr. Phillips signed the MOUs after only receiving oral advice from the then Solicitor General.

**d) WHAT VALIDITY WAS THERE IN THE CLAIM THAT MR. COKE'S CONSTITUTIONAL RIGHTS WERE INFRINGED?**

There are two relevant constitutional issues, the interference with Coke's freedom of expression, and the interference with his immunity of expulsion from Jamaica. We deal with these issues in turn under this heading.

**SUMMARY**

Our view is that:

1. The Constitution provides for freedom of expression, which includes freedom from interference with communications (s. 22(1)).
2. That freedom is subject to laws satisfying certain criteria, and actions under the authority of such laws (s. 22(2)).
3. The Interception of Communications Act is the exception to the constitutional right to freedom of expression.
4. The question of whether Coke's constitutional right to freedom of expression was breached can only be determined by first determining whether there was compliance with the Interception of Communications Act.
5. The Constitution gives immunity from expulsion from Jamaica, but subject to laws permitting extradition.
6. The Extradition Act is the exception to the constitutional right not to be expelled from Jamaica.

The Constitution of Jamaica at Chapter 3 contains certain provisions dealing with fundamental rights and freedoms. In particular, sections 13, 16 and 22, are relevant here.

**Section 13:**

**“Whereas every person in Jamaica 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**

- 1) life, liberty, security of the person, the enjoyment of property and the protection of the law;**
- 2) freedom of conscience, of expression and of peaceful assembly and association; and**
- 3) respect for his private and family life,**

**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 said rights and freedoms by any individual does not prejudice the rights and freedom of others or the public interest.”**

## **Section 16**

- 1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica, the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.**
  
- 2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.**
  
- 3) 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 ...**
  
- 4) for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence or to undergo imprisonment outside Jamaica in execution of the sentence of a court in respect of a criminal offence of which he has been convicted ...”**

## **Section 22**

- 1) Except with his own 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 the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.**

**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) Which is reasonably required –**

- (i) in the interest of defence, public safety, public order, public morality or public health; or**
- (ii) for purpose of protecting the reputations, rights and freedoms 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, or regulating telephony, telegraph, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or**

**(b) which imposes restrictions upon public officers, police officers or upon members of a defence force.”**

#### **4.1 The Constitutional Right To Freedom of Expression**

We are not a court, and accordingly can only set out what appears to us to be the law. Our view is that Section 13 of the Constitution anticipates in general terms the specific provisions of the Constitution that protect the fundamental rights and freedoms of individuals. Such protection is stated in section 13 to be

**“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.”**

Among the rights so protected is the right to freedom of expression, set out in detail in section 22(1).

Section 22(1) appears to define freedom of expression as including “freedom from interference with.....correspondence and other means of communication”. Section 22(2) seems to limit the scope of this freedom, as anticipated by section 13, by providing that:

**“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-“**

Accordingly, Mr. Coke's telephone conversations, the subject of the extradition request under consideration, were communications to which section 22(1) applied, and by virtue of which they were protected from interference, unless such interference was made subject to a law falling within the ambit of section 22(2).

#### **4.2 The Interception of Communications Act**

Our view is that the Interception of Communications Act is the only law that creates exceptions to the protection of freedom from interference with telephone communications. Accordingly, anything “done under the authority” of the Interception of Communications Act will not have been a breach of Mr. Coke's rights under Section 22 of the Constitution. In order to determine, therefore, whether Mr. Coke's constitutional rights were infringed, it will first be necessary to determine whether actions purportedly taken under the authority of the Interception of Communications Act were in law within its authority.

Mr. Lackston Robinson, Deputy Solicitor General, was cross-examined by Ms. McGregor (pages 36 and 37 of the transcript, 28<sup>th</sup> February, 2011). He was asked, “What then, Mr. Robinson was your concern regarding intercepted communications used in this?” Answer: “Well, put it this way. First of all I think Section 22 prohibits the interception of one's conversation and communication, but that right is not absolute, it can be breached. The Interception of Communications Act breaches that right and allows for that person's telephone conversations to be intercepted in specific circumstances outlined in the statute. If those procedures are not followed and the statute is breached, it also amounts to a breach of that person's Constitutional right...”

Later, Mr. Robinson said that the Interception of Communications Act was breached, and the intercepted communication was unlawfully obtained by the US authorities. In our system of law a man is presumed to be innocent until he is proven guilty. Mr. Coke, like any other person in Jamaica, is entitled to Freedom of Expression under the Constitution, but if he is suspected, as he was, of conspiring to break the law such as by illegally exporting narcotics, then he is liable to have his telephone calls listened to by those authorised to do so under Section 4 of the Interception of Communications Act.

We address the question of compliance with the Interception of Communications Act under a separate heading.

