Papua New Guinea

IN THE SUPREME COURT OF JUSTICE AT WAIGANI

SC REF NO.3 OF 2011

BETWEEN:
REFERENCE PURSUANT TO CONSTITUTION SECTION 19

AND:
REFERENCE BY THE EAST SEPIK PROVINCAL EXECUTIVE
-Referor-

AND:
HON. DR ALLAN MARAT, MP
as the Minister for Justice and Attorney General
-First Intervenor-

AND:
HON. JEFFERY NAPE MP,
as Speaker of Parliament
-Second Intervenor-

AND:
THE OMBUDSMAN COMMISSION OF PAPUA EW GUINEA
-Third Intervenor-

AND:
HON. SAM ABAL MP
-Fourth Intervenor-

AND:
HON. PETER O'NEILL MP,
as Prime Minister of Papua New Guinea
-Fifth Intervenor-

AND:
HON . BELDEN NAMAH MP,
as the Deputy Prime Minister of Papua New Guinea
-Sixth Intervenor-

AND:
NATIONAL ALLIANCE INC.
-Seventh Intervenor-

AND:
GRAND CHIEF SIR MICHAEL SOMARE MP
-Eighth Intervenor-

Waigani: Injia, CJ; Salika Dep.CJ; Sakora, Kirriwom & Gavara-Nanu JJ
2011: December 12th

Special Reference (s 19 (3)(b) of the Constitution – Removal of Prime Minister – Appointment of Prime Minister – Removal of Member of Parliament for absence on three consecutive sittings of Parliament- Constitution, s 142, s 104, s 135.

FACTS
Prime Minister Sir Michael Somare was absent from the country and in Singapore from 24th March 2011 to 26th August 2011 for medical treatment. During that time there were 3 meetings of the Parliament in May June and August. Sir Michael had leave of the Parliament to be absent from the May meeting. On 2nd August 2011 Parliament passed a motion declaring that there was a vacancy in the office of Prime Minister and immediately thereafter elected the Hon Peter O'Neill as Prime Minister. There was a further meeting of the Parliament in September and Sir Michael attended that meeting on 6th September. Subsequently on that day the Speaker declared that Sir Michael Somare had lost his seat in Parliament by virtue of having been absent from Parliament without leave for 3 consecutive sittings of the Parliament.

HELD

Injia CJ, (views of Sakora J to be inserted later) Kirriwom J and Gavara-Nanu J (Salika DCJ dissenting)

1. The occasions and methods for removing a Prime Minister are restricted to those specified in constitutional laws;

2. Sir Michael Somare was not lawfully removed from office as Prime Minister;

Injia CJ, Salika DCJ, (views of Sakora J to be inserted later), Kirriwom J and Gavara Nanu J:

3. A Prime Minister can only be elected on the day following the Speaker's advice to Parliament that there is a vacancy in the office of Prime Minister.

4. Mr Peter O'Neill was not lawfully elected as Prime Minister, the election was unconstitutional and invalid;

5. The National Court has exclusive jurisdiction as to whether the seat of a member has become vacant by reason of facts arising under Section 104(2)(d) of the Constitution;

6. The declaration made by the Speaker on 6th September 2011 that Sir Michael Somare had lost his seat by reason of being absent from Parliament for three consecutive meetings of Parliament pursuant to Section 104(2)(d) of the Constitution is unconstitutional and invalid.

7. The meaning of "person of unsound mind" in Section 103(3)(b) of the Constitution is the meaning given by Section 81 of the Public Health Act Chapter 226

NOTE: The questions raised in the Reference and the answers of the members of the Court appear at the end of the judgment.

PNG Cases cited:

Alois Kingsly Golu v National Executive Council [2011] PGNC 134;N4425
Application by Francis Gem (2010) SC 1065
Avia Aihi v The State (No.1) [1981] PNGLR 81
Burns Philp v The State & Ors [1989] PGNC 24, N769
Constitution:Application by Gabriel Dusava (1998) SC581;

Derbyshire v Tongia [1984] PNGLR 148
Douglas Charles Dent v Thomas Kavali [1981] PNGLR 488
Ex parte Moses Sasakila [1976] PNGLR 491
Hagai Joshua v Aron Meya [1998-89] PNGLR 188
Haiveta v Wingti (No. 3) [1994] PNGLR 197
Haivila Kavu v Mark Maipakai [201[PGNC 82; N4094
In re Election of the Governor General (2010) SC 1085
Isidore Kaseng v Namaliu and The State [1995] PNGLR 481
James Mopio v The Speaker [1977] PNGLR 420
Kaguel Koroka v Phillip Kapel & Ors [1985] PNGLR 117
Kaseng v Namaliu [1995] PNGLR 481
Kekedo v Burns Philp (PNG) Ltd [1988 – 89] PNGLR 122,
Kila Wari and others v Gabriel Ramoi and Another [1986] PNGLR 112,
Launa v Alphonse Willie (2004) N2595
Lionel Gawi v The State (2006) SC850,
Matter Pursuant to Section 18(1) of The Constitution, Southern Highlands Provincial Government v Sir Michael T Somare; Sir Matiabe Yuwi v Sir Michael T Somare (2007) SC854
Mauga Logging Company Pty Ltd v South Pacific Oil Palm Development Pty. Ltd (No.1) [1977] PNGLR 80
Minister for Lands v Frame [1980] PNGLR 433
Morobe Provincial Government v Minister for Village Courts & The State (1994) N1215,
Motor Vehicles Insurance (PNG) Trust v Reading [1988] PNLR 608
NCDIC v Crusoe Pty Ltd [1993] PNGLR 139
New Guinea Cocoa (Export) Pty. Ltd v Basis Vedbaek [1980] PNGLR 205
Paul Kipo v Rova Maha [1994] PGNC 15;N1252
Peter Makeng & Ors v Timbers (PNG) Limited N3317
Premdas v The State [1979] PNGLR 329.
Public Prosecutor v John Aia of Mondo and Peter Pino of Idu [1978] PNGLR 224
Public Service Commission v Independent State of Papua New Guinea [1994] PNGLR 603
Re Election of Governor General; Reference by Morobe Provincial Executive (2010) SC 1085
Re Election of Governor–General (No 1) (2003) SC721
Re Election of Governor–General (No 2) (2004) SC728
Re Election of Governor-General (No 3) (2004) SC752
Re Election of Governor-General (No 4) (2004) SC773
Re Joseph Auna [1980] PNGLR 500
Re Reference by Ken Norae Mondiai (2010) SC1087
Re Sitting Days of the Parliament and Regulatory Powers of Parliament (2002) SC722

Reference by the Ombudsman Commission of PNG (2010) SC 1027
Reference by the Ombudsman Commission of PNG (2010) SC1058
Rundle v MVIT [1987] PNGLR 44
Rundle v MVIT [1988] PNGLR 20
Safe Lavao v The Independent State of Papua New Guinea [1978] PNGLR 15
SC Ref by Ombudsman Commission re Amendments to Forestry Act (2010) SC 1088.

SC Reference No 4 of 1990 Special Reference Pursuant to Section 19 of the Constitution in the Matter of a Reference By The Acting Principal Legal Adviser Re Meeting of Parliament [1994] PNGLR 141
SCR No 1 of 1992; re Constitutional Amendment No 15 [1992] PNGLR 73
SCR No 2 of 1992; Reference by the Public Prosecutor [1992] PNGLR 336;
SCR No 3 of 1999:Re Calling of the Parliament [1999] PNGLR 285
SCR No. 1 of 1997 Re s 19 of the Constitution Reference by the Principal Legal Advisor [1998] PNGLR 453
SCR No. 2 of 1982; Re Kunangel [1991] PNGLR 1
Special Reference by Fly River Provincial Executive, re Organic Law on Integrity of Political Parties and Candidates (2010) SC 1057
The Independent State of Papua New Guinea v Philip Kapal [1987] PNGLR 417
The State v The Independent Tribunal; Ex parte Sasakila [1976] PNGLR 491
Titi Christian v Rabbie Namaliu (1996) OS No 2 of 1995, Unreported and Unnumbered Judgement of Amet CJ, Kapi Dep CJ, Salika , Doherty & Andrew JJ dated 18 July 1996
Titus Taber v Keran Rimbao (1998) N1767
Tom Korea v Sepoe Karawa [1989] PGNC 33; N791

Overseas case cited:
Armstrong v Budd (1969) 71 SR (NSW) 386
Beswick v Beswick [1968] AC 58
Boettcher v Boettcher [1948] 8 St R Qd 74
Bryan v Arthur 11 A & E 117
Cosham v Cosham (1899) 5 ALR 291;
Ex parte Cranmer (1806) 12 Ves 445; 33 ER 168;
Hanbury v Hanbury (1892) 8 TLR 559, CA.
Howard v Bodington (1877) 2 P. D. 203
J v J [1957] VR 523; [1957] ALR 1017;
Kirby v Leather [1965] 2 All ER 441
M'Naghten's Case (1843) [1843-60] All ER Rep 229;(1843) 8 ER 718
Murphy v Doman [2003]58 NSWLR 51
Nelsovil v Minister of Housing (1962) 1 All E.R. 423

Owners-Strata Plan No.23007 v Cross – in the matter of Cross [2006] FCA 900
Pepper v Hart [1993] AC 593; [1993] I All ER 42;
Poynton v Walkey [1951] SASR 191,
R v S (1979) 2 NSWLR 1
Re Barnsley (1944) 23 Atk. 168; 36 ER 899).
Re Holmes (1827) 4 Russ 182; 38 ER 774;
Regina v Secretary for State for Transport, Ex parte Factortame Ltd and Others (No. 5) [2000] 1 AC 524
Ridgeway v Darwin (1802) 8 Ves 65; ER 275
SS Constructions Pty Ltd v Ventura Motors Pty Ltd [1964] VR 229
Warner v Metropolitan Police Commander [1969] AC 256

PNG Statutes & Subordinate legislation referred to:
Constitution,
Education Act 1983,
Frauds and Limitations Act 1988
Marriage Act 1963,
Medical Registration Act 1980
National Court Rules 1983
Organic Law on National and Local-Level Government Elections.
Parliament Standing Orders
Parliamentary Powers and Privileges Act (Ch 24)
Partnership Act 1951,
Professional Engineers (Registration) Act 1986,
Public Health (Mental Disorders) Regulation 1962
Public Health Act Chapter 226
Supreme Court Rules 1987
Trade Licensing Act 1969,
Underlying Law Act 2000

PNG Books and Articles and Reports referred to:

CPC Final Report 1974

Overseas Statutes & Subordinate legislation referred to:

Constitution Act 1902 (Australia),
European Communities Act 1972 (UK)
Legislative Assembly Standing Order 29 of New South Wales, Australia,
Merchant Shipping Act 1988 (UK)
Papua New Guinea Act 1943 – 1973 (Australia)

Papua New Guinea Independence Act 1975.

Overseas Books and Articles and Reports referred to:

Constitutional and Administrative Law, 5th Ed., O. Hood Philips
Cross on Evidence , 7th Australian Ed (2004), Butterworths
Expulsion of Members of NWS Parliament, Briefing Paper No. 17 /2003, Gareth Evans; NSW Parliamentary Library Research Service publications August 2003.
Halsbury's Laws of Australia.285-85.
Halsbury's Laws of England
Judicial review in New Democracies: Constitutional Court in Asian Cases, Tom Ginsberg, Cambridge University Press at p 1-10
Oxford Concise Dictionary of Politics, Oxford University Press, Third Edition, 2009, page 391.
Statutory Interpretation in Australia, 4th Ed. DC Pearse and RS Geddes
The Parliamentary Mandate – A Global Comparative Study, Marc Van der Hulst, Inter-Parliamentary Union, Geneva, 2000
Writings of Thomas Jefferson (1897) vol.8; Oxford Dictionary of Quotations (7th ed.), 2009, Oxford University Press.

Counsel:
I Molloy & *W Thomas* for the Referor
J A Griffin QC with *P Tabuchi* for the First Intervenor
R J Webb SC with *K Frank* for the Second Intervenor
V L Narakobi for the Third Intervenor
D Kerr for the Fourth Intervenor
M M Varitimos with *F Griffin* for the Fifth and Sixth Intervenors.
J K Gawi for the Seventh Intervenor
M Cooke QC with *J Wohiunangu* for the Eighth Intervenor

12 December 2011.

Injia, CJ:

1. This is a special Reference under s 19 of the *Constitution* brought by the East Sepik Provincial Executive (Referor). It raises questions relating to the interpretation and application of several provisions of the *Constitution*. The main provisions under consideration are *Constitution*, s142 (2), (3), (4) (5); s103(3)(b), s104 (2) (d), s 133, s 134, s 135, s 141 (a), s 86 (4), Schedule 1.10 (3). Also under consideration is the *Organic Law on National and Local-Level Government Elections* (OLNLLGE), Part XVIII, Division 2 (ss 228 – 233).

2. The Reference emanates from decisions made by the National Parliament (Parliament) on 2 August 2011, to declare a vacancy in the office of the Prime Minister then held by the Hon Sir Michael Somare (Eighth Intervenor) and immediately thereafter to appoint the Hon Peter O'Neill (Fifth Intervenor) as the new Prime Minister. Also subject of the Reference is a subsequent *pronouncement* (hereinafter referred to as "*decision*") by the Speaker of Parliament, on 6 September 2011, that Sir Michael ceased to hold office as member for the East Sepik Provincial seat by reason of his absence without leave during three consecutive meetings of Parliament. The Referor challenges the Constitutional validity of Parliament's decisions of 2 August and the Speaker's *decision* of 6 September.

3. The original Reference raised five (5) questions. A further thirty-three questions were included in the Reference, by leave of the Court, on application by the Attorney - General (First Intervenor) and Sir Michael Somare, bringing the total number questions to thirty-eight. I reproduce those questions in the Appendix to this judgment.

4. At the hearing, parties were divided into two groups - those supporting the Referor's position on the questions (Third, Fourth,

Seventh and Eighth Intervenors) and those supporting the First Intervenor's position (Second, Fifth and Sixth Intervenors). The Third Intervenor took a neutral position however, because its answers to the main questions similar to those of the Referor, I have included it amongst the parties supporting the case for the Referor. For purpose of easy reference, I refer to the case for the Referor (and those Intervenors supporting its case) as the case for the negative, primarily by reference to their positions on the key questions in the Reference. I refer to the case for the First Intervenor (and those supporting him) as the case for the affirmative.

5. The parties were represented by different counsel. Again, for purpose of easy reference, I refer to them collectively as counsel for the affirmative and counsel for the negative respectively.

6. I am assisted by the structured manner in which counsel presented their arguments in what is clearly a case with multiple issues of fact and law that required a structured approach. That has enabled me to crystallize the issues and deliberate on them under eight topics, as follows:

(1) Preliminary matters.

(2) Vacancy in the office of the Prime Minister and appointment of a new prime Minister under s 142 (2), Schedule 1.10 (3); and inherent power of Parliament.

(3) Vacancy in the office of the Prime Minister under s 142 (2) by virtue of removal of the Prime Minister for physical and mental incapacity (s 142 (5)(c); and appointment of Prime Minister.

(4) Vacancy in the office of the Prime Minister under s 142 (2) by virtue of disqualification of the Prime Minister for unsound mind (s 103 (3)(b);and appointment of Prime Minister;

(5) Vacancy in the office of Prime Minister by reason of disqualification of member of Parliament who is Prime Minister,

for absence without leave on three consecutive meetings of Parliamen (s 104 (2)(d));and appointment of Prime Minister;

(6) Miscellaneous matters.

(7) Effect of answers to questions in the Reference.

(8) *Declaratory orders.*

1. Preliminary matters

7. Several preliminary matters were argued before us, some of which concern threshold issues with regard to jurisdiction whilst others raise specific points of procedural law. Those considered under this part relate to standard of pleading questions in the Reference, principles of constitutional interpretation, onus of proof, facts, hansard and non-justiciability.

Standard of Pleading Constitutional Questions.

8. This Court may decline to answer a question in the Reference if it is vague, duplicitous or lacks sufficient particulars: *Order 4 Rule 16, Supreme Court Rules 1987, Special Reference by Fly River Provincial Executive, re Organic Law on Integrity of Political Parties and Candidates* (2010) SC 1057 (*OLIPAC case*); *SC Ref by Ombudsman Commission re Amendments to Forestry Act* (2010) SC 1088. The pleadings in this Reference are not in issue.

Constitutional Interpretation

9. The principles of constitutional interpretation are settled. A broad and expansive approach is favoured over the strict, technical and legalistic

approach. The Court must interpret the words used in a provision in the context of the whole provision and do so, in a fair and liberal manner so as to give effect to the intention, purpose and spirit of the provision. However, interpreting in this manner does not involve inventing a new principle of law that would be tantamount to legislating by judicial act under the guise of statutory interpretation: *Reference by the Ombudsman Commission of PNG (2010)* SC1058; *Reference By Ken Mondiai* (2010) SC1087. The Court must defer to the legislature if issues of public policy must be decided to fill a gap in the law*: SCR No 5 of 1980 Re Joseph Auna* [1980] PNGLR 500, and see also *Ex parte Moses Sasakila* [1976] PNGLR 491.

10. The need to resolve the constitutional questions in this Reference is prompted by political developments that occurred in Parliament that resulted in a change of government led by Prime Minister Sir Michael Somare. This followed hospitalization of Prime Minister Sir Michael Somare since March 2011. I should remind myself of the nature of the task ahead; by echoing the same sentiments this Court expressed in the *OLIPAC case,* in the following terms:

> "105. We appreciate that the *Constitution,* though law, is a document derived from a political process and that many of its components contain political statements.
> ….
>
> 107. It is therefore difficult for Judges to be totally divorced from considering socio-political considerations which permeate the *Constitution*. The CPC considered this difficulty but counseled against judges withdrawing from taking into account political considerations in appropriate cases. The CPC stated in Chapter 8, paragraphs 5 -6, as follows:
>
> *5. The Courts do not, however exist in a vacuum. Like other institutions of government of a country, they are caught up in political reality, and often their decisions have political consequences.*
>
> *6. In carrying out their judicial role, judges... must take full account of society in which they live; they must be attuned to the wishes of the society and to that extent must be politically conscious (although not party politically conscious).*
>
> 108. In the past, this Court has been conscious of the potential risk of politicization of the Court in deciding politically charged cases and taken great care in staying within the limits of law and reason. That has always been the approach of this Court and this Court will continue that path."

