

## COURT FINDS GOVERNMENT'S CONTROVERSIAL PORT REFERENDUM LAW IS INCOMPATIBLE WITH THE CONSTITUTION

In a landmark decision handed down today by the Honourable Mr. Justice Tim Owen, the Grand Court of the Cayman Islands has found that the 'Referendum (People-Initiated Referendum Regarding the Port) Law 2019' (the "**Port Referendum Law**") is incompatible with section 70(1) of the Cayman Islands Constitution Order 2009 (the "**Constitution**").

Broadhurst LLC represented Ms Shirley Roulstone, who was the Plaintiff in the case.

### **Background**

The Port Referendum Law was passed by the Cayman Islands Government on 31 October 2019 to establish the process and procedure for the conduct of the first ever people-initiated referendum in the Cayman Islands. The subject of that referendum is whether the Government should proceed with its controversial policy to construct a cruise ship berthing facility in George Town Harbour (the "**Referendum**").

The judicial review claim filed by Ms. Roulstone sought to challenge the legality of the regulations setting the Referendum question, the Referendum date and the legality of the Port Referendum Law itself. The decisions made by Cabinet setting the Referendum question and date, enacted by way of regulations, were challenged on the basis that they had been unlawfully pre-determined; that Cabinet had failed to have regard to relevant material considerations in making those decisions, including the requirement to have regard to the protection of the environment; and that the Referendum question was framed in a biased manner in breach of s. 4(3) of the Constitution. The Port Referendum Law was challenged on the basis that it frustrated the purpose of section 70(1) of the Constitution, which confers the right of the people of the Cayman Islands to petition their government for a referendum, as it did not promote the right to a fair and effective referendum.

By the time the matter went to trial on 22 January 2020, the only matter for determination by the Court was the legality of the Port Referendum Law. The other challenges had fallen away as a result of the stay of the intended Referendum date until the Court determined the judicial review claim

(granted by Order of the Hon. Justice Owen QC made on 3 December 2019); the concession made by Government on the wording of the Referendum question, and the Government's express acceptance of its duty to have due regard to the environment in making decisions regarding the Referendum. The Court was therefore able to focus on the compatibility of the Port Referendum Law with the Constitution.

## Hearing

In a well-attended hearing lasting two days before the Honourable Mr. Justice Owen QC, it was argued on behalf of Ms. Roulstone that s. 70 of the Constitution does not merely confer a right to trigger a referendum, but also a right to a fair and effective referendum. It was observed that as a people-initiated referendum will almost invariably constitute a challenge to Government policy, it will follow that Government will always be on one side of any particular referendum issue. Consequently, a general framework law governing all people-initiated referenda was required to protect and promote the right to a fair and effective referendum conferred by s. 70, not a bespoke law for the conduct of each individual referendum. It was argued that allowing Government to formulate a different set of rules for each referendum depending on the nature of its support or opposition for the particular referendum issue would allow Government to stack the odds in their own favour.

The following examples from the Port Referendum Law were drawn to the Court's attention in order to illustrate Ms. Roulstone's contention that in allowing Government to "*set the rules of the game*" in respect to a particular referendum, undermines the right to a fair and effective referendum promoted by s. 70 of the Constitution:

- First, the Port Referendum Law lacks effective provision for voter registration. That is, the time between the law being enacted and the date of the Referendum was too short to allow people not already registered to vote, to register for the purpose of voting in the Referendum;
- Secondly, the Port Referendum Law lacks any rules to govern campaign financing in circumstances where, in this particular Referendum (but not necessarily in other referenda), the Government is on the side of the issue with the most financial resources;
- Thirdly, the Port Referendum Law lacks clear rules regarding political broadcasting, making no provision for equality of access to state-owned media and resulting in this case in the pro-

port campaign run by the Government getting much more broadcasting time than the anti-port campaign message;

- Fourthly, the Port Referendum Law lacks rules for the formulation of the referendum question. In this case, that allowed the Government to conflate a popular issue, being enhancement of the cargo port, with the less popular cruise ship berthing facility issue, that was the subject of the petition that triggered the requirement for the Referendum. Merging a controversial issue that is the proper subject of the referendum question with a popular issue, decreases the prospect of the Government's policy being vetoed in a referendum;
- Finally, the Port Referendum Law lacks any rules requiring the provision of objective, unbiased information on the referendum issue to the public, allowing the Government in this case to disseminate information, at public expense, that has misled the public in respect to the referendum issue.

In opposing the Application, the Government argued that while s. 70 requires passage of "a law" regulating a s. 70 referendum, nothing in its wording suggests that this must be a general law applicable to all referenda rather than a specific law enacted to govern a particular referendum, so it should be left to the legislative assembly to decide on the form and scope of the enactment.

## **Decision**

Before drawing his conclusions, the Hon. Justice Owen QC acknowledged that the issues before the Court were novel and that in the absence of any case law, either in the Cayman Islands or abroad, addressing whether a constitutional right to a fair and effective vote demands, by necessary implication, the enactment of a framework law to "*clothe the referendum process with legality from start to finish*", or whether a bespoke law providing *ad hoc* for a legal framework for each referendum can guarantee compatibility with the Constitution, the Court would be working from a "*blank canvass*".

In his determination that there was a lack of clarity in the bare language of s. 70 concerning the form in which the Legislature must enact legislation to make provision for the holding of a people-initiated referenda, he found that the Court must adopt a "*generous and purposive interpretation*" to what he described as a "*unique constitutional provision which guarantees an important democratic right*". In applying that approach, the Hon. Justice Owen QC held that the Constitution requires the enactment

of a general law because “Section 70 of the Constitution confers a direct democratic right on the people to veto the policy choices of their democratic representatives” and “allowing the democratic representatives to change the ground rules every time there is a referendum risks the rules being changed to promote their policy choice” (para 64).

Consequently, Justice Owen found that the Port Referendum Law had created “an unequal playing field which was heavily stacked in favour of the Government side to an extent which endangered the right to a fair and effective vote” (para 64). He made particular reference to the rules governing voter registration, the absence of campaign finance rules, the absence of rules governing political broadcasting and the absence of provision for voters to be provided with objective information. The Judge indicated that such matters would need to be addressed in the context of drafting a general referendum law, in observing that the Legislature’s approach will be “no doubt informed by the advice of the Constitutional Commission in discharge of its s.118 Constitutional function to advise the Government on constitutional development in the Cayman Islands”. In this respect, Justice Owen lamented the fact that “no Government has seen fit since the Commission published its thoughtful and well-reasoned Research Paper in 2011 to respond to the Commission’s views on what it clearly felt was the obvious need for a general referendum law” (para 65).

The Court has confirmed that the Government has the right to appeal the ruling. They now have 14 days in which to make a final decision on whether to do so.

## **Significance**

Regardless of whether the Government chooses to appeal the Grand Court’s decision, Justice Owen’s judgment no doubt represents a significant setback to the Government’s plans to move forward with its controversial policy to construct a cruise ship berthing facility in George Town Harbour.

The decision will no doubt be of interest to stakeholders in both the Cayman Islands and those overseas jurisdictions which have and/or are considering the implementation of similar legislation pertaining to people-initiated referenda.

Broadhurst LLC is a local firm with over 30 years' experience in the Cayman Islands and is proud to have represented Ms. Shirley Roulstone in this case of national importance, the outcome of which will no doubt result in fairer and more effective referenda in the Cayman Islands in the future.

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