#### **4.3 The Constitutional Immunity From Expulsion From Jamaica**

It seems to us that Section 16(1) of the Constitution provides immunity from expulsion from Jamaica. However, such immunity is qualified by the terms of Section 16(3), which states that:

**“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.....for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence or to undergo imprisonment....”**

The request by the United States Government that Mr.Coke be sent there for

trial on serious narcotics and gun-running charges undoubtedly was a request to which section 16(1) of the Constitution applied, unless it was made under the authority of a law that came within the ambit of section 16(3) of the Constitution.

#### **4.4 The Extradition Act**

It seems to us that the Extradition Act is the only law that creates exceptions to the constitutional immunity from expulsion from Jamaica. In order to determine whether Mr. Coke's constitutional right not to be expelled was breached, it is first necessary to determine whether the request for extradition of Coke was made within the authority of the Extradition Act.

We address the question of compliance with the Extradition Act under the next section, section 5.

**5) SHOULD THE MINISTER OF JUSTICE HAVE SIGNED THE  
AUTHORITY TO PROCEED PROMPTLY?**

**SUMMARY**

It seems to us that:

1. The Minister's discretion under Section 8(3) Extradition Act is limited to considering:
  - a) Whether the papers are in order, that they disclose a request to extradition in relation to an extradition offence; and
  - b) Whether there was sufficient suspicion that the fugitive had committed the offence.
2. Having satisfied herself on these matters, she should have signed the Authority to Proceed.

The Extradition Act is the sole exception to the constitutional right to immunity from expulsion from Jamaica in Section 16 of the Constitution.

The Act provides at Section 8(1) that:

**“Subject to the provisions of the Act relating to provisional warrants, a person shall not be dealt with under this Act, except in pursuance of an order of the Minister (in this Act referred to as “Authority to Proceed”) issued in pursuance of a request made to the Minister by or on behalf of an approved state to which a person to be extradited or was convicted...”**

Section 1(2) requires that the request shall be accompanied by

**“...particulars of the person whose extradition is requested, and of the facts upon which and the law under which he is accused...and evidence to justify the issue of a warrant for his arrest under Section 9”.**

Importantly, Section 8(3) states:

**“On receipt of such a request, the Minister may issue an Authority to Proceed, unless it appears to him that an order for extradition of the person concerned could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act.”**

### **5.1 The Meaning of Section 8(3) of The Act**

There was much evidence given and argument presented on the meaning of Section 8(3) of the Act. However, the ordinary meaning of the words seems to us to be clear. They give to the Minister the discretion to sign an Authority to Proceed unless it appears that an order for extradition could not be made.

### **5.2 Did The Minister Have The Discretion To Sign The Authority to Proceed Under Section 8(3)?**

The answer to this question seems to us to be as follows:

Mr. Coke was entitled under Section 22 of the Constitution to immunity from interference with his communications, save where such interception was under the authority of a law.

We have already concluded in this Report that although the Interception of Communications Act authorizes interference with telecommunications, the interference with Mr. Coke's telecommunications was not in accordance with that Act, (due to disclosure having been made pursuant to the MOUs, which were not a part of our law) and that his Constitutional rights were breached.

However, the Minister had a discretion to sign the Authority to Proceed, and might have signed it immediately upon receipt of the request, if she was satisfied there was evidence to support the allegations against Mr. Coke.

There are arguments that she had a choice to examine the evidence to see if extradition could be pronounced in law and in fact. We think, however, that she should have left this matter to a magistrate.

The scheme of the Jamaican Act of 1991 seems to reflect the scheme of the English Extradition Act of 1870. The principles applicable to the scheme of the legislation have therefore been in effect for a long time. They have been tested and analysed in the courts in England, and the operating methodology, which appears from its words seems to carry little mystique.

The import of the Act, as appears to us from the ordinary meaning of its words is as follows:

- (a) The Minister, upon receipt of the request, and upon being satisfied that -

- (i) the papers are in order, that they disclose a request to extradite in relation to an extradition offence; and
- (ii) there was sufficient suspicion that the fugitive had committed the offence

(b) The Act specifically gives that power to the Magistrate, who must hear the case as though he were sitting as an examining justice, considering the evidence adduced (sections 10(1) and 10(5))

(c) The Minister of Justice is not necessarily a lawyer (unlike the Attorney General), and it seems to us doubtful that the power to consider admissibility could properly be assumed to have been given to a non-lawyer without there being specific words to that effect, particularly where that power has been specifically given to a Magistrate to exercise at a later stage in the scheme. Further, there is no provision for there to be any representation before the Minister, and we have difficulty in seeing how the statute could contemplate matters such as admissibility of evidence being addressed without interested parties being represented, and making submissions.