Facts

11. This Reference involves facts which this Court must determine: see *OLIPAC* case.

12. In compliance with our directions, parties filed affidavits. Based on those affidavits, the parties submitted to us a *Statement of Agreed and Disputed Facts*. We considered it was necessary to determine those disputed facts.

13. The procedure for determining facts is set out in *Order 3 rule 3* of the *Supreme Court Rules* 1987, which is in the following terms:

> *"Upon the direction of the Court, either on the application of a party to the proceedings or of its own motion, a single Judge may take evidence upon any issue of the fact for the determination of the proceedings and state those facts as found by him, and the Court may act upon such statement of facts so far as it thinks fit to adopt it."*

14. In *The Application by Francis Gem* (2010) SC 1065, this Court established the preferred practice, that a single Judge of the Supreme Court, other than any of the Judges constituting the bench that is seized of the substantive matter, should take the evidence and state those facts as found by him to the full Court. We adopted that practice in this Reference. We directed Justice David Cannings, a Judge of the Supreme Court (referred to as the trial Judge), to take the evidence and make those findings of fact. The trial judge completed his task and a statement of those facts is before us. It is for this Court *"to act upon such statement of facts so far as it thinks fit to adopt it."* All parties made submissions on those facts for our consideration.

15. The criteria for adopting those facts is that the findings must be open on the evidence before the trial Judge. Those facts must be relevant to or have a bearing on the constitutional issues before the Court. With regard to procedural matters relating to admissibility of evidence and credibility of witnesses, this Court almost invariably will defer to the trial Judge's findings on those matters.

16. In this case, the adoption of undisputed facts and those facts stated by the trial is addressed in the course of my reasoning. Except where the facts are expressly or by implication referred to and adopted or

rejected in the judgment, all other facts are disregarded as of little or no material relevance to the important issues in this Reference.

Onus of Proof:

17. In the *OLIPAC* case, this Court adopted principles enunciated in earlier cases, that in a Constitutional Reference under s19 which concerns challenge to the validity of a law that is said to infringe a Constitutional right, the Referor carries the initial burden of establishing a prima facie case, that the law infringes the right in question. Section s 38 (3) of the *Constitution* then shifts the onus of proving the validity of the law on the party relying on its validity.

18. Counsel for the affirmative distinguished the present case from the *OLIPAC* case, citing the difference between challenge to Parliament's decision to enact law and other type of decisions. They argued that the principle in *OLIPAC* should be confined to challenges to validity of legislation. The proposition that the onus shifts to the party relying on the validity of a law is consistent with the onus imposed by s 38 (3) in order to protect the rights and freedoms guaranteed by Subdivision C of Part II of the *Constitution.* In the absence of an equivalent provision in respect of other types of decisions of Parliament, such as decisions made in the exercise of the powers under s 142 (2),(3) and (4); the onus of proving the necessary facts to support invalidity of the decision rests with the party that asserts invalidity. In a Constitutional case that turns on proof of facts, the actual scenario alleged to be causative of the invalidity of the decision must necessarily be established by the party impugning the decision. This proposition is consistent with the approach at common law where a person challenging actions of a statutory body made under statute, carries the onus of proving any facts upon which the contention depends: *Nelsovil v Minister of Housing* (1962) 1 All E.R. 423. Further it is argued that given the binding nature of an opinion under s 19, and declaratory relief sought in the Originating Summons proceedings filed in the National Court by Sir Michael and the Hon Sam Abal wshich forms the basis of the additional questions introduced by Sir Michael and SamAbal. The onus of proving the necessary facts relied

upon should rest with the Referor and the parties supporting it, as is the case with proof of ordinary civil actions.

19. It is argued for the negative that the onus of proof in a constitutional Reference, whether it concerns legislative enactment or other forms of decision of Parliament, both involve exercise of Constitutional power; and the onus of proof applied in the *OLIPAC* case should equally apply to those other types of decisions.

20. In my view, whilst noting the difference between Parliament's decision to enact law as opposed to other type of decisions, I can think of no real reason, in principle, why the onus of proof should be any different. I consider the point of difference between the two types of decisions of Parliament to be of no material consequence in terms of the onus and standard of proof in a constitutional case brought under this Court's original jurisdiction, including a Constitutional Reference: see *Constitution*, Pat II, Division C (ss 18 – 19). There is no real difference in the nature of the judicial task as to the interpretation and application of provisions of the *Constitution* in question. Both decisions involve Parliament's exercise of constitutional power. The foundation of the challenge in the Reference both involves determination of questions relating to the interpretation and application of provisions of a Constitutional law. The Court having jurisdiction to give a binding opinion in both types of References, may also, in appropriate cases, make orders in the nature of declaratory orders: see *Re-Election of the Governor-General; Reference by the Morobe Provincial Executive* (2010) SC1085 at 148 -155.

21. A Referor who invokes this Court's jurisdiction under s 19 is usually a Constitutional body or authority that has a grievance over Parliament's exercise of its constitutional power to enact law or make some other form of decision. Such authority is usually an outsider to the decision-making process that is employed by Parliament; and unfamiliar with the processes followed and the underlying reasons for the decision. Proof of those matters by the Referor would prove to be enormously burdensome and almost

insurmountable. There may be difficulties encountered by such person in accessing information, records and witnesses which may make it difficult for the Referor to prove its case beyond prima facie case. The *Constitution* is a special law that limits government power in favour of protecting citizens' rights. It is not in the scheme of the *Constitution* to place a heavy burden of proof on a Referor who challenges a decision of Parliament, in the public interest, to ensure compliance with the *Constitution*. It is unreasonable to impose a burden of proof in a constitutional case on a Referor that is beyond its capacity to discharge in a Court of law. It makes sense, and sound in principle, for the onus of proving the validity of a decision of Parliament made the exercise of constitutional power, to rest with the person or authority relying on the validity of the decision. That burden rests with the Parliament, the Principal Legal Adviser or the Attorney General, the National Executive Council (NEC) or another parties that support the decision: see *The Matter Pursuant to Section 18(1) of The Constitution, Southern Highlands Provincial Government v Sir Michael T Somare; Sir Matiabe Yuwi v Sir Michael T Somare* (2007) SC854.

22. In the present case I am of the opinion that the Referor carries the onus of establishing a prima facie case that Parliament's decision made on 2 August and the Speaker's *decision* of 6 September were made in breach of the provisions of the *Constitution* relied upon in the Reference. The onus will then shift to the Parliament represented by its Speaker, the Attorney General, Prime Minister and Deputy Prime Minister; all of whom are parties in this Reference; and all of whom rely on the validity of the decisions; to prove that the decisions complied with those provisions.

23. For these reasons, I reject the arguments of counsel for the affirmative and accept those of counsel for the negative.

Hansard:

24. In general, proceedings of Parliament are protected by Parliamentary privilege. An exception is the Court's use of Hansard records to

resolve ambiguities or competing meanings in statutory provisions, and their application to the circumstances of the case at hand. Recourse to the Hansards for statutory interpretation is not a breach of Parliamentary privilege: *Election of Governor General; Reference by Morobe Provincial Executive* (2010) SC 1085 at 21, *Rundle v MVIT* [1988] PNGLR 20*, Minister for Lands v Frame* [1980] PNGLR 433 at 462, 488; , *Rundle v MVIT* [1987] PNGLR 44 at 47, *Morobe Provincial Government v Minister for Village Courts & The State* (1994) N1215, *Titus Taber v Keran Rimbao* (1998) N1767, *Pepper v Hart* [1993] AC 593; [1993] I All ER 42; *Warner v Metropolitan Police Commander* [1969] AC 256 at 279, *Beswick v Beswick* [1968] AC 58; *Cross on Evidence* , 7th Australian Ed (2004), Butterworths , at paragraph 27095, at page 881.

25. The admission into evidence the Hansards of the May, June, August and September 2011 meetings of Parliament and their relevance to the issues in the Reference were not in issue before the trial Judge. The trial Judge relied on them to make findings of fact which are before us. They were referred to and used by counsel in the course of arguments before us until towards the conclusion of arguments, when I raised the point concerning relevance of material and information that are *extrinsic* to the record of proceedings in Parliament as per the Hansards; to construe events in Parliament.

26. Counsel for the affirmative submitted that the Hansards should be excluded from these proceedings because they are not in admissible form, in that they are not in official print: s 48 of the *Evidence Act* s (printed by the government). It is further argued that the "Draft Hansard" , as the title shows, are in draft. They contain inaccurate record of proceedings of Parliament for the meetings in question and should not be used by the Court.

27. Counsel for the negative argued that notwithstanding the want of prescribed form of print, they are relevant to the constitutional issues at hand. The were used at the trial and by this Court. The objection is belated and should be rejected.

28. I accept arguments of counsel for the negative. In my view, notwithstanding that the Hansards are marked "Draft Hansard" and lack the prescribed form of print under s 48 of the *Evidence Act*, they are the best available record of proceedings of the Parliament for the meetings in question and were placed before the trial Judges and also before this Court without any objection at the commencement of the hearing. Those are reasons enough to dismiss the objection by counsel for the affirmative. They are relevant for purpose of this Court's task in interpreting and applying the provisions of the *Constitution* in question.

Non-justiciability - Proceedings of Parliament

29. The proceedings of Parliament of 2 August which culminated in the decision to create, by declaration, a vacancy in the office of the Prime Minister under *s 142 (2)* and *Sch 1.10 (3)*, is said to be non-justiciable. The provisions cited to support this contention include s 133, s 134 and *Schedule 1. 7* of the *Constitution* and *Standing Orders of Parliament,* No.6. It is necessary to set out those provisions.

30. Section 142 is in the following terms:

142. The Prime Minister.

(1) An office of Prime Minister is hereby established.

(2) The Prime Minister shall be appointed, at the first meeting of the Parliament after a general election and otherwise from time to time as the occasion for the appointment of a Prime Minister arises, by the Head of State, acting in accordance with a decision of the Parliament.

(3) If the Parliament is in session when a Prime Minister is to be appointed, the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day.

(4) If the Parliament is not in session when a Prime Minister is to be appointed, the Speaker shall immediately call a meeting of the Parliament, and the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day.

(5) The Prime Minister—

(a) shall be dismissed from office by the Head of State if the Parliament passes, in accordance with s 145 (motions of no confidence), a motion of no confidence in him or the Ministry, except where the motion is moved within the last 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election; and

b) may be dismissed from office in accordance with Division III.2 (leadership code); and

(c) may be removed from office by the Head of State, acting in accordance with a decision of the Parliament, if the Speaker advises the Parliament that two medical practitioners appointed by the National Authority responsible for the registration or licensing of medical practitioners have jointly reported in accordance with an Act of the Parliament that, in their professional opinions, the Prime Minister is unfit, by reason of physical or mental incapacity, to carry out the duties of his office.

31. Sections 133 and 134 of the *Constitution*, are in the following terms:

133. Standing Orders.
The Parliament may make Standing Orders and other rules and orders in respect of the order and conduct of its business and proceedings and the business and proceedings of its committees, and of such other matters as by law are required or permitted to be prescribed or provided for by the Standing Orders of the Parliament
.

134. Proceedings non-justiciable.
Except as is specifically provided by a Constitutional Law, the question, whether the procedures prescribed for the Parliament or its committees have been complied with, is non-justiciable, and a certificate by the Speaker under Section 110 (certification as to making of laws) is conclusive as to the matters required to be set out in it.

32. *Schedule 1. 7* states as follows:

Sch.1.7. "Non-justiciable".
Where a Constitutional Law declares a question to be non-justiciable, the question may not be heard or determined by any court or tribunal, but nothing in this section limits the jurisdiction of the Ombudsman Commission or of any other tribunal established for the purposes of Division III.2 (leadership code).

33. Sch.1.10 (3) is in the following terms:

(1)...
(2)...

(3) Where a Constitutional Law confers a power to make any instrument or decision (other than a decision of a court), the power includes power exercisable in the same manner and subject to the same conditions (if any) to alter the instrument or decision.

34. *Standing Order* No. 6 is in the following terms:

"6. The Parliament may be adjourned, if the Parliament so resolves, for up to three sitting days at a time before a motion for election of a Prime Minister is moved."

35. The relevant facts, which I adopt, are derived from the undisputed facts contained in paragraphs 1 – 9 of the *Statement of Agreed and Disputed Facts,* which are as follows:

1. The last general election to the Parliament occurred in 2007. At that election Sir Michael Somare was elected to the seat of East of East Sepik Provincial.

2. Sir Michael Somare was appointed Prime Minister at the first meeting of the Parliament after the 2007 general election pursuant to s.142(2) of the Constitution and in accordance with a decision of the Parliament.

3. On 24 March 2011 Sir Michael travelled to Singapore for medical consultation and returned to PNG on 28 March (August) 2011.

4. As at 2 August Sir Michael had not been removed or dismissed from the office of Prime Minister within the meaning of s.142(5) of the Constitution.

5. After prayers at the commencement of the sitting of the Parliament on 2 August 2011, the first day of the August meeting, the member for Vanimo Green, the Hon Belden Namah, asked the Speaker for leave to move a motion without notice. Leave was granted. Mr Namah then moved a motion that so much of the standing orders be suspended as would prevent the moving of a motion without notice. That motion was carried on the voices.

6. Mr Namah then moved a second motion in terms to the following effect: "pursuant to s.142(2) of the Constitution and Schedule 1.10(3) of the Constitution and the inherent powers of the Parliament that we declare the Office of the Prime Minister be vacant, and that consequently, in accordance with the provision of s.142(2), this Parliament proceed forthwith to elect and appoint a new Prime Minister." This motion was then carried on the voices.

7. The Speaker then called for nominations for the election of the Prime Minister. Mr Namah moved a motion nominating the Hon. Peter O'Neill, member for Ialibu Pangia Open, as Prime Minister.

8. The motion for the election of the Prime Minister was voted on by a head count involving the members standing and being counted. Seventy (70)

members voted in favour of the motion that Mr O' Neill be elected as Prime Minister. Twenty Four (24) members voted against the motion, including the Hon. Sam Abal and the Hon Sir Arnold Amet.

9. Mr Namah then moved a motion to the effect that Parliament be adjourned to allow the ringing of the bells to allow Mr O'Neill to present himself to the Governor General to be sworn in as Prime Minister.

36. Those facts are consistent with the records contained in Hansard 2 August, which I reproduce below:

"FIRST DAY
Tuesday 2 August 2011

The Parliament met at 2:00 p.m; according to the terms of Resolution of 24 June, 2011.
The Speaker **Mr Jeffrey Nape** took the Chair and invited the Member for Finshafen, **Honourable Theo Zurenuoc** to say Prayers;

' In the name of the Father, and of the Son and the Holy Spirirt, Mr Speaker and Members of Parliament let us go before our Lord, God, Almighty in prayer by reciting the prayer of our Lord Jesus Christ, Amen.'

BROADCASTING OF PARLIAMENT PROCEEDINGS – STATEMENT BY THE SPEAKER.

Mr SPEAKER - Honourable Members, I have to inform Parliament that the Permanent Parliamentary Committee on Broadcasting of Parliament Proceedings met today and resolved that the *National Broadcasting Corporation (NBC)*, the National Television Service *Kundu 2, EM TV* and the *Australian Broadcasting Corporation (ABC)* will be allowed to broadcast live Questions Time for these purposes only for the duration of this Meeting.

CERTIFICATION OF ACT

Mr SPEAKER – Honourable Members, I have to inform Parliament that I have in accordance with Section 110 of the Constitution certified the *Jiwaka* Transitional Authority Amendment Act 2011 made by the National Parliament.

MOTION BY LEAVE

Mr BELDEN NAMAH (Vanimo-Green River) – I ask leave of Parliament to move a motion without notice.

Leave is granted.

Motion (by Belden Namah) agreed to –

(a) That so much of the Standing Orders be suspended as would prevent me from moving a motion without notice.

(b) That pursuant to *Section 142, sub-section 2* of the *Constitution* and *schedule 1.10, sub-Section 3* of the *Constitution*, and in the inherent powers of the Parliament that we declare the Office of the Prime Minister be vacant and consequently in accordance with the provisions of *Section 142, sub-Section 2* this Parliament proceeds forthwith to elect and appoint a new Prime Minister.

NOMINATION AND ELECTION OF THE PRIME MINISTER
Mr BELDEN NAMAH – I nominate the Member for Ialibu Pangia, Honourable Peter O'Neill to be the alternate Prime Minister.

MR SPEAKER – Do you accept the nomination?

Mr PETER O'Neill – Yes, I humbly accept the nomination.

Mr WILLIAM DUMA – I second the nomination.

Mr SAM BASIL – I move that the nomination be closed.

Mr JOHN BOTO – I second the motion for the nomination be closed.

02/01

The Parliament voted (the Speaker, **Mr Jeffrey Nape** in the Chair –

04/01

Mr SPEAKER – Honourable Members, the results of the vote are as follows;

AYES – 70
NOES – 24

Mr SPEAKER – Honourable Members, the Prime Minister-elect will now present himself to the Governor General at Government House.

Motion by **(Mr Belden Namah)** agreed to –

That the Parliament be suspended until the ringing of the bells so as to allow the Prime Minister -elect to present himself at the Government House to be sworn in as the Prime Minister of Papua New Guinea.

Sitting suspended from 3.20 p.m.

Leave granted."

37. Counsel for the affirmative argued that s 142 (2) is a general enabling provision under which Parliament may appoint a Prime Minister

whenever the occasion for it arises. Section 142 (2) is a procedural provision that of itself empowers Parliament to create a vacancy and appoint a Prime Minister. Section 142 (2) together with (3) and (4) prescribe the procedure by which Parliament determines whether an occasion has arisen for the appointment of a Prime Minister and if it so determines, appoints the Prime Minister. They are complemented by the *Standing Orders, Order No 6;* made under s 133. Pursuant to *s 134* and *Schedule 1.7*, the conduct of those proceedings under s 142 (2), (3) and (4) are non-justiciable.

38. Counsel for the affirmative draw support for this submission from this Court's decision in *James Mopio v The Speaker* [1977] PNGLR 420 (*Mopio* case) , where this Court considered the question of non-justiciability of proceedings of Parliament conducted under s 142 (2) and (4), and ruled that they are procedural provisions that come within the term *"prescribes"… procedures .. for the Parliament*" in s 134. The Court ruled that any proceedings of Parliament resulting in decisions made under those provisions were non-justiciable.

