



Negotiating Out of a By-Election?

By Robert Collie

It has been a hot topic in the news these days, can the political parties 'negotiate' around holding by-elections. The merits of the position are clear to most well thinking Jamaicans. Elections tend to be expensive affairs and at a time when the economy is in a parlous state few see the efficacy to the nation of holding by-elections at this time. Indeed the attractiveness of this argument is such that it has been suggested by no less a person than the Chief Servant himself that the parties should head to the bargaining table to find an 'end around' the whole by-election business. However, is this in fact a legal position that the parties can take? Can they negotiate out of holding a by-election?

Firstly, let us set the stage for the discussion and what has led us to this state of affairs. Section 40(2)(a) of the Constitution in essence says that who are disqualified by virtue of their own act have obtained the citizenship of a non-Commonwealth country. At least three members of the ruling party have been declared to be in violation of these provisions and thus were unseated by the courts. Having come to this determination what is the next step?

It is at this time that we must look towards the courts again as Section 44 of the Constitution vests in only one arm of government, the judiciary, the power to determine the qualification of a person to sit as an MP under the law. Having so determined that a person is disqualified what does the Constitution say about filling the vacancy which has arisen?

In this writer's opinion the Constitution is also clear on what must occur and that is Section 45 (2) of the Constitution must be complied with. That Section reads as follows:

“Whenever the seat of any member of the House of Representatives becomes vacant the vacancy shall be filled by election in the manner provided by or under any Law for the time being in force in Jamaica.”

It is therefore clear that when a person, declared to be unqualified by virtue of the Constitution, is expelled from Parliament the next step, constitutionally at least, would be that a by-election should take place. Of course there has been argument that the 'Law for the time being in force in Jamaica' is the Representation of the People Act. That being the case the argument goes that if a person is not qualified under the Constitution then that person could not be properly nominated. There being only one duly nominated candidate then based on Section 27 of the Act that person should be returned by acclamation as the elected representative. Based on a well known British case of *Drinkwater v Deakin* it is said that where electors know a candidate is unqualified to sit as an MP then they would have been deemed to have thrown away their votes. Ergo it would mean that there being only one duly nominate candidate he would be re-elected by acclamation pursuant to Section 27 of the Act. This reasoning was accepted to be the position in Jamaican law with the case of *Mattison v Junor*.

Of note however was that, on a finding of fact in the cases that went before the courts, that is *Dabdoub v Vaz* and *Mitchell v Mair*, it was held that by virtue of the actions of the Director of Elections Danville Walker in stating that all candidates who were nominated on Nomination Day were properly nominated then, despite the flyers from Mr. Dabdoub in at least one constituency indicating that Vaz was a dual national and thus not properly qualified, there could be no finding that the electors who voted for Vaz threw away their vote. In this writers opinion this was a weak ground on which to come to the conclusion that a by election should be

held instead of a return by acclamation. Given the primacy of the Constitution as the fundamental law of the land it is curious that the courts did not make the bold decision to hold that the Drinkwater line of cases had no application to the Jamaican Constitution as Drinkwater was determined on a the basis of the unwritten UK Constitution and Junor concerned the election of a Parish Councillor, a creature wholly different from an MP. That being the case in this writers opinion it was well within the power of the courts to hold that the holding of a by election was the only just constitutional position in a country where democracy has prime of place.

Nevertheless, and getting back to the relevant question, it appears that there is no negotiating around the Constitution. However what can be done, and what this writer imagines is taking place in the negotiations, is that if one of the parties determines that they will not nominate a candidate then the sole candidate will be elected by acclamation and no election will have to be held. As you can see from the foregoing, it is not a negotiation around the Constitution but in fact a negotiation with the Constitution, and the people, at the forefront of the mind.

Robert Collie is an Associate at Myers Fletcher & Gordon and a member of the Firm's Litigation Department. Robert may be contact at Robert.collie@mfg.com.jm or through www.myersfletcher.com.