(d) Accordingly, the Minister's discretion seems to us to have been limited to the considerations in (a) above.

### **5.3 The Authorities**

We are, we believe, supported in our views as set out above by the authorities. In this regard, we turn first to the decision of the English Divisional Court *in R. v. Secretary of State for the Home Department ex parte Norgren* 2000 QBD–

The judgment of the Court was delivered by the Lord Chief Justice, and contains a useful review of the authorities.

The Lord Chief Justice's comments on the scheme of the English Act are helpful:

**“The statutory scheme makes no provision for representations to be made by the object of an extradition request before an order to proceed has been issued. R. v. Secretary of State for the Home Department, *ex parte* McQuire (1995) 10 Admin. LR 534 at 537 highlights the general undesirability of prolonged representations and counter-representations at this stage.”**

The Claimant in this English case was seeking the review of the Home Secretary's decision to issue an authority to proceed without first playing a role as legal arbiter, entertaining his submissions on a variety of issues, including the admissibility of evidence.

Lord Bingham CJ cited the judgment of Robert Goff LJ, as he then was, in the Court of Appeal in *R.v. Chief Metropolitan Magistrate ex parte* Government of Denmark (1984) 79 Cr App Rep 1, 148 JP 551, as follows:

**“Now it is important to observe that the legal proceedings in this country depend entirely upon the Secretary of State issuing his order to proceed....The Secretary of State has a discretion whether to issue an order to proceed, and the question whether the offence is of a political**

character is only one of the matters which he may take into account in considering the exercise of his discretion. But since, as we have already observed, the Act which confers his power upon the Secretary of State only applies subject to the limitations, etc, if any, contained in the order in Council (which incorporates the Treaty), he can only act within that framework. Accordingly he has to consider, before issuing an order to proceed, whether the requisition and the documents presented with it comply with the terms of the Treaty. If he satisfies himself that this is so, then (subject to any question of the offence being of a political character) he issues his order to proceed.”

Lord Bingham continued to quote from Goff LJ as follows:

“This, as we read it, is the statutory scheme for extradition of an accused person from this country, as set out in the extradition Act 1870. The scheme is entirely sensible in that it leaves the question of compliance with the Treaty to the Secretary of State, subject only to consideration (as far as permissible) by the High Court in habeas corpus proceedings; and leaves to the magistrate matters appropriate to his consideration in accordance with ordinary English law and procedure.....Before issuing his order to proceed

in case of an accused person, the Secretary of State has, of course, to consider whether the fugitive is accused of an offence which is an offence against the law of the foreign country. He next has to consider whether the fugitive is accused of a crime specified in the Treaty. Since the Treaty, in specifying the crimes to which it applies, does so by listing crimes in two languages which may not be identical, the Treaty can only be complied with if the conduct complained of constitutes an offence under both lists of crimes in the Treaty. Finally, the statutory procedure under the Act only applies in respect of what is defined as an 'extradition crime' by the Act...."

Lord Bingham turns, later in his judgment, to dicta of Lord Diplock in *R. v. Governor of Pentonville Prison ex parte Sotiriadis* [1975] AC 1, as follows:

"The core of this procedure is a judicial hearing before a metropolitan magistrate at Bow Street, whose function is to determine whether the evidence adduced against the accused on behalf of the foreign state requiring his surrender would have been sufficient to justify his committal for trial in England if the crime in respect of which the requisition has been made had been committed there."

These dicta of Lord Diplock are critical in establishing that it is the function of the Magistrate and not of the Secretary of State to determine the admissibility of evidence. Lord Bingham concludes:

**“This was not in our view a matter on which the Home Secretary was required to form a correct legal judgment before issuing his order to proceed. Nor, in our judgment, is it a matter on which we should at this stage, before there is any ruling by the magistrate, make any decision. The statutory scheme envisages that a challenge of this kind should follow and not precede a decision by the magistrate, and it would in our view distort that scheme if we were now to rule.”**

In the case of *R v Weil* [1892] QBD 701 at 706, in the judgment of Sir George Jessel, MR:

**“All that the Act requires is that the evidence should be sufficient in the opinion of the persons issuing the warrant. That is a matter of judicial discretion. There must be some evidence, but very little, for it is merely for the purpose of detaining the man.”**

And in the case of *R v Ashford* [1892] 8 TLR 283 it was held that the evidence for the purposes of the issue of a warrant need not be admissible for the purpose of the subsequent proceedings. This means, therefore, that even if the evidence of John Doe and of CW1 and CW2 was inadmissible in

subsequent proceedings they could still be used by the Minister in deciding that she could sign the authority to proceed.