39. In *Haiveta v Wingti (No. 3)* [1994] PNGLR 197 (*Wingti* case), this Court, per Amet CJ, overruled *Mopio;* and held that proceedings under s 142 (2), (30 and 94) were justiciable. Counsel for the affirmative argue that *Wingti* was wrongly decided. Although the point was not before the Court, only the Chief Justice dealt with the point. His Honour's purported overruling of *Mopio*, without support from the other members of the Court is of uncertain import and obiter; it should not be read as overruling *Mopio*. They argue *Mopio* is sound law and it should be re-affirmed by this Court. *Wingti* should be overruled on this point.

40. Counsel for the negative argued that *Wingti* effectively overruled *Mopio*. Compared to a three- member bench which decided *Mopio*, *Wingti* was a five- member bench. In *Mopio,* the Court did not hear full arguments on the point because Mr Mopio was unrepresented and he did not address the point. The Court did not fully consider the point before arriving at the conclusion it reached. In *Wingti,* the question before the Court was whether Parliament followed the

procedures set out in s 142 (2), (3) and (4), to determine a vacancy occurred in the office of the Prime Minister and appointed a new Prime Minister. The Court fully considered and determined that question. The decision of the five-member bench was unanimous; that Parliament had breached s 142 (3) and (4). In effect, the Court regarded the procedures employed by Parliament under those provisions to be justiciable and determined that they were breached. The Chief Justice correctly stated the import of the Court's unanimous decision. *Wingti* has been accepted and followed in subsequent cases: *SCR No. 1 of 1977 Re s 19 of the Constitution Reference by the Principal Legal Advisor* [1998] PNGLR 453 at 455, *In re Election of the Governor General* (2010) SC 1085. Counsel for the negative concluded that *Wingti* is sound law and it should be affirmed.

41. It is trite law that the Supreme Court may in a subsequent case overrule itself on a point of law decided in an earlier case: see *Schedule 2.9(1)* of the *Constitution*. It may reverse, affirm, or modify its earlier decision if it is convinced that the decision was clearly or manifestly erroneous: *Lionel Gawi v The State* (2006) SC850; *Re Reference by Ken Norae Mondiai (2010)* SC1087; *Motor Vehicles Insurance (PNG) Trust v Readin*g [1988] PNGLR 608 at 610. The Court should be cautious in overruling itself and should only do so in exceptional circumstances after a careful consideration of the consequences of doing so: *Titi Christian v Rabbie Namaliu* (1996) OS No 2 of 1995, Unreported and Unnumbered judgment of Amet CJ, Kapi Dep CJ, Salika , Doherty & Andrew JJ dated 18 July 1996. The Court should not overrule itself unless parties have been allowed to make full arguments on the point and the Court has had an opportunity to consider those arguments: *Public Prosecutor v John Aia of Mondo and Peter Pino of Idu* [1978] PNGLR 224.

42. An earlier decision may be overruled by a Court that is constituted by the same Judges or different judges; or by the same number or different number of Judges: *SCR No 2 of 1992; Re The Leadership Code: Reference by the Public Prosecutor* [1992] PNGLR 336; *Enforcement Pursuant to Constitution s57; Application by Gabriel Dusava (1998) SC* 581. It is preferable that the subsequent bench is constituted by a greater number of Judges (*Lionel Gawi*) and chaired

by the Chief Justice: *Derbyshire v Tongia* [1984] PNGLR 148 at 150. Where the Court is asked to overrule itself at short intervals, the Court must be cautious in doing so as this could lead to uncertainty in principles of law pronounced by the Court: *SCR No 2 of 1982; Re Kunangel* [1991] PNGLR 1 at 10 -11.

43. In the *Mopio* case, Mr Mopio brought an action challenging Parliament's appointment of Prime Minister Mr Michael Somare after a general election, on the ground that s 142 (4) of the *Constitution* had not been complied with. Mr Somare was appointed Prime Minister on the first sitting day after the general election. He contended that the Prime Minister should have been appointed on the next sitting day after the day on which the Speaker was appointed. The Principal Legal Officer contended that the question whether Parliament complied with s 142 (4) is non-justiciable pursuant to s 134 of the *Constitution*. The Court accepted his submission.

44. It is apparent that from my reading of the judgment in *Mopio* that the Court did not construe s 142 (2), (3) and (4). The Court mentioned the provisions in question, restated the law and applied them to the case. The Court's full reasons for decision is brief ; those reasons appear at pages 423, in the following terms:

The submission (Mr Mopio's submission) as we understand it is that the Constitutional right of a Member of Parliament to be elected as Prime Minister and the enforcement of the Speaker's duty in that regard are required to be protected by the National Court, and that this consideration over-rides the provision that certain proceedings are to be non-justiciable. But the Standing Orders deal with the conduct of the Parliament's business and s. 142 (4) does not deal with or affect the rights of Members. Further, s. 22 in its generality must give way to the particular provisions of s. 134. Section 142 (4) provides merely for the time for the question of the appointment of Prime Minister to be considered, and the order of business — whether on one day or more than one day — in which it is to be dealt with by the Parliament.

These are matters which concern the conduct of the business of the Parliament and its procedure. Accordingly as the issues before the Court involve the question whether that procedure has been complied with, and also the exercise of the

freedom of proceedings of Parliament and the functions and duties of the Speaker, this Court has no jurisdiction to entertain the case now before it.

45. In the *Wingti* case, Mr Wingti resigned as Prime Minister, was re-nominated and re-appointed by Parliament on the same day. The Court unanimously considered and determined that Parliament breached the mandatory procedure set out in s 142 (2), (3) and (4), holding that *"on the next sitting day"* in s 142 (3) and (4) means what it says - on the next sitting day after Parliament is informed of the vacancy in the office of the Prime Minister. Each of the Judges of the five-member Court gave extensive reasons for arriving at the same conclusion.

46. I have read the decisions in the *Mopio* and *Wingti* cases and find myself in total agreement with the *Wingti* decision. *Mopio*, with respect, as brief as the *ratio decidendi* is (in six lines), is a brief restatement of s134 and its application to the arguments raised on behalf of only one of the parties. It cannot be said that the Court in that case made a considered and reasoned pronouncement on the point. In the sixteen years that followed *Mopio*, although *Mopio* is referred to and or followed in a number of decisions of the National Court and the Supreme Court, it is obvious to me that the law on s 134 as it applied to s 142 (2), (3) and (4) did not undergo significant development by the Courts until *Wingti*.

47. It is true that in *Wingti*, the point was not before the Court and argued. It is not without significance that though Mr Wingti relied on *Mopio* to dispute the action brought by Mr Haiveta in the National Court, and the Court distinguished *Mopio* and declined to adopt it: *Haiveta v Wingti (No 1)* [1994] PNGLR 160. The National Court went on to consider the procedure followed by Parliament under s 142 (2), (3) and (4) and found the appointment was valid. On appeal Mr Haiveta did not take issue with the ruling and the point was not argued on appeal. This to my mind suggests that the justiciability of Parliament proceedings under s 142 (2), (3) and (4) was conceded by all the parties in *Wingti* , and four of the five Judges did not have to address the point. The Chief Justice took up the point, and did so correctly, because, in my view, it is a threshold issue that goes to the jurisdiction

of the Court. It is in the Supreme Court's inherent discretionary jurisdiction to consider and determine, at any stage of the proceedings, jurisdictional issues of its own motion, even if parties do not raise the point. The Chief Justice correctly considered the inadequacy of the point considered in *Mopio*; and for reasons his honour gave in his judgment which I agree with, overruled *Mopio*. The Chief Justice accurately expressed the import of the unanimous decision of the Judges as to the justiciability of the proceedings of Parliament conducted under s 142 (2), (3) and (4). *Wingti* has been adopted by this Court in important constitutional cases that followed it: : *SCR No. 1 of 1977 Re s 19 of the Constitution Reference by the Principal Legal Advisor* [1998] PNGLR 453 at 455, *In re Election of the Governor General* (2010) SC 1085.

48. If *Wingti* were to be overruled, that would destroy the body of jurisprudence on constitutional law relating to strict compliance with mandatory provisions of the *Constitution,* which the Courts have developed and applied consistently over almost two decades, in many important constitutional cases. It would permit Parliament to commit breaches of Constitutional provisions which empower Parliament to make decisions in important matters of Constitutional significance within prescribed parameters, with impunity. It would allow Parliament to flout our *Constitution*, a *Constitution* that has withstood the test in our short history as an Independent nation. In the case of s 142 (2), (3) and (4), it would produce a high turnover of Prime Ministers and members of the National Executive Council thereby creating political instability.

49. For the foregoing reasons, I find the judgment and reasoning in *Wingti* to be overwhelmingly persuasive and affirm the decision of that Court to overrule *Mopio*. I am of the view that the question whether Parliament complied with the procedures prescribed under s 142 (2), (3) & (4) of the *Constitution* is justiciable.

2. *Vacancy in the office of the Prime Minister and appointment of a new Prime Minister by under s 142 (2) and Schedule 1.10(3) ; and inherent power of Parliament.*

50. The main question considered under this part is: Does the phrase *"and otherwise from time to time as the occasion for the appointment of a Prime Minister arises*." (hereinafter referred to as *the second limb*) in s 142 (2) when read with Schedule 1.10 (3), give Parliament the power or inherent power to create, by resolution, a vacancy in the office of the Prime Minister; and if it so decides, the power to appoint a new Prime Minister. The answer depends on the meaning to be ascribed to *the second limb*.

51. The relevant facts, which I adopt, are the undisputed facts and those facts as derived from the Hansard reproduced in paragraphs 34 and 35 hereof, respectively.

52. It is settled law that under s 142 (2), a *vacancy* in the office of the Prime Minister is a pre-requisite for the appointment of a new Prime Minister under the *second limb.* It is established in *Wingti* that a vacancy in the office of the Prime Minister may occur in a number of ways and those are not restricted to the three vacancy situations set out in s142 (5). I accept the parties' common position that the vacancy situations set out in s 142 (5) is not exhaustive. Clearly, it is intended by s 142 (2) that the occasions giving rise to appoint a new Prime Minister during the life of the Parliament is not confined to those three vacancy situations under s 142 (5). Indeed in *Wingti*, a vacancy created by resignation of the Prime Minister (s146) was accepted as coming within the terms of s 142 (2). The position was confirmed later in *SCR No 1 of 1997* [1998] PNGLR 453 at 460 - 461.

53. It goes without saying then, that those other vacancy situation, must be spelt out by express provision elsewhere (outside of s 142) in the *Constitution.* Many of those were brought to our attention by counsel for the parties. My own search of vacancy situations expressly spelt out in the *Constitution* has produced several more . There may be other vacancy situations that are expressly provided in the *Constitution* which has escaped my attention and those can be added

to the list of vacancy situations. I set out a list of those vacancy situations by reference to provisions in the *Constitution,* as follows:

(1) The Prime Minister is dismissed from office by the Head of State in accordance with a motion passed by the Parliament under s 145 (Motions of no confidence): s 142 (5) (a) & s 147 (1) (d);
(2) The Prime Minister is dismissed from office in accordance with Division III.2 (leadership code): s 142 (5) (b) & s 147 (1) (d);s 104 (2) (h); s 145;
(3) The Prime Minister is removed from office by the Head of State, acting in accordance with a decision of the Parliament on the grounds of physical or mental incapacity to carry out the duties of his office: s 142 (5)(c) & s 147 (1) (d);
(4) The Prime Minister dies in office: s 147 (1) (a); (s 104 (2) (g)
(5) The Prime Minister resigns from office: s 147 (1) (b); and s 146 (1);
(6) The Prime Minister ceases to be qualified to be a Minister: s 147 (1) (c), (1)(d) & or ceases to be a Minister (s 141 (a);
(7) If the member of Parliament who is Prime Minister is appointed Governor General (s 104 (2) (a);
(8) When the elected term of the member who is Prime Minister expires (s 104 (2)(b);
(9) If the member who is Prime Minister resigns his seat as a member of Parliament by notice in writing to the Speaker (s 104 (2)(c);
(10) Removal of a member of the Parliament occupying the office of the Prime Minister, for absence without leave, of three consecutive sittings of Parliament without leave, under Section 104 (1)(d);
(11) If the member who is Prime Minister receives payment for his service to Parliament without authorization (s 104 (2) (e);
(12) If the member who is Prime Minister is not entitled to vote at an election to the Parliament (s 103 (30(a), s 104 (f);
(13) If the member who is Prime Minister is of unsound mind within the meaning of any law relating to the protection of the persons and property of persons of unsound mind; (s 103 (3) (b); s 104 (2)(g); and
(14) The member who is Prime Minister is under sentence of death of imprisonment for a period of more than nine months (s 103 92) (c);s 104 (2) (g).

54. An issue has emerged in this case which was not before the Court in *Wingti*. The issue is whether the vacancy situations are limited to those spelt out by express provision in the *Constitution*. A related issue that is pertinent to the circumstances of the present case is, also whether, by an expanded construction of the second limb of s 142

(2), Parliament may create a vacancy situation in the office of the Prime Minister under s 142 (2), that is not expressly spelt out in the *Constitution*.

55. It is submitted for the affirmative that a proper construction of *the* second limb read in conjunction with Schedule 1. 10 (3), should permit Parliament, in the exercise of its inherent power, to create a vacancy on grounds for which there is no express provision in the *Constitution*. The second limb of s 142 (2) should be construed expansively and accorded a fair and liberal meaning so as to give effect to the intention and purpose of the provision: *Constitution*, Sch 1.4 and Sch 1.5 (2). The purpose of s 142 (2) was to enable the executive power of the people vested in the National Executive Council, to be exercised through the Parliament, by making provision for Parliament to appoint the Prime Minister, who in turn appoints his Ministers to constitute the NEC. There must be in place a functioning executive (*Constitution*, s 99) at all times. Where there is none, the second limb enables Parliament to create a vacancy situation from time to time as the need arises, and then appoint a new Prime Minister.

56. The purpose of s 142 (2) in the way it is expressed in simple terms intended that the vacancy situations are not closed to those contained in s 142 (5) or any other vacancy situations expressly provided elsewhere in the *Constitution*. An example is that of the Prime Minister of Australia Harold Holt who went missing in the 1960s while swimming at a beach in Victoria. He was never found. A new Prime Minister was appointed. Another example is where a Prime Minister is in a coma and is unable to make any decision concerning his future as Prime Minister. An analogy is drawn with Sir Michael's situation where medical evidence shows, and it has been found by the trial Judge, that *"Sir Michael was in the period from 30 March to 26 August 2011 or a significant part of it, incapable of managing his affairs"* and that *"Sir Michael has lacked the capacity to carry out the functions and duties of the office of the Prime Minister from 30 March to date or a significant part of it."* Such situations fall outside of the wording of s142 and outside of vacancy situations expressly spelt out in other provisions of the *Constitution,* yet they are clearly

situations which would produce a vacancy in the office of the Prime Minister, thus giving rise to the occasion to appoint a new Prime Minister. It is argued that Parliament, in its discretion, can by resolution, determine the occasion to remove a Prime Minister in such situations and thereby create a vacancy under s 142 (2) and Sch 1.10 (3).

57. Counsel for the negative argued that a vacancy situation is limited to those expressly provided in the *Constitution*. There is no reason for this Court to expand the list of vacancy situations outside of those expressly provided in the *Constitution*. The case of a Prime Minister going missing and presumed dead, comes under s 147 (1) (a) and s 104 (2) (g). A Prime Minister going into a comma which renders him unfit to perform his duties comes under the terms of s 142 (5) (c). Parliament does not have an inherent power to create a vacancy on grounds which are not expressly authorized in the *Constitution*. The CPC in its report recommended that the office of the Prime Minister become vacant under three situations only; the *Constitution* extended those to other situations. There is no reason for Parliament to further extend those vacancy situations to those not intended by the *Constitution*, under notion of Parliament's *"inherent power." Schedule* 1.10 (3) is an aid to construction of the substantive provisions and only applies to the extent that the contrary intention is not expressed in the main provisions. In this case, the express vacancy provisions in the *Constitution* prevents the application of Sch 1.10 (3).

58. It is argued for the negative that if the arguments of the affirmative were accepted, it would undermine entirely the supremacy of the *Constitution*. If Parliament were allowed complete freedom to choose, as it pleases, in the exercise of its *inherent power*, to remove a Prime Minister for a reason or ground that is not expressly authorized in the *Constitution*, this would produce political instability and lead to anarchy. Those vacancy provisions expressly spelt out in the *Constitution* for removal or dismissal of a Prime Minister, are deliberate and intended to limit Parliament's power to remove a Prime

Minister on grounds that the *Constitution* regarded essential to ensure stability.

59. In my view, consistent with the principle of a government of limited power under the *Constitution* (see *OLIPAC* case), Parliament's power to create a vacancy in the office of the Prime Minister must be derived from express provision in the *Constitution*. The source of the power, the power itself, the conditions that must be fulfilled to exercise that power are matters of express provision in the *Constitution*. For such matters are so essential and go to the core of the structure of government in a Parliamentary democracy; that they a not intended to be left to ambiguity. In those sorts of subject matters, Parliament's power, and even the Court's power for that matter, are limited by express provision in the *Constitution*. Parliament cannot under the guise of its *"inherent power"* per se or in connexion with s 142 (2), invent a vacancy situation that does not exist by express provision in the *Constitution*. The Courts too cannot , by judicial act, under the guise of constitutional interpretation, invent a vacancy situation that does not exist by express provision in the *Constitution*. If Parliament or the Courts were to embark on such course, it would give way to a host of vacancy situations neither intended nor contemplated in the *Constitution*, that would undermine the system of government. One can only imagine the types of vacancy situations in all their diversity, especially those with no legal and constitutional foundation or significance, chosen at Parliament's behest, upon which Prime Ministers could be easily removed at Parliament's whim, in a relatively short period of time.

60. The *Constitution* is quite clear on the ways or situations which give rise to a vacancy in the office of the Prime Minister. The *Constitution* makes deliberate provision, in express terms, the grounds and the fulfillment of conditions which gives rise to a vacancy in the office of the Prime Minister.