Accordingly, we are of the view that the discretion afforded the Minister of Justice was circumscribed in much the same way as that of the Secretary of State in England. In our view, the committal stage before the Magistrate is the first point at which the admissibility of evidence ought to be considered, and we do not see that considerations of admissibility should have any bearing on the issue of an authority to proceed.

After the Minister had signed the authority to proceed, she could still have asked the US authorities to provide further and more evidence, which the court might wish to have in addition to the evidence given in the indictment (Exhibit 255.2). Such evidence would have gone before the court and would have assisted the judge in making his decision (Article 9(ii) of the Extradition Treaty).

The prompt signing of the authority to proceed would have prevented the criticism that the Minister was deliberately delaying the extradition process of Mr. Coke for political reasons.

In addition, it would have removed some of the causes of friction between the Jamaican Government and the Government of the U.S.

The Minister of Justice, as well as the Solicitor General and Deputy Solicitor General maintained that in their interpretation of section 8(3) Extradition Act, the Minister had a duty to determine whether in law and in fact the fugitive would be extradited before the minister signed the Authority to Proceed. We do not agree with this point of view, but they have argued it, and we hope that a Jamaican Court will be asked to interpret section 8(3) of the Act in due course.

**6) WHO ENGAGED MANATT PHELPS AND PHILLIPS? WHY WAS MANATT, PHELPS AND PHILLIPS ENGAGED?**

**SUMMARY**

It seems to us that:

1. On the evidence before us we conclude The Jamaica Labour Party instructed Manatt, Phelps and Phillips ("MPP").
2. Diplomatic matters of this sort should be dealt with by our foreign service, accountable to Parliament through the Minister of Foreign Affairs, and not by a political party.

Several witnesses gave evidence to the Commission concerning Mannatt Phelps and Phillips ("MPP"); these included Ambassador Coye, the Solicitor General, Douglas Leys, the Deputy Solicitor General, Lackston Robinson, Dr. Ronald Robinson, Senator Lightbourne and the Prime Minister. Mr. Harold Brady, who was the person who actually engaged MPP, refused to testify before the Commission but it is entirely proper for us to draw inferences from the documentary evidence.

MPP maintained that they were acting on behalf of the GOJ, although it is the position of the Jamaica Labour Party that Mr. Brady was instructed to engage MPP on behalf of the JLP.

In Mr. Golding's evidence to the Commission of Enquiry, he said that on 3<sup>rd</sup> September, 2009, Mr. Brady and Dr. Ronald Robinson went to see him. Mr. Brady informed the PM that there was a great deal of unrest in the society caused by the request for extradition of Mr. Coke, and the JLP was particularly concerned about the reported friction between the GOJ and the US authorities over the extradition matter. It was felt that the GOJ was protecting Mr. Coke

because he was an important member of the JLP. Mr. Brady suggested that he was still in touch with some of the persons with whom he was associated in the International Democratic Union, and he mentioned Mr. Frank Fahrenkoff, a former Chairman of the US Republican Party, who had been a close friend of the JLP in former years. Dr. Robinson on the other hand suggested the firm of Guilliani & Partners in New York, who had also assisted the GOJ in the past.

The PM stated that Senator Lightbourne had informed him that she was particularly concerned that the Extradition treaty had been breached by the US in the extradition request for Mr. Coke. He felt that a Treaty matter should be dealt with at a diplomatic level. Since there was no US Ambassador in Jamaica at the time, he agreed with Mr. Brady and Dr. Robinson that contact should be made with either Mr. Fahrenkoff or Messrs. Guilliani & Partners, so that "through those contacts some effort should be made to secure a listening ear, for want of a better way of putting it, from the US." While the Attorney General and Solicitor General should continue to deal with the extradition matter from a legal stand point, the PM thought that he should approach the matter of a breach of a Treaty from the diplomatic/political angle.

The evidence of Dr. Robinson is that Mr. Fahrenkoff said that he was unable to assist as the Administration in the US had changed. Mr. Fahrenkoff recommended that they visit Mr. Charles Manatt in Washington who was a Democrat and was experienced in extradition matters.

There is an engagement letter between MPP and Harold Brady dated October 1<sup>st</sup>, 2009 (Exhibit 29) which sets out the terms of the relationship between MPP and Brady & Co. The letter notes:

**“...for the purpose of the engagement we will be representing you only and all duties and**

**responsibilities created and imposed by this agreement shall be owed solely to you and we will not be deemed to represent the interest of any of your affiliates, subsidiaries, present companies, joint ventures, officers, directors, partners, individual members, investors or employees, (collectively, “your affiliates”) unless otherwise agreed in writing.”**

The letter goes on to refer to rates and billing practices and other terms of engagement. It notes that US\$100,000 was required as a deposit and the first quarter's fees in connection with legal services. Instructions were also given in the letter for wire transfer of the fees. At the end of the letter, Mr. Brady, in accepting the terms of the agreement, signed the letter as Harold Brady, Consultant to the Government of Jamaica (GOJ).

In the absence of Mr. Brady's evidence at the Enquiry, a statement made by him in a radio interview was admitted in evidence and also a press release (Exhibits 61a and 68), wherein Mr. Brady stated that he signed as the Consultant to the GOJ but “that this was an error and that it has been corrected.” Mr. Brady also made similar statements in his pleadings and supporting documents in litigation against the Prime Minister, which were also admissible in evidence. From these statements Mr. Brady accepts that he had no authority to employ MPP on behalf of the GOJ.

Mr. Daryl Vaz, at that time Deputy Treasurer of the JLP said in evidence that he only paid US\$49,812.62 and not the US\$100,000 as requested by MPP, as he wanted to see some results before any further sums were paid. This money, he said, was paid by the JLP.

Mr. Leys in his evidence said that he never signed any agreement with MPP and he never engaged them to act for the GOJ. Before that could be done the PM would have to approve and a document would have to be drawn up to permit MPP to represent the GOJ. No such document was ever prepared or signed.

An aspect of the engagement of MPP that needs special consideration is the presence of Mr. DiGregory of the firm of MPP at the meeting between representatives of the US Government and the GOJ on September 17, 2009. Was it proper for him to attend? In what capacity did he attend? The evidence of Mr. Leys, Solicitor General, was that he did not get the approval of the Minister of Justice to have Mr. DiGregory attend the meeting. He further said that Mr. DiGregory took no part in the meeting but he was there because he felt that the GOJ might employ MPP in the future.

We have come to the conclusion that MPP was in fact engaged by the JLP and not the GOJ.

We should mention that up to the date of this Enquiry MPP maintained that they were acting on behalf of the GOJ, and they stated that before they could give evidence before the Commission, the GOJ would have to waive privilege as their client. The PM in a letter dated March 3<sup>rd</sup>, 2011 (Exhibit 63) to the Chairman of the Commission stated that the GOJ was not claiming any privilege, as the GOJ was not the client of MPP. The JLP in a letter to the Commission advised that it considered itself the client of MPP and was prepared to waive any privilege that arises so that MPP could give evidence before the Commission (Exhibit 64). All these letters were sent to MPP.

The Chairman of the Commission first wrote to MPP and later had a conversation with the US lawyers representing MPP, urging them to come and give evidence, but we heard nothing more from MPP.

We should also add that it was imprudent for the Prime Minister to have instructed his party to deal with diplomatic matters involving US/Jamaica relations, when the party is obviously not accountable to Parliament, unlike the Minister of Foreign Affairs. It was also imprudent for any such initiative not to have been led and managed by our ambassador in Washington. Surely, that would have been the appropriate diplomatic channel, accountable through the Ministry of Foreign Affairs, to Parliament.

**7) DID THE PRIME MINISTER AND OTHERS ACT PROPERLY IN INSTRUCTING MANATT, PHELPS & PHILLIPS?**

**SUMMARY:**

It seems to us that:

1. The Prime Minister's involvement with Coke's extradition was inappropriate.
2. The Jamaica Labour Party should not have been involved, and to the extent it was, there may have been inappropriate comingling.

The question has arisen as to whether the retention of MPP by the JLP caused a co-mingling of the operations by the law officers of the Crown with the JLP at the behest of the PM.

It must be remembered that the PM did not send Mr. Brady and Dr. Robinson to

MPP. They were sent to Mr. Farhenkoff and Guillian & Partners to speak to people at the top of the political ladder in the US. It was Mr. Brady who was sent by Mr. Farhenkoff to MPP in Washington. It was Mr. Brady who spoke to Mr. Leys and insisted that Mr. Leys should meet with MPP. If Mr. Brady had not insisted that Mr. Leys meet with MPP, it appears that there would not have been any mingling. According to Mr. Leys, it was Mr. Brady who caused MPP representatives to be invited to the Ambassador's dinner in Washington. According to Mr. Leys, his entire involvement with MPP was caused by Mr. Brady, and it was limited by the fact that it was useful to see whether they could in the future become helpful to the GOJ if the GOJ chose to employ them.

The PM apologised to the nation in a broadcast for getting involved and said that it was a mistake to have engaged MPP.

We feel that it was an unfortunate mistake because it fuelled suggestions that this move was made to protect Mr. Coke because he was an important man to the JLP. This was put to the PM in cross-examination and he resolutely denied. It was also put to the PM that the US\$50,000 paid to MPP was supplied by Mr. Coke, since neither Mr. Samuda nor the PM would divulge who had contributed the money. All of these suggestions were denied by the PM. No evidence was given to support these suggestions, and there is a rule of evidence that if a suggestion is put to a witness and it is denied, the mere suggestion is not evidence.