61. I am of course obliged by the *Constitution* to construe provisions of the *Constitution*; to adopt an expansive approach, and to accord a fair and liberal meaning to the provision in question. In this case, I have

fulfilled that duty by construing s 142 (2), by extending the list of vacancy situations from the three set out in s 142 (5) to include eleven more vacancy provisions expressly provided elsewhere in the *Constitution,* of which there is no reference in s 142. To go beyond those vacancy situations not expressly provided in the *Constitution* is to create a new vacancy situation. That involves an approach to the construction of the *second limb* of s 142 (2) that is far too expansive and would be tantamount to legislating by judicial act, a power that is not vested in this Court; and to recognize and give effect to a constitutional power that Parliament does not possess.

62. The underlying principle in s 142 is of course one of Parliamentary responsibility over the executive government, and a Parliamentary executive that in turn is accountable to the Parliament: *Constitution*, s 141. Appointment of the executive, through appointment of the Prime Minister, following the procedures expressly provided for in the *Constitution*, is Parliament's responsibility: see *Constitution*, s 141. Removal of a Prime Minister by Parliament on specified grounds and the procedures by which he is removed are expressly stipulated in the *Constitution*. This removes any notion of Parliamentary sovereignty similar to that enjoyed by the United Kingdom House of Commons that says that Parliament's decisions, including in law-making, are beyond the reach of judicial scrutiny. Our Parliament and its members can be forgiven for holding such notion because this country has adopted the reserve powers of the United Kingdom's House of Commons with respect to powers (other than legislative power), privileges and immunities as at 1 January 1901: *s 3 of Parliamentary Powers and Privileges Act* (Ch 24). Our Parliament has had a relatively short history of Independence compared with other democracies and most of its members seem to have little clue of many of the fine principles that are rooted in the Parliamentary system, let alone their knowledge of Parliament's reserve powers based on those of the House of Commons. One thing that Parliament and its members need no reminder, is that whatever reserve powers Parliament has to manage its own affairs are, when it comes to exercising a Constitutional power, subject to the express provisions of the *Constitution*, and to the extent that the *Constitution* prescribes the type

of Constitutional power and the manner in which it is exercised, falls within the ambit of judicial review.

63. Our Parliament should exercise great care and restraint in quickly assuming any reserve power similar to that is enjoyed by the United Kingdom House of Commons for three reasons. First, the United Kingdom does not have the benefit of a written *Constitution* which limits Parliament's power in decision-making on important matters of Constitutional significance. Secondly, the House of Commons, unlike our Parliament, traditionally, over centuries, has enjoyed much freedom in the conduct of its proceedings with little judicial scrutiny of its decisions. Thirdly, that position is now rapidly changing in the United Kingdom in modern times. There has been rapid decline in the notion of Parliamentary sovereignty since the 1990s when the House of Lords in *Regina v Secretary for State for Transport, Ex parte Factortame Ltd and Others (No. 5)* [2000] 1 AC 524 first invalidated the *Merchant Shipping Act 1988* on the ground that it was inconsistent with an earlier statute, namely the *European Communities Act 1972*: Also see Tom Ginsburg, *Judicial review in New Democracies: Constitutional Court in Asian Cases*, Cambridge University Press at p 1-10; *Oxford Concise Dictionary of Politics*, Oxford University Press, Third Edition, 2009, page 391.

64. Our *Constitution* to which all subordinate enactments are subject to, and Parliament's power to make decisions in important matters of constitutional significance, are limited by the express provisions of the *Constitution*. Where a Constitutional law gives non - legislative power to make a decision, it is intended that the exercise of that power be performed by and in Parliament, in accordance with the procedures prescribed in the *Constitution*. An essential feature of this decision-making process is for members of Parliament to be given reasonable and equal opportunity to consider and debate on the matter and be accorded complete freedom to make their own decisions. Not every instance of exercise of constitutional power on the floor of Parliament will attract the same level of significance and deliberation. Much depends on the importance of the constitutional power to be exercised. The appointment and removal of the Prime Minister, is

amongst the few non-legislative decisions that tops the list of items of constitutional significance for which full opportunity for debate and vote, must be accorded to members of Parliament.

65. I believe it was the intention of the founders of the *Constitution* that the proceedings of Parliament should be participatory and democratic, with every member of Parliament given reasonable opportunity to present the views of his people, in an environment, in the chamber of Parliament, that allows for free, full and unimpeded participation on any matter before Parliament. I do not believe that it was the intention of the founding fathers of our *Constitution* that Parliament would become a mere rubber stamp for the policies and decisions of the executive government, without opportunity for debate and meaningful discourse in Parliament. These principles are embodied in the system of participatory democracy that underlie our system of constitutional government, in which Parliament plays a central role. The CPC in its report made no secret of this system of participatory democracy when it said :

> *" In the kind of participatory democracy we envisage for Papua New Guinea, with maximum emphasis on consultation and consensus, the national legislature must clearly have a central role. We believe that while the executive must be given every opportunity to provide strong leadership in reshaping our new nation to meet the needs and aspirations of our people, it is important also that this leadership does not become autocratic so that the legislature becomes a mere rubber stamp. If government is to be truly responsive to people, it is vital that those whom the people elect to represent them should be able to contribute actively and effectively to the government of the nation". (CPC Final Report, Chapter 6 1.)*

66. Applying the principles on onus proof alluded to earlier in this case, I am satisfied that the parties arguing the negative case have established a prima facie case that Parliament breached s 142 (2) by showing that, that provision read in conjunction with Sch 1.10 (3), s 133, s 134, and the *Parliament Standing Orders;* did not grant Parliament the power to create a vacancy in the office of the Prime Minister on 2 August. I am satisfied that Parliament lacked inherent power to create a vacancy in the office of the Prime Minister on 2 August. I am also satisfied that the parties arguing the case for the

affirmative have failed to discharge the onus placed on them to justify the decision of Parliament, in terms of the construction of those provisions and on the facts. For the foregoing reasons, Parliament's decision on 2 August to create a vacancy in the office of Prime Minister is unconstitutional and invalid.

67. It should follow that the subsequent appointment of a new Prime Minister of the Hon Peter O'Neill which the affirmative say was also made under s 142 (2), was also in breach of s 142 (2), and therefore, unconstitutional and invalid.

68. Turning now to s 142 (3) and (4), it is unnecessary to consider arguments on the construction of those provisions. The facts also do not support the need to construe those provisions. On 2 August Parliament purported to create a vacancy in the office of the Prime Minister and then proceeded immediately thereafter to appoint a new Prime Minister. Clearly, the decision is in breach of the procedures under s 142 (2),(3) and (4) as interpreted by this Court in *Wingti*. Faced with the Wingti decision against them, counsel for the affirmative moved to overrule *Wingti* and made extensive submissions which were countered by counsel for the negative.

69. It suffices to say that the point was extensively argued and dealt with comprehensively by this Court in *Wingti*. For the avoidance of confusion, I take time to paraphrase the unanimous decision of the Court. The appointment of a new Prime Minister under the *second leg* of s 142(2) occurs during the life of the Parliament. The procedure to be followed is set out in sub-Sections (3) and (4). If Parliament is in session when Parliament is informed of the vacancy, an occasion arises for the appointment of a new Prime Minister. The appointment of the new Prime Minister is the first matter for consideration *"on the next sitting day"(* sub-Section (3)*).* If Parliament is not in session when the vacancy occurs, the Speaker must call a meeting of the Parliament. When Parliament is convened, on the first day, Parliament is informed of the vacancy. Parliament then adjourns, to give members time to consider their positions. When Parliament meets next, *"on the next sitting day",* the question of appointment of a Prime

Minister is the first matter for consideration. The phrase *"on the next sitting day"* means what it says – on the next sitting day after Parliament convenes and is informed of a vacancy in the office of the Prime Minister. The Court unanimously concluded that a new Prime Minister should not be appointed on the first day of the session or sitting when Parliament is informed of the resignation of the Prime Minister. The learned Chief Justice, Deputy Chief Justice and Salika J (as he then was) extensively discussed the purpose behind this provision in the light of the CPC recommendations. They gave profound reasons on the need to give members of Parliament sufficient time and an equal opportunity to consider and debate the matter. Justice Salika succinctly put it in these terms, at p 226 - 227:

> " *It is therefore my view that all along, the founding fathers of our nation did not intend a sudden and discrete election of a Prime Minister. They intended an open, democratic parliamentary process in the election of the Prime Minister by allowing plenty of time.*
>
> *It is my view that the proper construction of s 142 (3) is that when a Prime Minister resigns, Parliament is to be informed and stands adjourned to the next sitting day. This is because the question of appointment of a Prime Minister arises in Parliament after the notice of resignation of the Prime Minister is tabled in it. Furthermore, it gives effect to the aspirations of the Constitutional Planning Committee and to the National Goals and Directive Principles. On the next sitting day the new Prime Minister is appointed. This is consistent with the original intention of the CPC".*

70. In my view, *Wingti* is sound law and for the reasons set out in my consideration of s 142 (2), there is no reason to overrule *Wingti* and develop new principles of law with regard to s 142 (3) and (4).

71. I consider all the arguments made by counsel for the affirmative are without merit and dismiss them. By way of illustration, I deal briefly with one of the main points. Counsel for the affirmative drew a distinction between the word *consideration* appearing in s 142 (3) and (4) and the word "*decision*" . In the absence of a time prescription when the decision under s 142 (3) and (4) is to be made; and given that a decision on the appointment must be made without delay; it must be made when the occasion arises for a decision to be made. Section 142 (2) gives Parliament the power to make that decision on the same day when the vacancy giving rise to the occasion occurs. If

the procedure under s 142 (3) and (4) are invoked, that would delay the appointment to the date on which Parliament sits next, whenever that occurs. It could be days or weeks when Parliament next sits.

72. I adopt the principle enunciated in *Wingti* that s 142 (2) (3) and (4) must be read together, as giving rise to an occasion to appoint a new Prime Minister. The two words read together in that context refers to the embodiment of the whole decision-making process by which Parliament makes a decision under s 142 (2), (3) and (4). Parliament is informed of a vacancy in the office of the Prime Minister, a motion for new Prime Minister is introduced and moved, the motion is debated and a decision on the vote is taken. I consider that a technical distinction between those words, asurged upon us by counsel for the affirmative, would produce unintended results. It would enable Parliament to appoint a Prime Minister at any time after it is informed of the vacancy or after Parliament has unconstitutionally created a vacancy to give itself the opportunity to appoint a new Prime Minister. It could see the appointment of a new Prime Minister rushed with extraordinary speed without giving an opportunity to members to consider their own positions. On the other hand it could also result in considerable delay in the election of the Prime Minister by days, weeks or even months, after Parliament is informed of a vacancy, thereby allowing the incumbent Prime Minister who has ceased to hold office to continue in office for a lengthy period pending the appointment of a new Prime Minister. In a situation where an Acting Prime Minister has been appointed to fill the temporary vacancy, it could see the country being run by an Acting Prime Minister for a lengthy period without proper mandate from the Parliament.

73. I have already concluded that Parliament's decision on 2 August to accept the motion by Mr Namah as giving rise to a vacancy in the office of the Prime Minister was unconstitutional and invalid. That conclusion should dispose of the issue before us.

74. In any case, assuming that a vacancy occurred on 2 August, Parliament proceeded to elect the Prime Minister *"on the same day"* in the same session of Parliament after it had created a vacancy for

itself. This in my opinion, is a blatant breach of the *"next sitting day"* requirement in s 142 (3) or (4) as interpreted in the *Wingti* case. Thus, Parliament's decision to appoint the Hon Peter O'Neill was unconstitutional and invalid.

75. Having reached the foregoing conclusions, it is unnecessary to deal with arguments on the two vacancy situations which are said to have existed by the time of the meeting of 2 August, namely *physical or mental incapacity*) (paragraph 52 (3), and *unsound mind* (paragraph 52 (13). In any event, those vacancy situations did not form the basis for the decisions made on 2 August; they cannot be said to give rise to an occasion to appoint a new Prime Minister under the *second limb* of s 142 (2). Those grounds are irrelevant and of no consequence to the decisions of 2 August.

76. That said, I consider those two matters since counsel spent a great deal of time and effort arguing those matters, and for purpose of development of the law in those two areas.

3. *Vacancy in the office of the Prime Minister under s 142 (2) by virtue of removal of Prime Minister for physical and mental incapacity (s 142 (5)(c); and appointment of a new Prime Minister.*

77. A "vacancy" occurring under s 142 (5) (c) is the culmination of an investigation process undertaken by the NEC in consultation with the Parliament, to establish the fulfillment of the conditions of removal. There is no question that an Act of Parliament referred to in s 142 (5) (c) is the *Prime Minister and National Executive Council Act 2002* (*PM & NEC Act*) of which s 6 is the relevant provision.

78. Section 6 of *PM & NEC Act* is in the following terms:

6. Suspension from office of the Prime Minister.

(1) The Head of State, acting on advice, may, on a matter relating to the health of the Prime Minister, request the National Authority responsible for the registration and licensing of medical practitioners to appoint two medical practitioners to examine the Prime Minister and to provide him with full details of the examination, together with their joint certification that the Prime Minister—
(a) is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office, and as to how long they consider that the unfitness or inability will continue to exist; or
(b) is not suffering from any physical or mental incapacity; or
(c) although suffering from physical or mental incapacity, is still able to carry out the duties of his office; or
(d) refuses to be examined.
(2) The Head of State, acting on advice, may, where he has called for a report under Subsection (1), suspend the Prime Minister from office.
(3) The medical practitioners referred to in Subsection (1) shall report to the Head of State as soon as practicable, but in any event no later than 28 days, after the date of their appointment.
(4) If the Prime Minister refuses to be examined by the medical practitioners referred to in Subsection (1), he is guilty of misconduct in office within the meaning of Division III.2. (leadership code) of the Constitution.
(5) Where the medical practitioners referred to in Subsection (1) certify that the Prime Minister—
(a) is not suffering from any physical or mental incapacity; or
(b) although suffering from mental or physical incapacity is still able to carry out his duties,
the Head of State, acting on advice, shall immediately remove any suspension.
(6) Where the medical practitioners referred to in Subsection (1) certify that—
(a) the Prime Minister is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office; and
(b) the unfitness or inability will, in their opinion, continue to exist for a period of more than three months from the date on which he was examined by them,
the Head of State shall forward the report of the medical practitioners, together with their certification, to the Speaker for presentation to the Parliament, and the Prime Minister is suspended from office until the Parliament has dealt with the matter.
(7) Where the medical practitioners referred to in Subsection (1) certify that—
(a) the Prime Minister is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office; and
(b) the unfitness or inability will, in their opinion, last for not more than three months from the date on which he was examined by them,
the Head of State, acting on advice, shall direct the medical practitioners to conduct another examination of the Prime Minister at the end of the period for which the unfitness or inability is expected to last, and the Prime Minister is suspended from office until he is certified to be fit to carry out his duties.

(8) Where, on any second or subsequent examination, the medical practitioners referred to in Subsection (1) certify that the unfitness or inability of the Prime Minister will, in their opinion, continue to exist for a period of more than three months measured from the date on which he was first examined by them, the Head of State, acting on advice, shall forward the report of the medical practitioners together with their certification to the Speaker for presentation to the Parliament and the Prime Minister is suspended from office until the Parliament has dealt with the matter.
(9) Where the Speaker has received a report under Subsection (6) or (8), he shall present it to the Parliament on the first sitting day of the Parliament after he receives it.
(10) If the Parliament is not meeting when the Speaker receives the report and is not due to meet for more than 14 days after that time, a meeting shall be called as soon as practicable.
(11) Where a report is presented to the Parliament under Subsection (6) or (8), the Parliament may advise the Head of State to remove the Prime Minister from office.

79. There is no dispute amongst the parties with regard to the steps involved in the investigation process. I have amplified those steps to clarify some of the practical steps in the process. I set out those steps by reference to relevant statutory provisions, the key players in the process and their duties, as follows:

Step 1

National Executive Council (NEC) (s142(5)(c), 6(1) of the Prime Minister and NEC Act 2002)

(a) NEC determines that a question arises as to the Prime Minister's physical or mental incapacity to carry out the duties of the office, such that an investigation is necessary; and decides to advise the Head of State to request the National Authority responsible for the registration and licensing of medical practitioners, to appoint two medical practitioners to examine the Prime Minister. The relevant authority is the PNG Medical Board established under the *Medical Registration Act* (Ch 398).

(b) NEC also decides to advise the Head of State whether to suspend the Prime Minister pending the medical examination.

Step 2:

Head of State (Section 6(1) of the Prime Minister and NEC Act 2002)

Head of State, Acting in accordance with NEC's advice, issues the relevant statutory instruments to effect the decisions.

Step 3

National Medical Board (Medical Registration Act (Ch 398)..

Appoints two doctors to conduct examination.

Step 4

Two medical practitioners (Section 6(1), (3) and (4) of the Prime Minister and NEC Act 2002)

Conduct medical examination of the Prime Minister and submit their report to the Head of State. The report sets out full details of the examination, together with their joint certification, that the Prime Minister-

(a) is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office, and as to how long they consider that the unfitness or inability will continue to exist;
or
(b) is not suffering from any physical or mental incapacity; or
(c) although suffering from physical or mental incapacity, is still able to carry out the duties
of his office; or
(d) refuses to be examined.

Step 5

NEC & Head of State (Section 6(5), of the Prime Minister and NEC Act 2002)

(a) Where the medical practitioners certify that the Prime Minister -

(i) is not suffering from any physical or mental incapacity; or

(ii) although suffering from mental or physical incapacity, is still able to carry out his duties;

the Head of State acting on advice of the NEC, removes any suspension.

(b) The Head of State acts in accordance with the advice and issues the appropriate statutory instrument to remove the suspension (if any). The investigation is concluded.

Step 6

Doctors and NEC & (Section 6(6), (7) and (8) of the Prime Minister and NEC Act 2002

(1) Where the two medical practitioners jointly certify that –

(a) the Prime Minister is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office; and

(b) the unfitness or inability will, in their opinion, **continue to exist for a period of more than three months** from the date on which he was examined by them;

they submit their report to the Head of State; and the Head of State submits the report to the Speaker. The Speaker receives the report. The Prime Minister may be suspended until Parliament has dealt with the matter.

(2) In the alternative, where the two medical practitioners report to the Head of State that the Prime Minister is unfit or unable, by reason of physical or mental incapacity to carry out his duties; and the unfitness or inability will, in their opinion, **last for no more than three months** from the date he was examined; the Head of State, on advice of the NEC directs two doctors to conduct another examination. The doctors conduct another examination.

Step 7:

Head of State & Parliament (Section 6(6), (7) , (8) and (9) of the Prime Minister and NEC Act 2002)

(a) In the case where the Head of State has submitted a report to the Parliament, the Prime Minister remains suspended from office until dealt with by Parliament.