We are of the view however, that the PM's involvement with Mr. Coke's extradition was inappropriate. He should have distanced himself completely from the matter. His failure to do this led to the unfortunate suspicion that he was protecting an alleged narcotics dealer and drug smuggler.

Mr. Brady did not carry out the PM's instructions.

8) DID THE MINISTER OF JUSTICE ACT REASONABLY IN  
SIGNING THE AUTHORITY TO PROCEED AT THE TIME AND IN  
THE CIRCUMSTANCES IN WHICH SHE DID?

**SUMMARY**

It seems to us that, although late in signing the Authority to Proceed the Minister acted reasonably in signing it when she did.

The Minister of Justice had been advised by her lawyers to seek the direction of the Court in a declaratory judgment on her duties under section 8(3) Extradition Act. But the Court would not make such a declaration when two of the defendants withdrew from the action, and the third was not served. However, tensions had risen and as Senator Lightbourne said in cross-examination to Mr. Phipps (7<sup>th</sup> March 2011 pages 69-70 of the transcript) "At that time, the public was - everyone was in an uproar, every association in this country was crying out for the matter to be put before the Court. Civic organisations, the church, human rights organisations, ordinary citizens, were saying – put the matter before the Court. Bodies and organisations were refusing to co-operate with the Government. It was almost coming to social disorder, that was facing this country, and so I had to review my position." Accordingly, the Minister advised the Prime Minister and the Cabinet on 17<sup>th</sup> May 2010 that she would be signing the Authority to Proceed. It is our view, that although late, the Minister acted reasonably in signing the authority to proceed when she did.

## 9) CREDIBILITY OF WITNESSES

1. A dispute arose over whether a document put to the Minister in cross-examination by counsel for the Solicitor General was a genuine copy of an email allegedly sent on behalf of the Minister to Mr. Leys, copied to Mr. Brady. The Minister denied having communicated with Mr. Brady on the subject.
2. The evidence was not complete, as no evidence was put before us by the Minister to support her claim that the email was a forgery.
3. The Minister's recollection may have been faulty on the issue.

Sometime after Mr. Leys had given evidence, his counsel, Mr. Oliver Smith, put a copy of an email to Senator Lightbourne and cross-examined her on it. The email was dated 16<sup>th</sup> September, 2009 and sent by Verna McGaw in the Minister's office, to Mr. Douglas Leys, and copied to [lbrady@lawbrady.net](mailto:lbrady@lawbrady.net) (Exhibit No. 55).

On seeing the email, the Minister's immediate response was to agree with the suggestion that she could have authored it. However, on further consideration, she said that it was not a document she had either authored or authorized, and she thereafter categorically denied that she had had anything to do with the document. She accepted that she did not send emails herself, but wrote them out in longhand, and gave them to a secretary to be typed and sent.

The email was headed "Extradition" and set out six procedures to be followed when a Foreign State requested the extradition of a Jamaican national. Under a sub-heading, "Michael Coke" it gave twelve details of the extradition matter of Mr. Coke, some of which could have been known only by Senator Lightbourne.

The significance of the document was that if it was genuine, it demonstrated that the Minister had been in contact with Mr. Brady, contrary to her evidence.

Mrs. McGaw when giving evidence before the Commission said that she remembered sending this email but did not remember the contents in detail. She said the email was no longer stored on her computer, in accordance with what she said were usual procedures. She was cross-examined extensively on subjects including whether she might have had a motive for forging the copy of the email, but no evidence was led on behalf of the Minister regarding the existence or otherwise of the email on any email servers through which it will have passed if it was genuine.

We are therefore left with a document:

- (i) Relied upon by counsel for the Solicitor General, but not put in evidence by him;
- (ii) Denied by the Minister; but
- (iii) Confirmed by the secretary who says she typed it; and
- (iv) In respect of which the Minister led no evidence as to its existence or otherwise on the email servers through which it will have passed were it to have been genuine.

In our view, the evidence is incomplete, and given the significance of the document, we would have preferred if all avenues had been explored before us. That not having been done, we are left with a document, which has not been proven to be a forgery. Accordingly, the Minister's recollection may be faulty on this issue. We put it no higher than that in view of the incompleteness of the evidence.

## 10) ACCOUNT OF THE INPUT OF PUBLIC OFFICIALS

Mrs. Beverley gave evidence that on 25<sup>th</sup> August, 2009, the Minister of Justice asked her to telephone the Ministry of Foreign Affairs and Foreign Trade to find out if they had received a request for the extradition for Christopher Coke. She said she made the call and she did so before 1pm.

She was not cross-examined on this aspect of her evidence. This area of the law is quite clear. Failure to cross-examine a witness who has given relevant evidence on any part of the witness' evidence which runs contrary to the cross-examiner's case amounts to an admission of what the witness has said on the matter.

See Murphy - Practical Approach to Evidence (3<sup>rd</sup> Edition, page 444, Para 14.3):

**“Failure to cross-examine a witness who has given relevant evidence for the other side is held technically to amount to an acceptance of the witness's evidence-in-chief. It is, therefore, not open to a party to impugn in a closing speech, or otherwise, the unchallenged evidence of a witness called by his opponent, or even to seek to explain to the tribunal of fact the reason for the failure to cross-examine. In R v. Bircham (CA) [1972] Crim LR 430, for example, counsel for the defendant was not permitted to suggest to the jury that the co-defendant and a witness for the prosecution were the perpetrators of the offence charged,**

where that allegation had not been put to either in cross-examination. Accordingly, it is counsel's duty, in every case: (a) to challenge every part of a witness's evidence which runs contrary to his own instructions; (b) to put to the witness, in terms, any allegation against him which must be made in the proper conduct of the defence; and (c) to put to the witness counsel's own case in so far as the witness is apparently able to assist with relevant matters, or would be so able, given the truth of counsel's case."

See *Browne v. Dunn* [1893] 6 R pages 70 - 71, HL per Lord Halsbury

"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a

witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no

**suggestion whatever in the course of the case that his story is not accepted.”**

The Commission accepts the unchallenged evidence of Mrs. Beverley that she telephoned the Ministry of Foreign Affairs and Foreign Trade and find that the call was made before 1pm.

What was the state of things in the Ministries involved; what was the state of things at the office of the DPP before 1pm? Mr. Taylor's evidence on the matter is quite clear. .

**“A: Between – my recollection is not too well, but I think between hours of perhaps 2:30 and 3 o'clock in the afternoon of that day, I received a call from someone at the United States Embassy that they were making the formal request for the extradition of Christopher Coke on that day.**

**Q: After you had received that information what did you do?**

**A: Well, I contacted the Ministry.**

**Q: Which Ministry?**

**A: The Ministry of Foreign Affairs, to confirm whether or not the request had been made.**

**Q: Who did you speak to?**

**A: I spoke to Mr. Herman Lamont at the Ministry of Foreign Affairs.**

**Q: And did you get a response to your question whether the extradition request had been received?**

**A: I think at the time I called, it may not have been received as yet.”**

It follows from what is quoted above that neither of the two Ministries had the request, nor did the DPP. What Mrs. Palmer-Hamilton said was her recollection of the conversation with the Minister of Justice, could not have represented the true position.

This equally applies to Lieutenant Colonel Cole's statement to the effect that Mr. Taylor told him the process had started. How could the process have started before 1pm when up to 2:30pm (Mr. Taylor's evidence) the Ministry of Foreign Affairs and Foreign Trade had not received the request?

All the parties concerned, Jeremy Taylor, Lisa Palmer-Hamilton, and Lt. Col. Cole were aware of the mandatory requirement that the request should have been made through the Ministry of Foreign Affairs and Foreign Trade. No doubt on their concern for national security they sought the assistance of the Minister to stem any problems that might have arisen. No malevolence towards the Minister was intended.

Rear Admiral Hardley Lewin gave evidence that on 4<sup>th</sup> August, 2009 he was told by someone in the US Embassy that on 25<sup>th</sup> August, 2009 a request would have been made for the extradition of Mr. Coke.

Both the US Embassy and Rear Admiral Hardley Lewin who was then the Commissioner of Police knew that the request should have been made through the Ministry of Foreign Affairs and Foreign Trade. Notwithstanding the above, the Rear Admiral chose to act on the information without pointing out to the US Government that they were ignoring the proper procedure.

He gave evidence that he contacted Major General Saunders who was then the head of the Jamaica Defence Force and together they went to see Senator Dwight Nelson, the Minister of National Security, who sent them on to the Prime Minister, who is also the Minister of Defence.

The Commission can understand the Police Commissioner's concern for security, but he may have gone too far. It appears that the recollection of some people was faulty, but they were recollecting matters that had happened some 18 months before they gave evidence, in any event, nothing seems to us to turn on these apparent contradictions.

## 11) MISCONDUCT

We have considered the question as to whether any person may be guilty of misconduct in the matters we have enquired into. By "misconduct" we accept it to be unacceptable or deliberate, dishonest and mischievous conduct on the part of these persons engaged in the matters concerning the request for the extradition of Mr. Christopher Coke.

We have found no misconduct on the part of persons we enquired into. Mistakes and errors of judgement were made, but no one in our view was guilty of misconduct in the part he or she played in the matter of the extradition of Mr. Coke. It is regrettable that the memories of some of these witnesses failed them at the Enquiry.