(b) In the case where the Head of State instructs the two doctors to conduct further examination, the same doctors who conducted the first examination conduct "another examination" of the Prime Minister. If the doctors further report that the Prime Minister's unfitness and inability will continue for a period of more than three months, the report is presented to the Head of State who forwards the reports to the Speaker. The Prime Minister remains suspended until Parliament has dealt with the matter.

Step 8

Speaker of Parliament (s 142 (5) (c) of Constitution.); Section 6(9)) & (10), of the Prime Minister and NEC Act 2002)

Speaker receives the medical examination report and presents the medical report to Parliament on the first sitting day after receiving the report. If Parliament is not in session and it is not expected to sit in the next 14 days, the Speaker must call the Parliament as soon as possible to consider the matter. In either situation, the Speaker advises Parliament that two medical practitioners appointed by the National Authority responsible for the registration or licensing of medical practitioners have jointly reported in accordance with an Act of the Parliament that in their professional opinion, the Prime Minister is unfit by reason of physical or mental incapacity, to carry out the duties of his office.

Step 9

Parliament (s 142 (5) (c) of Constitution & s 6 (11) of PM &NEC Act).

(a) Where the Parliament receives the reports under Step 7 (a) or (b), and based on advice of the Speaker, Parliament makes a decision to remove the Prime Minister under s 142 (5)(c) of the *Constitution*.

(b) The Speaker of Parliament informs the Head of State of Parliament's decision to remove the Prime Minister under s 142 (5) (c) for the stated reason that the Prime Minister is unfit to carry out the duties of the office due to his mental or physical incapacity.

Step 10

Head of State (s 142 (5) (c))

Upon receiving the advice from the Speaker, the Head of State by issuing the necessary statutory instrument to that effect, removes the Prime Minister from office for the reason stated by Parliament in its decision (s 142 (5) (c)). The decision of Parliament takes effect. Copies of the signed instrument are returned to Parliament through the office of the Speaker.

Step 11

Parliament (s 142 (2)

Upon receiving the signed instruments effecting the removal from the Head of State, the Speaker informs Parliament of the removal of the Prime Minister and tables the instrument of removal issued by the Head of State. A vacancy in the office of the Prime Minister exists giving rise to an on occasion for the appointment of a new Prime Minister.

80. The eleven - step set out above constitute the constitutional process for process for removal of a serving Prime Minister by reason of physical or mental unfitness under s 142 (5) (c) in conjunction with s 6 of *PM and NEC Act.*

81. The relevant facts were not contested before the trial Judge and I adopt ta statement of those facts, as follows:

(1) On 28 July 2011, NEC commenced the investigation process under s 6 of *PM & NEC Act* by completing Step 1. The NEC resolved to advice the Head of State to appointment two doctors to examine Sir Michael. It appears the Head of State was not advised to suspend the Prime Minister;

(2) Step 2 was completed in part. On 1 August the Head of State requested the PNG Medical Board to appoint two doctors to carry

out the medical examination. The Head of State did not suspend the Prime Minister.

(3) Step 3 did not commence. Before the PNG Medical Board acted on the request, the events of 2 August in Parliament occurred. The investigation process was stalled.

82. The facts found by the trial Judge, which I adopt, shows that the only statement made to Parliament on the health of the Prime Minister up to the passing of the motion on 2 August was a statement by the Hon Sam Abal made on 10 May, that Sir Michael was undergoing treatment in Singapore. He made the following statement:

> *"The people of Papua New Guinea have been praying for our Prime Minister since he was admitted to hospital for surgery in Singapore. Mr Acting Speaker, in the interest of the people of Papua New Guinea, I take the opportunity to explain to Parliament the condition of the Prime Minister, Grand Chief Sir Michael Somare.*
>
> *Following Sir Michael" suspension from Office last month, he took leave to address a condition in his heart last month that has prevailed over a long period of time. Sir Michael had a successful valve replacement surgery. The surgery was successful but Sir Michael developed complications in the post operative period that required corrective surgery. Consequently, corrective surgery has taken place and Sir Michael is in recovery. Due to the nature of surgery, the period of recovery will be longer than anticipated. Mr Acting Speaker, our senior cardiologist and Dean of the University of Papua New Guinea Medical School, Professor Isi Kevau who has been managing Sir Michael's valves over many years is involved in the management decisions in a consultative manner with his Singapore cardiologist and the nursing staff. Professor Kevau is satisfied with the progress so far and has informed me that the medical staff are providing good medical care and good progress is being made at this time. " (quoted from the Hanshard)*

83. These facts prove that prior to 28 July, Sir Michael was receiving medical attention in relation to his heart condition at Singapore's Rafles Hospital, with the assistance of Sir Michael's Port Moresby-based doctor, heart specialist Professor Isi Kevau. The medical attention received in the period prior to 28 July occurred outside of the constitutional process which commenced on 28 July. Thus the Constitutional investigation process for examining Sir Michael's physical and medical condition had only commenced by the 2nd August when he was removed from office. In the circumstances,

Parliament was not and could not have been in a position to comply with s 142 (5) (c). Thus the Motion by the Hon Belden Namah did not specify s 142 (5) (c) as a basis for the motion. Assuming that the motion was purportedly premised under s 142 (5) (c), the facts did not support that basis.

84. It is clear to me that much of the factual matters that were the subject of dispute before the trial Judge and findings made by the Judge with regard to Sir Michael's medical condition and the treatment he was receiving, his ability to continue in office as Prime Minister and his prospects of resignation or retirement; were based on material and information that related to events that occurred outside of the chamber of Parliament and were not the subject of proceedings on 2 August. At the hearing, I described those matters as *extrinsic material*. In my view, except where such of those facts are derived from material, reports and proceedings of Parliament as reflected in the Hansards, they are irrelevant for purposes of the application of provisions of constitutional law in question in this Reference. For this Court to rely on those extrinsic materials and facts in reaching its conclusions on compliance issues concerning s 142 (5) (c) would interfere with the decision-making process in respect of the Prime Minister that is reserved for Parliament by s 142 (5)(c).

85. It is true that this Court cannot completely turn a blind eye to matters of common knowledge. This Court may take judicial notice of such facts without proof. Sir Michael's health after 30 March 2011 and in the ensuing months was widely known by members of the public through information supplied by various sources including the mass media. Members of Parliament and members of NEC in particular, would have been in a far better position than anyone else, to become aware of Sir Michael's condition which rendered him incapable of performing his duties as Prime Minister in the period in question. It was publicly known that Sir Michael had been visited by his doctor from Port Moresby whilst in Singapore and some form of medical report would have been furnished to the NEC by doctors from Port Moresby and Singapore, to enable the NEC to commence the investigation and removal process under s 142 (5)(c) with due

expediency. It is reasonable for Parliament to expect from NEC, that NEC would account to Parliament by keeping it constantly informed of Sir Michael's condition and the steps taken by the NEC to put in motion the eleven step investigative process that I have referred to. The NEC is a Parliamentary Executive and its members are individually and collectively responsible to the People of Papua New Guinea, through Parliament, *"for the proper carrying out of the executive government of Papua New Guinea and for all things done by or under the authority of the National Executive"* (s 141). It appears months passed by with no satisfactory account being given by NEC to Parliament on those matters. An effort made by Acting Prime Minister Sam Abal in the May sittings did not address the matter in any meaningful way.

86. If the top Chief Executive of the country is unavailable to perform the duties of the office on medical grounds for a considerable period, that does raise questions concerning his fitness to continue in office. In other Constitutional democracies, if the head of the Executive, be it Prime Minister or President, is in that situation; it is reasonable for the public to expect him to do the right thing - resign or retire – and do so, voluntarily. It is pitiful that laws in most constitutional democracies including Papua New Guinea offer no relief from their yearning for a functioning executive and effective leadership. Early forced or compulsory resignations or retirement from public office is nowhere to be found in the laws of Constitutional democracies; and the public should not hold any illusions that voluntary resignations and retirements will come that easily, either. The third President of the Unites States, Thomas Jefferson, reminds us in these terms:

" If due participation of office is a matter of right, how are vacancies to be obtained? Those by death are few; by resignation none."

On the occasion of his first inaugural address on 4 March 1801, President Jefferson said about retirement:

"I have learned to expect that it will rarely fall to the lot of imperfect man to retire from this station with the reputation and favour which bring him into it."

(letter to E. Shipman and others, 12 July 1081, in P.L. Ford (ed.) Writings of Thomas Jefferson (1897) vol.8. Quoted in *Oxford Dictionary of Quotations* (7th ed.), 2009, Oxford University Press.

87. The people of Papua New Guinea waited in vain for satisfactory answers about Sir Michael's condition and his fitness to continue in office. As a result, the people of this country and especially their elected representatives in Parliament, as expected, were increasingly getting anxious, frustrated and impatient.

88. Removal of a Prime Minister for medical unfitness is always an option and the procedure to be followed is expressly spelt out in s 142 (5) (c) of the *Constitution* and s 6 of *PM & NEC Act*. It seems to me that the 11 step investigation process that I have outlined above is a complex and convoluted one that may not be in tune with the spirit of what is a simple process under s 142 (5) (c). That aside, s 142 (5) (c) gives Parliament a pivotal role in the removal process. It is in Parliament's interest and its constitutional duty, to ensure that when the question arises as to the medical fitness of the Prime Minister, NEC fully accounts to the Parliament as to the conduct of the investigation. Matters pertinent to the Prime Minister's health which raises questions about his capacity to carry out his duties are precisely the types of matters that Parliament; utilizing its legitimate powers, privileges and immunities that are given to it by the *Constitution*; must ensure they are placed before it, debated upon and decisions made. Parliament should allow itself full information and debate and where such information is not forthcoming from the executive, it is duty-bound to insist on it and make appropriate resolutions to facilitate provision of such information; and take appropriate steps to enforce those resolutions, to ensure that that the constitutional process under s 142 (5) (C) expedited. In this way, Parliament ensures the executive accounts to Parliament on the steps undertaken to commence and complete the process under s 142 (5) (c) and s 6 of *PM & NEC Act.*

89. It is completely a different thing however for Parliament and its members, to become oblivious to that process and rush to judgment

based on assumptions and *extrinsic* information that never entered the realm of Parliamentary proceedings on 2 August 2011. Parliament, failed to discharge its duty to hold the executive accountable on the steps taken to investigate and remove the Prime Minister under s 142 (5) (c). Instead it is clear from the Hansard that frustration and emotion took the better of members of Parliament, who then rushed two important decisions, within the same session, with extraordinary speed, without proper consideration of relevant matters.

90. Parliament is an independent institution of its own. Its functions should not be confused with the duties of individual members who comprise it and the Prime Minister and Ministers who constitute NEC. Parliament's business must be conducted in accordance with law. Information and material within the knowledge of members of Parliament which do not form part of the Parliamentary proceedings should not be imputed to Parliament. Constitutional powers vested in Parliament by the *Constitution* such as those in s 142 (2),(3),(4) and (5) (c) are not intended to be exercised in that manner. It is information, material and reports that are actually placed before the Parliament and become the property of Parliament , which are contained or referred to in the Hansard, that is the primary, if not the only source of material, which may be used to determine if the conditions required to be fulfilled for exercising a Constitutional power have been met.

91. In the present case, I am satisfied that the Referor and the intervenors supporting it have established a prima facie case that the occasion did not arise under s 142 (5) (c) for a new Prime Minister to be appointed in that the conditions for the removal of the Prime Minister were not fulfilled. I am satisfied that the affirmative has failed to discharge the onus placed on them to justify the validity of the decision purportedly made under s 142 (5) (c). For the foregoing reasons, I am of the opinion that the purported decision of Parliament made on 2 August 2011 that a vacancy in the office of the Prime Minister occurred under s 142 (5) (c), is unconstitutional and invalid.

4. *Vacancy in the office of the Prime Minister under s 142 (2) by virtue of disqualification of Prime Minister for unsound mind (s 103 (3)(b);and appointment of a new Prime Minister.*

92. The seat of a member of Parliament becomes vacant if he is disqualified under s 103 (3) (b): also see s 104 (2) (f). There is no question that where the member is a Prime Minister, he ceases to hold that office if he is disqualified under s 103 (3) (b).

93. Section 103 (3) (b) is in the following terms:

"A person is not qualified to be, or remain a member of the Parliament if ... he is of unsound mind within the meaning of any law relating to the protection of the persons and property of persons of unsound mind".

94. A vacancy under s 103 (3)(b) was not a ground for removal of the Prime Minister on 2 August. Therefore, it cannot be said that a vacancy occurred under s 103 (3)(b) on 2 August, giving rise to an occasion to appoint a new Prime Minister under s 142 (2). For this reason it is unnecessary to deal with the arguments on the facts and law made by the parties. However since the matter was argued at length before the trial Judge and also before us, and for purpose of development of the law in this area, I consider those arguments.

95. Counsel for the affirmative raised two main arguments. First, this Court should not accept the trial Judge's finding that the law on unsound mind for purposes of s 103 (3)(b) is exclusively *Part VIII* of *Public Health Act*. There are other statutes which provide for the protection of the persons and properties of persons of unsound mind: see *Frauds and Limitations Act 1988, s 22; Partnership Act 1951, Marriage Act 1963, Education Act 1983, Medical Registration Act 1980, Trade Licensing Act 1969, Professional Engineers (Registration) Act 1986*, and *Public Health (Mental Disorders) Regulation 1962* and *National Court Rules 1983, O 5 r 22*. The term "unsound mind" is used in these statues in a flexible way, which goes beyond "lunacy and idiocy" covered in the *Public Health Act*. Consistent with provisions in those other statutes, a broader definition

of the term *unsound mind* at common law should be adopted. At common law, person of unsound mind means a state of mind that involves mental weakness (imbecility) which sufficiently impairs the person's ability to manage his own affairs; (per Lord *Eldon LC, Ridgeway v Darwin* (1802) 8 Ves 65; ER 275 at 276; *Ex parte Cranmer* (1806) 12 Ves 445; 33 ER 168; *Re Holmes* (1827) 4 Russ 182; 38 ER 774; *Kirby v Leather* [1965] 2 All ER 441, at 443, per Lord Denning); or a state of mind that may be defective of memory, faulty reasoning, inadequate power of interpreting sensory impression, inability to communicate thoughts to another, or the like; which may vary in degree (*Poynton v Walkey* [1951] SASR 191; or state of mind that is worn out with age and unable to manage his affairs (*Re Barnsley* (1944) 23 Atk. 168; 36 ER 899).

96. Secondly, this Court should reject the trial Judge's finding that it had not been proved that Sir Michael was of unsound mind. Instead this Court should find that Sir Michael was of unsound mind for the following reasons:-

(a) Sir Michael's state of comma after being admitted to Raffles Hospital in Singapore and his physical and mental condition thereafter in the period from 30 March to 26th August was such that he was in a state of comma for some time;

(b) his physical and mental condition in that period rendered him incapable of managing his own affairs; and that he lacked capacity to carry out the functions and duties of the office of the Prime Minister;

(c) he lacked capacity to make an informed decision whether to resign (Fact 70 – 73); and

(d) that at the trial before Justice Cannings, he demonstrated lack of capacity to manage his own affairs in that he was unable to recall events during the trial including the nature of Originating Summons proceedings that he had commenced through his lawyers

notwithstanding that he had deposed to an affidavit with full knowledge of its contents and their truth.

97. For the foregoing reasons, counsel for the affirmative urged upon us to reject the trial Judge's finding and instead find that Sir Michael was of unsound mind within the meaning of that term in *Constitution*, s 303 (3)(b). Consequently, he was automatically disqualified as a member of the Parliament in the relevant period in question.

98. It is argued for the negative that the trial Judge was correct in finding that it had not been proven that Sir Michael was of unsound mind within the meaning of that term under the *Public Health Act.* That is the only statute which sets out a process for judicial determination that a person is of unsound mind. It is submitted there is a presumption of sanity in law and the onus is on the party alleging unsoundness of mind to prove it: *Halsbury's Laws of Australia /285 - 85; M'Naghten's Case* (1843) [1843-60] All ER Rep 229, (1843) 8 ER 718; *Hanbury v Hanbury* (1892) 8 TLR 559, CA; *Murphy v Doman* [2003]58 NSWLR 51; *Cosham v Cosham* (1899) 5 ALR 291.The procedure for finding a person is of unsound mind is found in *Part VIII* of the *Public Health Act.* That procedure was not invoked in Sir Michael's case.

99. It is further argued for the negative that Sir Michael's physical and mental condition was a temporary ailment that required treatment which he received in the period in question; his illness should not be converted into *lunacy or idiocy* under the *Public Health Act*, as urged by counsel for the affirmative.

100. Counsel for the affirmative submit the presumption of sanity is rebuttable. It has been demonstrated that Sir Michael was incapable of managing his own affairs as a result of his physical and mental condition in the period in question, in which case he was automatically disqualified as a member of the Parliament , by operation of law.

101. I have perused the various statutory provisions pertaining to *person of unsound mind.* Three statutes adopt the meaning of *person of unsound mind* in Part VIII of the *Public Health Act* namely, *Frauds and Limitations Act,* s 21 (b), *Trade Licensing Act,* s 24 (c), *Professional Engineers Act* , s 20 (d).

102. Other statutes simply refer to *person of unsound mind, a defective* or *a person incapable of performing his professional duties satisfactorily*, or a person or a mental defective: *Marriage Act,* s 22 (2) (b) (i) & (ii); S 104 (d) of *Medical Registration Act*.

103. Some sub-ordinate legislative enactments refer to *a mentally disordered person* on whose behalf an action may be taken by a Committee who has authority under an Act of Parliament to manage that person's affairs. Such an action may be commenced or defended in the National Court (Order 5 r 22 of the *National Court Rules*) by a committee appointed by the Court to manage the affairs of a person of unsound mind. Reference to a committee could mean a Committee appointed by the National Court to manage the affairs of a person of unsound mind ordered by the National Court under Part VIII of the *Public Health Act*.

104. None of the statutes, except Part VIII of the *Public Health Act* contain a comprehensive code of procedure for judicial determination of any question as to whether a person is of unsound mind and is incapable of managing his own affairs. *Part VIII* of the Public *Health Act* contains elaborate procedures for judicial determination of the question by the National Court. The term "person of unsound mind" is defined in s 81 as *" a person who is found under this Part to be of unsound mind and incapable of managing himself or his affairs."* Where it is alleged that a person is of unsound mind and incapable of managing himself or his affairs, a person related by blood or marriage to the person alleged to be of unsound mind, or an officer authorized for the purpose by the Minister, may make an application to the National Court for an order directing an inquiry. After notice of the inquiry is given to the person alleged to be of unsound mind, the National Court must conduct a public judicial hearing, determine the

question and make an order to that effect. The Court may also issue orders for detention of the person at a mental facility, or make orders for disposal of the property of the person or for a Committee to protect and manage his properties or estate, etc.

105. Whilst there is no uniformity in those statutes in terms of adoption of Part VIII of the *Public Health Act*, none of those statutes preclude the application of this statute either. From this general scheme, it is clear to me that Part VIII of the *Public Health Act* is of general application to all cases in which there is a question as to the unsoundness of a person's mind. Under that statute, the National Court has exclusive jurisdiction to determine that question.

106. In my view, the definition of *" person of unsound mind"* in s 81 of the *Public Health Act* displaces any common law definition of a person of unsound mind. It would be inconsistent with the specific definition of a person of unsound mind in s 81 of the *Public Health Act* to expand the meaning of that term to include s state of mind that falls short of a judicial determination by the National Court under Part VIII of the *Public Health Act* : see *Constitution Sch* 2.2 ; *Underlying Law Act 2000*, s 4 (3) (a).

107. I am persuaded that *Part VIII* of the *Public Health Act* is a law that comes within the term "*any law relating to the protection of the persons and property of persons of unsound mind." in s 103 (3)(b).* Any allegation that a member of the Parliament is of unsound mind should be determined by order of the National Court under Part VIII under the *Public Health Act.* It appears that upon issue of an order by the National Court and upon Parliament being informed of the Court order by the Speaker; and upon the production of the Court order by the Speaker in Parliament; that person would cease to remain a member of the Parliament. Parliament only needs to be informed of that order through the office of the Speaker and the office of the Speaker would take the appropriate steps for Parliament to fill the vacancy.

108. In the alternative, if the matter is raised in Parliament, and Parliament by resolution determines that a question arises as to the unsoundness of mind of a member of Parliament, that raises a question as to the qualification of a person to be a member or remain as member of Parliament. Parliament may refer the question to the National Court for determination under s 135. The procedure is set out in Part XVIII, Division 2 (ss 228 – 233) of the *Organic Law on National and Local Government Elections* (OLNLLGE): see full discussions on this procedure in paragraphs 112-154 of this judgment. Any lack of provision on proof of matters pertaining to unsoundness of mind under OLNLLGE, Division 2 may be supplemented by Part VIII of the *Public Health Act*, pursuant to OLNLLGE, s 231 and s 212.

109. There is no question that the procedure under Part VIII of the *Public Health Act* was not invoked in the case of Sir Michael.

110. I am satisfied that the Referor and those Intervenors supporting it have established a prima facie case that Sir Michael was not of unsound mind and incapable of managing his own affairs within the meaning of Part VII of the *Public Health Act* and s 103 (3)(b) of the *Constitution*. They have shown to this Court's satisfaction that Sir Michael's medical condition was a temporary ailment that required close management and medical treatment in or from Port Moresby and in Singapore in the period between 30th March to 26th August 2011; and that in that period, he lacked full capacity to perform his official duties. Sir Michael's condition in that period and up to the time he gave evidence before the trial Judge does not come within the meaning of a person of unsound mind in s 103 (3)(b) and Part VIII of the *Public Health Act*. I am satisfied that the First Intervenor and those Intervenors supporting the Reference have failed to prove the same.

111. For the foregoing reasons, to the extent that Parliament on 2 August, purportedly determined that a vacancy existed by virtue of the operation of s 103 (3) (b) and proceeded to elect a new Prime Minister under those decisions were was made in breach of s 103 (3) (b) and s 142 (2). The decisions are unconstitutional and invalid.

5. *Vacancy in the office of the Prime Minister by reason of disqualification of member of Parliament who is Prime Minister, for absence without leave, on three consecutive meetings of Parliament under s 104 (2)(d); and appointment of a new Prime Minister.*

112. Sir Michael was removed as a member of Parliament on 6 September.

113. Sections 104 and 135 of the *Constitution* and OLNLLGE, ss 228 - 233 are relevant on this issue and I set them out in full, below.

114. Section 104 is in the following terms:

104. Normal term of office.
(1) An elected member of the Parliament takes office on the day immediately following the day fixed for the return of the writ for the election in his electorate.
(2) The seat of a member of the Parliament becomes vacant—
(a) if he is appointed as Governor-General; or
(b) upon the expiry of the day fixed for the return of the writs, for the general election after he last became a member of the Parliament; or
(c) if he resigns his seat by notice in writing to the Speaker, or in the case of the Speaker to the Clerk of the Parliament; or
(d) if he is absent, without leave of the Parliament, during the whole of three consecutive meetings of the Parliament unless Parliament decides to waive this rule upon satisfactory reasons being given; or
(e) if, except as authorized by or under an Organic Law or an Act of the Parliament, he directly or indirectly takes or agrees to take any payment in respect of his services in the Parliament; or
(f) if he becomes disqualified under Section 103 (qualifications for and disqualifications from membership); or
(g) on his death; or
(h) if he is dismissed from office under Division III.2 (leadership code).
(3) For the purposes of Subsection (2)(d), a meeting of the Parliament commences when the Parliament first sits following a general election, prorogation of the Parliament or an adjournment of the Parliament otherwise than for a period of less than 12 days and ends when next the Parliament is prorogued or adjourned otherwise than for a period of less than 12 days. (underlining is my emphasis)

115. Section 135 provides as follows:

135. Questions as to membership, etc.
The National Court has jurisdiction to determine any question as to—
(a) the qualifications of a person to be or to remain a member of the Parliament; or
(b) the validity of an election to the Parliament.

116. OLNLLGE, Part XVIII, Division 2 (*Qualifications and Vacancies*), Sections 228 – 233) provide as follows: :

Division 2.—Qualifications and Vacancies.

228. Reference of question of qualification or vacancy.
A question respecting the qualifications of a member or respecting a vacancy in the Parliament may be referred by resolution to the National Court by the Parliament and the Court shall thereupon have jurisdiction to hear and determine the question.

229. Speaker to state case.
When a question is referred to the National Court under this Division, the Speaker shall transmit to the Court a statement of the question upon which the determination of the Court is desired, together with any proceedings, papers, reports or documents relating to the question in the possession of the Parliament.

230. Parties to the reference.
The National Court may allow a person who, in the opinion of the Court, is interested in the determination of a question referred to it under this Division to be heard on the hearing of the reference, or may direct notice of the reference to be served on a person, and a person so allowed to be heard or so directed to be served shall be deemed to be a party to the reference.

231. Powers of courts.
On the hearing of a reference under this Division, the National Court shall sit as an open court and has the powers conferred by Section 212 so far as they are applicable, and in addition has power—
(a) to declare that a person was not qualified to be a member; and
(b) to declare that a person was not capable of being chosen or of sitting as a member; and
(c) to declare that there is a vacancy in the Parliament.

232. Order to be sent to the Parliament.
After the hearing and determination of a reference under this Division, the Registrar of the National Court shall promptly forward to the Clerk of the Parliament and the Electoral Commissioner a copy of the order or declaration of the National Court.

233. Application of certain sections.
The provisions of Sections 217, 218, 219, 220, 221 and 222 apply so far as they are applicable, to proceedings on a reference to the National Court under this Division.

117. The pertinent facts, which I adopt, are not disputed: see *Statement of Agreed and Disputed Facts*, Nos. 18, 19, 21 & 23; and the trial

Judge's findings of fact Numbers 28 , 29 and 75. Those facts are as follows:

18. During the period from 24 March to September 2011 the Parliament sat on the following dates:

a. On 10, 11, 12, 13, 17, 18, 20, 24. 25, 26, and 27 May 2011.
b. On 14, 16, 17, 21. 22, 23, and 24 June 2011
c. On 2 and 9 August 2011.

19. Sir Michael did not attend any day of sitting set out in paragraph 18 above.

20. On the first day of the May meeting, 10 May 2011, the Hon. Sam Abal made a statement to the Parliament on the health of Sir Michael Somare as a matter of public importance. He said that:

"The people of Papua New Guinea have been praying for our Prime Minister since he was admitted to hospital for surgery in Singapore. Mr Acting Speaker, in the interest of the people of Papua New Guinea, I take
the opportunity to explain to Parliament the condition of the Prime Minister, Grand Chief Sir Michael Somare.

Following Sir Michael" suspension from Office last month, he took leave to address a condition in his heart last month that has prevailed over a long period of time. Sir Michael had a successful valve replacement surgery. The surgery was successful but Sir Michael developed complications in the post operative period that required corrective surgery. Consequently, corrective surgery has taken place and Sir Michael is in recovery. Due to the nature of surgery, the period of recovery will be longer than anticipated. Mr Acting Speaker, our senior cardiologist and Dean of the University of Papua New Guinea Medical School, Professor Isi Kevau who has been managing Sir Michael's valves over many years is involved in the management decisions in a consultative manner with his Singapore cardiologist and the nursing staff.
Professor Kevau is satisfied with the progress so far and has informed me that the medical staff are providing good medical care and good progress is being made at this time. "

21. On the fifth day of the May meeting, 17 May 2011, the Hon. Paul Tiensten without notice, moved a motion, passed by the Parliament, that:

"That leave of absence be granted to the Prime Minister Sir Michael Somare for the duration of this meeting."

23. Sir Michael did not obtain any (other) leave from the Parliament other than the leave granted 17 May 2011.

28. Meetings of the Parliament occurred on the following dates:

a. On 10, 11, 12, 13, 17, 18, 20, 24, 25, 26 and 27 May 2011 ("the May meeting")
b. On 14, 16, 17, 21, 22, 23 and 24 June 2011 ("the June meeting")
c .On 2 and 9 August 2011 ("the August meeting")

29. The three meetings referred to were consecutive meetings of the Parliament. The August meeting was the first meeting of the fifth year of the current Parliament. The August meeting of Parliament concluded on 9 August 2011.

42. On 6th September 2011 Sir Michael attended the sitting of Parliament in the Parliament Chamber on that day.

43. On 6 September 2011 the Clerk of Parliament, Mr Don Pandan wrote a letter to Posman Kua Aisi Lawyers advising as follows:

> " *I confirm that my records constituting the minutes of proceedings of the Parliament as required by Standing Orders 30 for 2011 show that Sir Michael has been absent for only the June and August meetings of Parliament. He was granted leave by the Parliament for the May 2011 meetings.*
>
> *I confirm that when Sir Michael attends today's meeting of Parliament he will avoid being absent for three consecutive meetings of Parliament and thus being disqualified as the member of Parliament for the East Sepik Regional Seat, pursuant to the requirements of Section 104 (2) (d) of the Constitution.*

44. On 6 September 2011 the Second Intervenor (Speaker) ruled in Parliament that the Eighth Intervenor (Sir Michael Somare) had ceased to be a member of Parliament, for reasons given in Parliament. (Those reasons are contained in the Hansard and before the trial Judge, amongst them vacating the leave of absence granted for the May sittings as having been made without authority).

75. Between 6 August and 6 September 2011 Sir Michael did not make any request to the Parliament in respect of his absences from meetings of the Parliament in 2011 or provide any information to the Parliament in respect of his likely future attendances at meetings of the Parliament.

118. Counsel for the affirmative argued that a proper representation of the people in Parliament through participation by their elected leaders, is essential for members to exercise the people's law-making power vested in the Parliament. Section 104 (2)(d) safeguards that process by making it mandatory for members of Parliament to automatically

vacate their seats in Parliament if they fail to perform their duties by attending three consecutive meetings of the Parliament. Section 104 (2)(d) provides for an automatic consequence on the happening of the prescribed event, by operation of law. The plain meaning of the term *"The seat of a member becomes vacant"* in s 104 (2)(d) is that the provision is mandatory and self-executing: s 11 (2), *SCR No 1 of 1992; re Constitutional Amendment No 15* [1992] PNGLR 73 at p 80. The seat of a member is automatically vacant if he is absent *"during the whole of three consecutive meetings of the Parliament."*

119. It is argued that on a proper construction of s 104 (2) (d), an affected member must obtain leave of absence or waiver which covers the whole of three meetings. The import of this argument is that a member of Parliament only needs to absent himself for a minimum of a day or a part thereof of three consecutive meetings without leave in order to qualify for expulsion under that provision.

120. It is argued that the phrases *"leave of absence"* and *"unless Parliament decides to waive this rule"* are common expressions that are intended to have their normal meaning. Those phrases contemplate that a member of Parliament may be given permission, ordinarily in advance, to be absent for the whole of three consecutive meetings and such leave to be obtained prior to or at the commencement of each of the three meetings or three consecutive meetings.

121. It is argued that the phrase *"unless Parliament decides to waive this rule"* contemplates a situation where a member has not obtained leave of absence in advance and it is necessary to obtain a waiver. The waiver must be obtained prior to the end of the third consecutive meeting in question because of the automatic creation of a vacancy coming into operation at the end of the third consecutive meeting.

122. It is argued that Sir Michael did not seek and obtain leave of absence for the whole of three consecutive meetings of Parliament held in May, June and August respectively. By operation of law, he ceased to be a member of Parliament at the end of the August meeting. The Speaker pronounced the correct legal position on 6 September

that Sir Michael had ceased to be a member as of 10 August 2011. The Speaker did not make a ruling; he merely pronounced the occurrence of an event, by operation of law.

123. It is argued the existence of a vacancy by operation of law in the context of proceedings of the Parliament and the Speaker's pronouncement of a vacancy in the office of a member of Parliament are non-justiciable by virtue of s 115 (3) of the *Constitution.*

124. It is argued for the affirmative that the process for disqualification in Section 135 of the *Constitution* and OLNLLGE, Div.2, ss 228 and 229 have no application to s 104 (2) (d) because the vacancy under s 104 (2)(b) is automatic, by operation of law. For instance it is not intended that a vacancy occurring as a result of death or resignation of a member should raise any question that would warrant invoking s 135 and OLNLLGE, Division 2, Part XVIII. Upon the occurrence of those events, a vacancy is created automatically, by operation of law.

125. Finally it is argued for the affirmative that Sir Michael was absent without leave of the Parliament on three consecutive meetings because the leave granted for the May meeting was invalid. Sir Michael did not attend the whole of the May, June and August meetings. Therefore he ceased to be a member of Parliament at the end of the August sitting which ended on 10 August. On 6th September , the Speaker correctly ruled that Sir Michael had ceased to hold office after the August sittings and consequently, a vacancy in the office of the Prime Minister occurred after 10 August.

126. It is argued for the negative that the affirmative's argument on leave of absence required for a part of or each or every day of the meeting cannot be correct and untenable as it would produce absurd and unintended results. Leave may be obtained prior to, in the course of or after the meeting; that is a matter for Parliament. As in this case leave was validly granted by Parliament for the May meeting in that meeting.

127. It is argued that there is no requirement in s 103 for leave to be obtained prior to or during a meeting. There is also no requirement in s 103 that waiver must be obtained in that time. Leave of absence or waiver may be granted by Parliament at any stage of a meeting or after a meeting.

128. It is argued that by the end of the August meeting, Sir Michael was absent for only two of the three consecutive meetings without leave. Parliament validly granted leave of absence to Sir Michael for the May meeting. The Clerk of Parliament confirmed this position in his letter to Sir Michael's lawyers on 6th September 2011. The Speaker of Parliament lacked power under s 103 to vacate the leave of absence granted to Sir Michael for the May sitting.

129. It is argued that the removal of a member of Parliament under s 104 (2) (d) is not automatic; there is a process to follow, and that process is provided in s 135 (a) which gives the National Court exclusive jurisdiction to determine *"any question as to - the qualifications of a member to of the Parliament to be or to remain a member of the Parliament."* The procedure is provided in OLNLLGE, Part XVIII, Div.2 (ss 228 – 233). In this case, the question was raised by the Speaker in Parliament as to Sir Michael's qualification to remain a member as a result of his alleged absence from three consecutive meetings of Parliament. Parliament failed to invoke the procedure under OLNLLGE, Part XVIII, Div.2 ss 228- 233).

130. For these reasons, counsel for the negative argue that the Speaker's decision made on 6 September is unconstitutional and invalid.

131. This is the first occasion to my knowledge that this Court is asked to interpret s. 104 (2)(d) in the context of s 135 of the *Constitution* and OLNLLGE, Part XVIII, Div.2 (ss 228- 233). The Court is somewhat handicapped because there is no case law and little discussion in the CPC Report material available to be used as aids to interpretation. The *Papua New Guinea Act 1949-1793* (of Australia

which was later repealed by *Papua New Guinea Independence Act 1975*) contained provisions similar to the provisions under consideration that were considered by CPC and by the Constituent Assembly. The *Papua New Guinea Act 1949-179 (hereinafter referred to as The PNG Act)* is collateral material as an aid to constitutional interpretation: see *Constitution* s 24 (*use of certain materials as aids to interpretation*).

132. The CPC Final Report, in Ch 6 /13, 23 and 27 , CPC recommended adoption of most of the grounds for disqualification of a member of the House of Assembly contained in the *PNG Act.* With regard to leave of absence, Ch 6/27 states as follows:

> *" 27. The Papua New Guinea Act specifies, as a third ground for disqualification of a member of Parliament, absence without leave from three consecutive meetings of the House. We recommend that this be reduced to two consecutive meetings".*

133. Section 37 (4) of the *PNG Act* is in the following terms:

> *" (4) A person is not qualified to continue as a member of the House of Assembly*
> *if –*
> *(a) <u>he is absent at all times during each of three consecutive meetings</u> of the*
> *House of Assembly, and permission <u>has not been granted to him</u> by the House of Assembly to be absent from any of those meetings*"
> (underlining is my emphasis).

134. In enacting s 104 (2)(d) of the *Constitution*, it can be safely assumed that the CPC was fully aware of the requirement for three consecutive meetings in s 37 (4)(a) but recommended two meetings only. The Constituent Assembly retained three consecutive meetings. The Constituent Assembly then replaced the expression "*at all times during each of three consecutive meetings*" " in s 37 (4) (a) with the expression " *during the whole of three consecutive meetings"*. On a plain reading of those expressions, to my mind, they mean the same thing. That is, a member must be absent without leave at all times during three consecutive sittings; in other words; for the whole of the three consecutive meetings. It is clear to me that the Constituent

Assembly deliberately chose a different expression to say the same thing, perhaps to signify severance from words in a colonial statute to give the new Constitution's autochthonous character. Therefore, the expression *"during the whole of three consecutive meetings"* in s 104 (2)(d) means *absence at all times during each of three consecutive meetings* or words to that effect.