## 12) THE CONDUCT OF COUNSEL AT THE ENQUIRY

### SUMMARY

1. The conduct of some Counsel at the Enquiry was discourteous and below the standard of decorum one expects from members of the bar.
2. Such behavior sets a poor example to younger members of the legal profession.
3. We have not been influenced by such behaviour in coming to our conclusions.

With much regret, we must comment on some of the Counsel taking part in the Enquiry. We permitted them every facility, particularly in cross-examination of witnesses, but some counsel went far beyond the limits of what is properly permitted in cross-examination. When an attempt was made to restrain Counsel, the Chairman was accused of being biased.

Some Counsel were aggressive and rude. They behaved outrageously to some of the witnesses and some were even rude to the Commissioners. On one occasion when the Chairman was adjourning the Enquiry because of misbehaviour of Counsel, one Queen's Counsel shouted at the Commissioners:

"You were paid by the tax payers to stay and listen to us!"

On another occasion, one of the Counsel told the Commission that he heard the ruling of the Chairman, but that he did not accept it.

Conduct of this kind was not only reprehensible but did not assist the Commission in its search for the truth, it merely prolonged the Enquiry and gave to it an element of unpleasantness..

Every session of the Enquiry was shown on television and was seen not only in Jamaica but all over the world. People watching the Enquiry were no doubt given the impression that this was typical behaviour in Jamaican Courts. This is not so. Unfortunately, Commissioners are not given that power in the Enquiries Act to cite for contempt those who choose not to behave properly.

In addition, we should add that the misbehaviour of some counsel sets a poor example to younger members of the legal profession in Jamaica.

We wish however, to make it very clear that the misbehaviour of Counsel in no way interfered with or influenced the findings that we have made in this Enquiry.

### 13) RECOMMENDATIONS

#### SUMMARY

We suggest that:

1. The posts of Minister of Justice and Attorney General should be split; the Attorney General need not be a member of either House.
2. The Cabinet should be informed of any amendments or memoranda affecting constitutional rights.
3. Commissioners of Enquiry should be given the powers of a Supreme Court Judge for the purpose of being able to cite for contempt.
4. The Enquiries Act should provide that commissioners can state a case for the opinion of the Supreme Court in matters of law.

1. We have considered the quality and amount of work that is done by the Attorney General's Department, and the quality and volume of work done by the Ministry of Justice, and we recommend that these departments be headed by two different people.

The Attorney General does not have to be a Minister, or a member of the Senate or of the House of Representatives (see Section 79 of the Constitution), but may attend Cabinet meetings at the invitation of the Prime Minister.

2. We recommend that when any amendment or memorandum concerning a law or treaty, whether operational or not, which affects the Constitutional rights of individuals, is being introduced or amended, such

amendment or memorandum should be referred to the Cabinet and to the Prime Minister. This would prevent the situation such as that which arose in the matter of the MOUs 1 and 2.

3. We think that the behavior of Counsel would be very different if the Commissioners were to be given the right to cite them for contempt. We therefore recommend an amendment to the Enquiries Act to give Commissioners the power to commit for contempt.
4. We also recommend that the Enquiries Act should be amended to give the Commissioners the right to state a case for the opinion of the Supreme Court. It would be a useful procedure in matters such as this where the interpretation of statutory provisions is in issue.

**14) THANKS TO DR. KIRTON AND THE SECRETARIAT**

Finally, we must express our thanks to Dr. Kirton, C.D., Ph. D. and the Secretariat for the invaluable help and support they gave to us during the Enquiry. Not only did they help us in dealing with the documents during the hearings, but the stenowriters provided notes of evidence of all the proceedings within the twenty-four hours of the hearings. In addition, they were all very pleasant and co-operative and very helpful.

The secretariat comprised the following:

- a. Dr. Allan Kirton, C.D., Ph.D., J.P. – Secretary
- b. Mrs. Elizabeth Brown James – Administrative Assistant
- c. Mrs. Verna McGaw – Secretary
- d. Mrs. Sharon Duffus-Grant – Secretary
- e. Mrs. Ann Peddie – Registrar
- f. Miss Kimmie-Lee Ennis – Secretary
- g. Mr. Othniel Kidd – Information Technology
- h. Miss Elena Mohalland – Office Attendant
- i. Miss Winnifred Manahan – Stenowriter
- j. Ms. Yvonne Jenkins – Stenowriter
- k. Ms. Gloria Boxe – Stenowriter
- l. Ms. Elaine Walker – Stenowriter

HON. EMIL GEORGE Q.C., O.J. CHAIRMAN .....

DONALD SHARSCMIDT Q.C. ....

ANTHONY IRONS O.J. ....

6<sup>th</sup> JUNE 2011