135. If the expression *"during th whole of three consecutive meetings"* were to be interpreted in the way suggested by the affirmative, it would produce unworkable and absurd results. A member would have to absent himself for a day or a part thereof of three consecutive meetings to satisfy the requirement. Given that members may be required for other electoral duties or other important commitments during the scheduled meeting times, it is unfair to disqualify a member for nonattendance for a minimum of three days or a part each thereof in total, during three consecutive meetings of Parliament. If the same scenario is applied to the circumstances prevailing nowadays with Parliaments the world over including our own Parliament with facing chronic problem of securing a quorum for meetings, Parliaments would be left with a small number of members completing their term.

136. With regard to the question whether leave of absence must be obtained prior to or during any of the three consecutive meetings, the expression *"has not been granted to him"* in s 37 (4)(a) of the *PNG Act* suggests that leave must have been given prior to the meeting. However s 104 (2)(d) in its present wording does not support that position. Section 104 (2)(d) does not prescribe a time frame for grant of leave of absence or waiver. As such, it is not intended that the provision is to be construed in a way that would impose on Parliament rigid time lines by which leave of absence or waiver may be granted; for to do so is an unnecessary fetter on Parliament's discretion to determine its own time, and the grounds upon which, leave of absence or waiver may be granted. Parliament in its discretion may grant such leave of absence or waiver on such grounds and in such circumstances as it sees fit, at any time and as often as the need arises: see Schedule 1. 9.

137. With regard to the construction of s135 and OLNLLGE, s 228-229, again, there is no case law on point to assist this Court. The CPC in its final report in Chapter 6, paragraph 20 made this recommendation:

"*Questions as to membership*

20. (1) Any questions as to whether a person has been validly elected as a member of the National Parliament or whether the seat of a member become vacant shall be determined by a Judge of the National Court constituted as the Electoral Court.

(2) An appeal against a decision of the Electoral Court made under clause (1)above shall lie to the Supreme Court."

138. The recommendation was made against the backdrop of s 39 of the *PNG Act,* which appears in the following terms:

"39.

(1) A question respecting the qualifications of a member of the House of Assembly , or respecting a vacancy in the House of Assembly, not being a question of a disputed election or of a disputed return in connexion with an election, may be determined by the House of Assembly or may be referred by resolution of the House of Assembly to the Supreme Court, which shall thereupon hear and determine the question.

*(2) When a question is referred to the Supreme Court under the last preceding sub-section, the Speaker or, if the Speaker is not present at the meeting of the House of Assembly at which the reference is made, the member presiding at the meeting in his absence shall transmit to the Supreme Court a statement of the question upon which determination of the Court is desired together with any record of proceedings or any papers, reports or documents relating to the question in the possession of the House of Assembly." (*underlining is my emphasis).

139. It is worth noting that s 39(1) of the *PNG Act* expressly vested in the House of Assembly and the pre-Independence Supreme Court (now National Court), equal jurisdiction to determine questions concerning qualifications of a member or a vacancy in the House of Assembly. The CPC departed from this position and recommended that the National Court should be given exclusive jurisdiction to determine questions as to disputed election and to determine questions with respect to a person's qualification to be or remain a member

other than through a disputed election. The same position is maintained in s 135, and in Division 2 of OLNLLGE, Part XVIII, Div. 2. The House of Assembly power to determine the question was not retained and this is reflected in the any of the vacancy or qualification provisions in the Constitution (s 103, s 104, etc) and the OLNLLGE, Part XVIII. There is no express provision in s 104 for giving the Parliament or the Speaker power to determine any question as to a vacancy under s 104 (2)(d). There is also no provision in s 104 for automatic disqualification of a member under s 104 (2) (d).

140. The National Court is given exclusive jurisdiction to determine any questions as to the qualification of a person to be or remain a member of Parliament. In my opinion, this power is part and parcel of the power vested by the *Constitution* in the National Court, to the exclusion of all other statutory authorities including the Parliament, to determine questions relating to the qualification of persons to be elected to Parliament and to be or remain a member of the Parliament. Members of Parliament are elected by the people to Parliament and they hold that office, in the exercise of their Constitutional right guaranteed by s 50 of the *Constitution*. The deprivation of that protected right can only be done by an independent and impartial Court or tribunal prescribed by law: *Constitution*, s 37 (11). The National Court is the court that determines a question relating to a person's qualification to be elected to Parliament or be or remain a member of Parliament by virtue of express provision in s 135 of the *Constitution* and Part XVIII of the *Organic Law on National and Local-Level Government Elections.*

141. Section 135 is a general empowerment provision that vests exclusive jurisdiction in the National Court to hear and determine any questions concerning the qualification of a member of Parliament in two distinct situations. Whilst there is no express reference in s 135 to OLNLLGE, this can be easily resolved by interpretation.

142. There are two distinct situations under s 135. The OLNLLGE is the only other form of Constitutional law that gives the National Court

sitting as the Court of Disputed Returns exclusive jurisdiction to hear and determine any disputes as to the validity of an election. The procedure is found in OLNLLGE, Part XVIII, Div.1. The OLNLLG also gives the National Court exclusive jurisdiction to determine any questions relating to the qualifications of a person to be or remain a member. The procedure is found in OLNLLGE, Part XVIII, Div. 2.

143. A pre-condition for the National Court's exercise of jurisdiction under s 135 (a) and OLNLLGE, Part XVIII, Div.2 is that there must be a *question* to be tried. In this Reference, counsel did not fully address us on the meaning of the term as it appears in to the qualification or vacancy appearing in s 135 and OLNLLGE., s 228. However this does not preclude this Court from ascribing a meaning to the expression if this Court feels that it is sufficiently informed to express its opinion. I believe I am in a position to do so.

144. I consider that not every concern that may be raised by a person or authority will raise a question as to the qualification of a person to be or remain a member of Parliament that is worthy of judicial consideration and determination. The concern must not be trivial or vexatious. The concern must originate from a genuine or credible source, and from someone who has a genuine interest in upholding the electoral laws; it must not come from some busybody bent on exacting revenge for political gain or expediency. The concern must be of such gravity that gives rise to a serious question as to the person's qualification to be or remain in office as a member of Parliament, such that it demands a judicial inquiry to determine the truth of the oncern.

145. In the case of concerns relating to any of the vacancy situations set out in s 104 (2), some will not meet that test because they are, by their very nature, uncontroversial such that they do not give rise to a serious question. In those situations, Parliament itself will take cognition of the situation when it is informed of it by the Speaker. I agree with arguments for the affirmative that in those cases, it is unnecessary for Parliament to refer the matter to the National Court

under s 135 (a) and OLNLLGE, Division 2. The vacancy situations that come under this category are as follows:

(a) member is appointed Governor-General;
(b) upon the expiry of day fixed for return of writ for the general election after he last became a member of the Parliament);
(c) resignation;
(d) death; and
(e) dismissal under leadership code.

146. Other vacancy situations under s 104 (2) such as s 104 (d) *(absent without leave for three consecutive sittings*) and (e) (*member takes or agrees to take unauthorized payment in respect of his services*), are potentially disputable or controversial. They may raise questions about deprivation of a member's s 50 Constitutional right. The concern should be carefully processed by the office of the Speaker and put to the member concerned first for his explanation before the matter is brought before Parliament. It is for Parliament to debate to decide on the matter. In the course of the debate, the member must be given an opportunity to give his position. If Parliament is satisfied that there is a serious question as to the qualification of the member to be or remain a member, it must pass the appropriate resolution to refer the matter to the National Court under OLNLLGE, Part XVIII, Div. 2. The member the subject of the resolution remains in office and continues to perform his duties until the National Court has dealt with the matter.

147. A determination under *Constitution*, s 135 and *OLNLLGE*, Part XVIII, Div.2 involves a determination of the member's constitutional right to be elected to and to hold that public office and to exercise public functions of the office during the term of his mandate (*Constitution*, s 50 (1) (d), (e)). Any such determination must be made by an independent and impartial court or authority prescribed by law (*Constitution*, s 37 (11)). That function is vested only in the National Court by s 135 and OLNLLGE. Neither Parliament nor the Speaker is given any power by express provision or by implication; direct or indirect, to determine such question when it arises. If it was intended

that questions as to qualification of a member of Parliament to hold that office, should be determined by an authority other than the National Court, the *Constitution* would have expressly said so in those provisions.

148. By way of contrast, in some other Constitutional democracies, Parliaments are vested with the power, by express provision in statutes, to determine question of removal resulting in permanent expulsion of a member. The decision is made on the vote: Constitution Act 1902 (Australia), s 14A (2) & (3) (*a member willfully contravenes a regulation made by the Head of State, inter alia, concerning a member's pecuniary interests*); Legislative Assembly Standing Order 29 of New South Wales, Australia, (*a Member adjudged by the House guilty of conduct unworthy of a Member of Parliament may be expelled by vote of the House, and the seat declared vacant*) (for leading case, see *Armstrong v Budd (1969) 71 SR (NSW) 386);* US Constitution, Article I, Section 5(a), Clause 1 (*Each house is the Judge of the Qualifications of its own members*), Clause 2 (*each house to determine Rules of its proceedings to punish its members for disorderly behavior, and with the Concurrence of two thirds, expel a Member*). In the United Kingdom, the authority to expel a member from the House rests with a decision of the House of Commons (not the Speaker) to decide by resolution. New Zealand and Canada have provisions in their statutes for Parliament, by resolution, to expel a member for various reasons: for discussion on expulsion of members in these and other countries, see Gareth Griffin, *Expulsion of Members of NWS Parliament, Briefing Paper No. 17 /2003,* NSW Parliamentary Library Research Service publications August 2003.

149. In those Parliamentary democracies where statutory provisions permit Parliament to expel a member, expulsion is the last resort and it is rarely done. Even when it is used, any proposal to expel a member is subject of a rigorous process to ventilate the grounds for expulsion; and; when, if ever, the matter ends up in Parliament, a majority by two thirds or five sixths is required to pass the resolution. This stringent process in necessary to prevent abuse by what could potentially

"*become a dangerous weapon – comparable to verification of credentials – in the hands of the majority.": see* Marc Van der Hulst, *The Parliamentary Mandate – A Global Comparative Study,* Inter-Parliamentary Union, Geneva, 2000; the passage appears on pages 20-21.

150. When Parliament is considering a decision under s 135 (a) of the Constitution and OLNLLGE,s 228, the conduct of proceedings is subject to the Standing Orders. I would strongly recommend to our Parliament to follow the practice in other Constitutional democracies by , amongst other measures, promulgating Standing Orders that would require an absolute majority of votes to pass a resolution. This will signify the importance that the Constitution attaches to the removal process of an elected leader.

151. It is clear to my mind that the Constituent Assembly deliberately enacted s 104 (2) in such a way that where a question of vacancy in the office of a member of Parliament arises under any of the grounds set out therein, the question should be judicially determined by an independent and impartial Court or tribunal, namely the National Court, by recourse s 135 of the *Constitution*, invoking the procedure contained in *OLNLLGE*, Part VIII, Division 2, ss 228 – 233. No express provision exists in s 104 which authorizes the Parliament or the Speaker to determine a question of qualification of a member to be or to remain a member of Parliament. The National Court has exclusive jurisdiction to determine the question pursuant to s 135 and OLNLLGE, Part XVIII, Division 2, ss 228 – s 233.

152. The foregoing reasons dispose of the arguments made by counsel for the affirmative on those issues.

153. Applying the principles enunciated in the foregoing to the facts of this case, Parliament validly granted to Sir Michael leave of absence for the May meeting. Therefore he had not missed three consecutive sittings without leave. He remained a member of Parliament from 30th

March to 6 September. He had not ceased to be a member by operation of law at any time between 30 March and 10 August. There was no basis in law for the Speaker to pronounce Sir Michael's cessation of membership in the Parliament. The pronouncement by the Speaker that Sir Michael had ceased to be the member for East Sepik Provincial seat, in effect, amounted to a determination by the Speaker that was made in breach of s 104 (2(d) and by that very act; constituted an usurpation of the National Court's exclusive jurisdiction to determine that question. On 6 September, Sir Michael was expelled from the house by the Speaker without giving him an opportunity to be heard, in breach of s 50 of the *Constitution*. The question of vacancy in the seat held by Sir Michael arose in controversial circumstances which gave rise to serious a question as to his remaining to be a member. The Speaker should have facilitated debate on the matter and allowed the Parliament to make its own decision after hearing Sir Michael who was in attendance at the meeting. The Speaker lacked power to rescind the Parliament's decision of 17th May to give Sir Michael leave of absence from the May sitting. The Speaker's pronouncement or decision of 6th September is in breach of s 135, s 104 (2) (d) and OLNLLGE, Division 2. To the extent that Parliament supported or acquiesced to the Speaker's decision, Parliament also breached those provisions. I conclude that the Speaker's decision or pronouncement of 6th September 2011and Parliament's support for this decision are unconstitutional and invalid. Sir Michael remained a member of Parliament at all material times.

154. An issue arises as to whether Sir Michael was denied natural justice when he was not given an opportunity to be heard before the Speaker announced the disqualification. I accept arguments for the affirmative that s 59 of the *Constitution* under which the argument is based may have no application to a matter that is the subject of Parliamentary proceedings. The correct position is that he could assert his s 50 right on the floor of Parliament or commence an action under s 57 of the *Constitution* to enforce his right under s 50 of the *Constitution*.

6. Miscellaneous matters

(a) Justiciability - Decision made by the Head of State on advice – Constitution, s 86 (4) of the Constitution.

155. This point is raised in Question No 32 and 33 of the Reference with regard to non-justiciability of the appointment of the Prime Minister and the appointment of the Deputy Prime Minister on advice given by the Parliament and the Prime Minister respectively. The Head of State in Papua New Guinea has no independent executive power. To the extent that the appointments are made on advice in breach of the *Constitution*, the decisions are justiciable: see s 86 (2): *Kekedo v Burns Philp (PNG) Ltd* [1988 – 89] PNGLR 122, *Kila Wari and others v Gabriel Ramoi and Another* [1986] PNGLR 112, *The Independent State of Papua New Guinea v Philip Kapal* [1987] PNGLR 417 at 420 – 421; *The Matter Pursuant to Section 18(1) of The Constitution, Southern Highlands Provincial Government v Sir Michael T Somare; Sir Matiabe Yuwi v Sir Michael T Somare* (2007) SC854.

(a) Should the Court decline to answer the questions in the Reference – Supreme Court Rules, O 4 r 16.

156. It is argued for the affirmative that this Court should decline to answer the questions in the Reference because the medical evidence shows and the trial Judge found that Sir Michael is unfit to carry out the functions of this high office since 30 March and even up to the date of trial in October 2011; and his successor is doing a good job in filling the vacuum. The argument was dismissed by counsel for the negative as of no relevance to the issues at hand. I accept arguments of counsel for the negative.

157. For the foregoing reasons, I answer the questions in the Reference as set out in the **Appendix** of this judgment.

6. Effect of Answers to Questions in the Reference:

158. Pursuant to s 19 (3) of the *Constitution*, an opinion given by this Court on the interpretation and application of a provision (s) of Constitutional law is binding. It is in the inherent power of this Court to give orders in the nature of declaratory orders or injunctions to give effect to its opinion. This power has been exercised in many instances other constitutional cases coming under its original jurisdiction: see *OLPIAC* case. I consider this case to be an appropriate case in which that power can be exercised.

7. Declaratory orders

159. I would issue the orders set out below and those orders take effect forthwith from this day . The orders are:

(1) The decisions of the Parliament made on 2 August 2011 to declare a vacancy in the office of the Prime Minister held by the Honourable Sir Michael Somare purportedly under s 142 (2) and Schedule 1.10 (3) of the Constitution and to appoint the Honourable Peter O'Neill as the new Prime Minister purportedly under s 142 (3) or (4); and which decisions were given effect to by the Head of State and gazette in the National Gazette, are declared unconstitutional and therefore invalid, effective from the date of this Judgment..

(2) The decision of the Speaker of Parliament the Hon Jeffrey Nape to inform Parliament that the Hon Sir Michael Somare ceased to hold office as the member for East Sepik Provincial seat is declared unconstitutional and therefore invalid, effective from the date of this Judgment..

(3) That the Hon Sir Michael Somare is restored to office as the Prime Minister of Papua New Guinea forthwith.

160. I would reserve on the question of costs to be argued later.

SALIKA: DCJ

Introduction

1. This special reference arises from a decision of Parliament made on 2 August, 2011 whereby Parliament declared a vacancy in the office of the Prime Minister.

2. At that material time Hon. Sir Michael Somare occupied the office of Prime Minister.

3. After Parliament declared the vacancy in the office of Prime Minister, Hon. Peter O'Neil was then elected on the floor of Parliament to fill in the just declared vacancy in the Office of Prime Minister.

4. The declaration of the vacancy in the Office of Prime Minister and the subsequent election of Hon. Mr Peter O'Neil as Prime Minister by Parliament are now issues raised as to whether what happened in Parliament on 2 August, 2011 are constitutionally valid.

5. The Special Reference was filed by the East Sepik Provincial Executive Council the Referror. Provincial Assemblies and their Executives are authorized authorities under s.19 of the Constitution that are entitled to make application to the Supreme Court for questions relating to interpretation of application of a constitutional law.

6. I have read the opening paragraphs of the opinion of the Chief Justice namely paragraphs 1,2,3,4,5,6,8,9 and 10 and repeat them in my own opinion.

THE COURTS DUTY TO INTERPRET CONSTITUTIONAL LAW

7. It is this Court's duty to interpret the relevant provisions of the Constitution which are at play in this case. Constitutional provisions which need to come under close scrutiny by this Court are :-

   Section 141

   141. Nature of the Ministry: collective responsibility.

The Ministry is a Parliamentary Executive, and therefore—

(a) *no person who is not a member of the Parliament is eligible to be appointed to be a Minister, and, except as is expressly provided in this Constitution to the contrary, a Minister who ceases to be a member of the Parliament ceases to hold office as a Minister; and*

(b) *it is collectively answerable to the People, through the Parliament, for the proper carrying out of the executive government of Papua New Guinea and for all things done by or under the authority of the National Executive; and*

(c) *it is liable to be dismissed from office, either collectively or individually, in accordance with this Subdivision.*

Section 142

142. The Prime Minister.

(1) An office of Prime Minister is hereby established.

(2) The Prime Minister shall be appointed, at the first meeting of the Parliament after a general election and otherwise from time to time as the occasion for the appointment of a Prime Minister arises, by the Head of State, acting in accordance with a decision of the Parliament.

(3) If the Parliament is in session when a Prime Minister is to be appointed, the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day.

(4) If the Parliament is not in session when a Prime Minister is to be appointed, the Speaker shall immediately call a meeting of the Parliament, and the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day.

(5) The Prime Minister—

(a) ***shall be dismissed from office by the Head of State if the Parliament passes, in accordance with Section 145 (motions of no confidence), a motion of no confidence in him or the Ministry, except where the motion is moved within the last 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election; and***

(b) ***may be dismissed from office in accordance with Division III.2 (leadership code); and***

(c) ***may be removed from office by the Head of State, acting in accordance with a decision of the Parliament, if the Speaker advises the Parliament that two medical practitioners appointed by the National Authority responsible for the registration or licensing of medical practitioners have jointly reported in accordance with an Act of the Parliament that, in their professional opinions, the Prime Minister is unfit, by reason of physical or mental incapacity, to carry out the duties of his office.***

(6) The Prime Minister may be suspended from office—

(a) ***by the tribunal appointed under an Organic Law made for the purposes of Section 28 (further provisions), pending an investigation into a question of misconduct in office within the meaning of Division III.2 (leadership code), and any resultant action; or***

(b) ***in accordance with an Act of the Parliament, pending an investigation for the purposes of Subsection (5)(c), and any resultant action by the Parliament.***

(7) An Organic Law made for the purposes of Subdivision VI.2.H (Protection of Elections from Outside or Hidden Influence and Strengthening of Political Parties) may provide that in certain circumstances a member of the Parliament is not eligible to be appointed to or hold the office of Prime Minister.

Section 143

143. Acting Prime Minister.

(1) Subject to Subsection (2) an Act of the Parliament shall make provision for and in respect of the appointment of a Minister to be Acting Prime Minister to exercise and perform the powers, functions, duties and responsibilities of the Prime Minister when—

(a) there is a vacancy in the office of Prime Minister; or

(b) the Prime Minister is suspended from office; or

(c) the Prime Minister is—

(i) absent from the country; or

(ii) out of speedy and effective communication; or

(iii) otherwise unable or not readily available to perform the duties of his office.

(2) Where a Prime Minister is dismissed under Section 142(5)(a) (the Prime Minister) the person nominated under Section 145(2)(a) (motions of no confidence)—

(a) becomes the Acting Prime Minister until he is appointed a Prime Minister in accordance with Section 142(2) (the Prime Minister); and

(b) may exercise and perform all the powers, functions, duties and responsibilities of a Prime Minister.

(3) The question whether the occasion for the appointment of an Acting Prime Minister or for the exercise or performance of a power, function, duty or responsibility by an Acting Prime Minister, under this section has arisen or has ceased, is non-justiciable.

Section 145

145. Motions of no confidence.

(1) For the purposes of Sections 142 (the Prime Minister) and 144 (other Ministers), a motion of no confidence is a motion—

(a) that is expressed to be a motion of no confidence in the Prime Minister, the Ministry or a Minister, as the case may be; and

(b) of which not less than one week's notice, signed by a number of members of the Parliament being not less than one-tenth of

the total number of seats in the Parliament, has been given in accordance with the Standing Orders of the Parliament.

(2) A motion of no confidence in the Prime Minister or the Ministry—

(a) moved during the first four years of the life of Parliament shall not be allowed unless it nominates the next Prime Minister; and

(b) moved within 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election shall not be allowed if it nominates the next Prime Minister.

(3) A motion of no confidence in the Prime Minister or the Ministry moved in accordance with Subsection (2)(a) may not be amended in respect of the name of the person nominated as the next Prime Minister except by substituting the name of some other person.

(4) A motion of no confidence in the Prime Minister or in the Ministry may not be moved during the period of eighteen months commencing on the date of the appointment of the Prime Minister.

Section 146

146. Resignation.

(1) The Prime Minister may resign from office by notice in writing to the Head of State.

(2) A Minister other than the Prime Minister may resign from office by notice in writing to the Prime Minister.

Section 147

147. Normal term of office.

(1) Unless he earlier—

(a) dies; or

(b) subject to Subsection (2), resigns; or

(c) subject to Subsection (3), ceases to be qualified to be a Minister; or

(d) is dismissed or removed from office,

a Minister (including the Prime Minister) holds office until the next appointment of a Prime Minister.

(2) Notwithstanding Subsection (1)(b)—

(a) a Prime Minister who resigns; and

(b) a Ministry that resigns collectively,

shall continue in office until the appointment of the next Prime Minister.

(3) Notwithstanding Subsection (1)(c), a Minister who—

(a) ceases, by reason of a general election, to be a member of the Parliament; but

(b) remains otherwise qualified to be a member of the Parliament,

shall continue in office until the next appointment of a Prime Minister.

Section 148

148. Functions, etc., of Ministers.

(1) Ministers (including the Prime Minister) have such titles, portfolios and responsibilities as are determined from time to time by the Prime Minister.

(2) Except as provided by a Constitutional Law or an Act of the Parliament, all departments, sections, branches and functions of government must be the political responsibility of a Minister, and the Prime Minister is politically responsible for any of them that are not specifically allocated under this section.

(3) Subsection (2) does not confer on a Minister any power of direction or control.

Subdivision C.—The National Executive Council.

Section 149

149. The National Executive Council.

(1) A National Executive Council is hereby established.

(2) The Council shall consist of all the Ministers (including the Prime Minister when he is present as Chairman).

(3) The functions of the Council are—

(a) to be responsible, in accordance with this Constitution, for the executive government of Papua New Guinea; and

(b) such other functions as are allocated to it by this Constitution or any other law.

(4) Except where the contrary intention appears, nothing in this Constitution prevents the powers, functions, duties or responsibilities of the Council from being exercised, as determined by it, through a Minister.

(5) Subject to any Organic Law or Act of the Parliament, the procedures of the Council are as determined by it.

Section 134

134. Proceedings non-justiciable.

Except as is specifically provided by a Constitutional Law, the question, whether the procedures prescribed for the Parliament or its committees have been complied with, is non-justiciable, and a certificate by the Speaker under Section 110 (certification as to making of laws) is conclusive as to the matters required to be set out in it.

Section 138

138. Vesting of the executive power.

Subject to this Constitution, the executive power of the People is vested in the Head of State, to be exercised in accordance with Division V.2 (functions, etc., of the Head of State).

Section 139

139. The National Executive.

The National Executive consists of—

(a) the Head of State acting in accordance with Division V.2 (functions, etc., of the Head of State); and

(b) the National Executive Council.

Section 103

103. Qualifications for and disqualifications from membership.

(1) A member of the Parliament must be not less than 25 years of age.

(2) A candidate for election to the parliament must have been born in the electorate for which he intends to nominate or have resided in the electorate for a continuous period of two years immediately preceding his nomination or for a period of five years at any time and must pay a nomination fee of K1,000.00.

(3) A person is not qualified to be, or to remain, a member of the Parliament if—

(a) he is not entitled to vote in elections to the Parliament; or

(b) he is of unsound mind within the meaning of any law relating to the protection of the persons and property of persons of unsound mind; or

(c) subject to Subsections (4) to (7), he is under sentence of death or imprisonment for a period of more than nine months; or

(d) he is adjudged insolvent under any law; or

(e) he has been convicted under any law of an indictable offence committed after the coming into operation of the Constitutional Amendment No 24—Electoral Reforms; or

(f) he is otherwise disqualified under this Constitution.

(4) Where a person is under sentence of death or imprisonment for a period exceeding nine months, the operation of Subsection (3)(d) is suspended until—

(a) the end of any statutory period allowed for appeals against the conviction or sentence; or

(b) if an appeal is lodged within the period referred to in paragraph (a), the appeal is determined.

(5) The references in Subsection (4), to appeals and to the statutory period allowed for appeals shall, where there is provision for a series of appeals, be read as references to each appeal and to the statutory period allowed for each appeal.

(6) If a free pardon is granted, a conviction is quashed or a sentence is changed to a sentence of imprisonment for nine months or less, or some other form of penalty (other than death) is substituted, the disqualification ceases, and if at the time of the pardon, quashing, change of sentence or substitution of penalty the writ for the by-election has not been issued the member is restored to his seat.

(7) In this section—

"appeal" includes any form of judicial appeal or judicial review;

"statutory period allowed for appeals" means a definite period allowed by law for appeals, whether or not it is capable of extension, but does not include an extension of such a definite period granted or that may be granted unless it is granted within that definite period.

Section 104

104. Normal term of office.

(1) An elected member of the Parliament takes office on the day immediately following the day fixed for the return of the writ for the election in his electorate.

(2) The seat of a member of the Parliament becomes vacant—

(a) if he is appointed as Governor-General; or

(b) upon the expiry of the day fixed for the return of the writs, for the general election after he last became a member of the Parliament; or

(c) if he resigns his seat by notice in writing to the Speaker, or in the case of the Speaker to the Clerk of the Parliament; or

(d) if he is absent, without leave of the Parliament, during the whole of three consecutive meetings of the Parliament unless Parliament decides to waive this rule upon satisfactory reasons being given; or

(e) if, except as authorized by or under an Organic Law or an Act of the Parliament, he directly or indirectly takes or agrees to take any payment in respect of his services in the Parliament; or

(f) if he becomes disqualified under Section 103 (qualifications for and disqualifications from membership); or

(g) on his death; or

(h) if he is dismissed from office under Division III.2 (leadership code).

(3) For the purposes of Subsection (2)(d), a meeting of the Parliament commences when the Parliament first sits following a general election, prorogation of the Parliament or an adjournment of the Parliament otherwise than for a period

of less than 12 days and ends when next the Parliament is prorogued or adjourned otherwise than for a period of less than 12 days.

"24. Use of certain materials as aids to interpretation.

(1) The official records of debates and of votes and proceedings—

(a) in the pre-Independence House of Assembly on the report of the Constitutional Planning Committee; and

(b) in the Constituent Assembly on the draft of this Constitution, together with that report and any other documents or papers tabled for the purposes of or in connexion with those debates, may be used, so far as they are relevant, as aids to interpretation where any question relating to the interpretation or application of any provision of a Constitutional Law arises.

(2) An Act of the Parliament may make provision for the manner of proof of the records and documents referred to in Subsection (1).

(3) In Subsection (1), "the report of the Constitutional Planning Committee" means the Final Report of the pre-Independence Constitutional Planning Committee dated 13 August 1974 and presented to the pre-Independence House of Assembly on 16 August 1974."

PRIME MINISTER AND NATIONAL EXECUTIVE COUNCIL ACT

Section 6

6. Suspension from office of the Prime Minister.

(1) The Head of State, acting on advice, may, on a matter relating to the health of the Prime Minister, request the National Authority responsible for the registration and licensing of medical practitioners to appoint two medical practitioners to examine the Prime Minister

and to provide him with full details of the examination, together with their joint certification that the Prime Minister—

(a) is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office, and as to how long they consider that the unfitness or inability will continue to exist; or

(b) is not suffering from any physical or mental incapacity; or

(c) although suffering from physical or mental incapacity, is still able to carry out the duties of his office; or

(d) refuses to be examined.

(2) The Head of State, acting on advice, may, where he has called for a report under Subsection (1), suspend the Prime Minister from office.

(3) The medical practitioners referred to in Subsection (1) shall report to the Head of State as soon as practicable, but in any event no later than 28 days, after the date of their appointment.

(4) If the Prime Minister refuses to be examined by the medical practitioners referred to in Subsection (1), he is guilty of misconduct in office within the meaning of Division III.2. (leadership code) of the Constitution.

(5) Where the medical practitioners referred to in Subsection (1) certify that the Prime Minister—

(a) is not suffering from any physical or mental incapacity; or

(b) although suffering from mental or physical incapacity is still able to carry out his duties,

the Head of State, acting on advice, shall immediately remove any suspension.

(6) Where the medical practitioners referred to in Subsection (1) certify that—

(a) the Prime Minister is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office; and

(b) the unfitness or inability will, in their opinion, continue to exist for a period of more than three months from the date on which he was examined by them,

the Head of State shall forward the report of the medical practitioners, together with their certification, to the Speaker for presentation to the Parliament, and the Prime Minister is suspended from office until the Parliament has dealt with the matter.

(7) Where the medical practitioners referred to in Subsection (1) certify that—

(a) the Prime Minister is unfit or unable, by reason of physical or mental incapacity, to carry out the duties of his office; and

(b) the unfitness or inability will, in their opinion, last for not more than three months from the date on which he was examined by them,

the Head of State, acting on advice, shall direct the medical practitioners to conduct another examination of the Prime Minister at the end of the period for which the unfitness or inability is expected to last, and the Prime Minister is suspended from office until he is certified to be fit to carry out his duties.

(8) Where, on any second or subsequent examination, the medical practitioners referred to in Subsection (1) certify that the unfitness or inability of the Prime Minister will, in their opinion, continue to exist for a period of more than three months measured from the date on which he was first examined by them, the Head of State, acting on advice, shall forward the report of the medical practitioners together with their certification to the Speaker for presentation to the Parliament and the Prime Minister is suspended from office until the Parliament has dealt with the matter.

(9) Where the Speaker has received a report under Subsection (6) or (8), he shall present it to the Parliament on the first sitting day of the Parliament after he receives it.

(10) If the Parliament is not meeting when the Speaker receives the report and is not due to meet for more than 14 days after that time, a meeting shall be called as soon as practicable.

(11) Where a report is presented to the Parliament under Subsection (6) or (8), the Parliament may advise the Head of State to remove the Prime Minister from office.

8. The Constitutional Planning Committee Report is a very useful tool which judges often rely on as an aid to interpretation of Constitutional law. Section 24 of the Constitution specifically authorizes the CPC report as an aid to interpretation of Constitutional Law.

9. In *The State v The Independent Tribunal : Exparte Sasakila (1976) PNGLR 491* of 506-507, Kearney J said:

"In my opinion these provisions amount to a direction to the Court that in carrying out its functions under constitution s.18(1) the words actually used in the Act do not have to be strictly adhered to but are to be construed with the assistance of the materials referred to I Constitution s.24, so as best to attain what Parliament intended. When Constitution ss.109(4) and 158(2) are themselves interpreted with the aid of s.24, this view is fortified; there are several references in Chapter 8 of the Report of the Constitutional Planning Committee which point against the Court taking a "narrowly legalistic" or 'literal' approach, and thus sacrificing the 'spirit for the letter of the Constitution'. The 'dynamic character' of the Constitution is emphasized; in interpreting the laws, the judges are urged to use 'judicial ingenuity' in appropriate cases, to do justice. One consequence of this approach to interpretation is that the Court should not fail to give a provision the effect it considers the Parliament intended, by applying a literal or 'plain meaning' test nor should it attribute to the legislature an intention to produce a

capricious or unjust result. The search throughout is for the intention of Parliament, a process which remains, formally at least, one of interpretation and not of legislation, and one in which the best guide remains the provisions of the Act itself."

10. I respectfully subscribe to the views expressed above by Kearney J, and I take that approach. There have been cases and will be cases when it may not be appropriate to refer to the CPC reports as aids to interpretation of the Constitution as was the view expressed by Wilson J in ***Premdas v The State (1979) PNGLR 329***.

11. I agree with the statement of Wilson J in *Premdas v The State (1979) PNGLR 329* where he said :-

    "In order to find the answer to this question one needs to interpret the provisions of the Constitution itself. For the purpose of the interpretation of the constitution the provisions of Sch.1 (Rules for Shortening and Interpretation of the Constitution it is necessary to read the Constitution, being a constitutional law in itself, as a whole (see Sch 1.5(1) of the Constitution) and to give to all provisions thereof and all words, expressions and propositions therein "their fair and liberal meaning (see Sch.1.5(2) of the Constitution."

12. In the instant case, I am respectfully of the opinion that it is and will be appropriate for us to refer to the CPC reports as a guide or aid to interpretations of the various provisions of the Constitution that I have with respect identified in paragraph 7 above.

FACTUAL BACKGROUND

AGREED FACTS

13. The last general election to the Parliament occurred in 2007. At that election Sir Michael Somare was elected to the seat of East Sepik Provincial.

14. Sir Michael Somare was appointed Prime Minister at the first meeting of the Parliament after the 2007 general election pursuant to s.142(2) of the Constitution and in accordance with a decision of the Parliament.

15. On 24 March 2011 Sir Michael travelled to Singapore for medical consultation and returned to PNG on 28 August 2011.

16. As at 2 August Sir Michael had not been removed or dismissed from the office of Prime Minister within the meaning of s.142(5) of the Constitution.

17. After prayers at the commencement of the sitting of the Parliament on 2 August 2011, the first day of the August meeting, the member for Vanimo Green, the Hon. Belden Namah, asked the Speaker for leave to move a motion without notice. Leave was granted.

18. Hon. Namah then moved a second motion that "pursuant to s.142(2) of the Constitution and Schedule 1.10(3) of the Constitution, and the inherent powers of the Parliament that we declare the Office of the Prime Minister be vacant," and that consequently, in accordance with the provision of s.142(2), this Parliament proceed forthwith to elect and appoint a new Prime Minister. This motion was then carried on the voices.

19. The Speaker then called for nominations for the election of the Prime Minister. Mr Namah moved a motion nominating the Hon. Peter O'Neill, member for Ialibu Pangia Open, as Prime Minister. There was no other nomination.

20. The motion for the election of the Prime Minister was voted by a head count involving the members standing and being counted. Seventy (70) members voted in favour of the motion that Mr O'Neill be elected as Prime Minister. Twenty Four (24) members voted against the motion, including the Hon. Sam Abal and the Hon. Sir Arnold Amet.

21. Hon. Namah then moved a motion to the effect that Parliament be adjourned to allow the ringing of the bells to allow Mr O'Neill to present himself to the Governor General

to be sworn in as Prime Minister.

22. The East Sepik Provincial Executive is a provincial executive council established by the Organic Law on Provincial and Local Level Governments, s.23.

23. Sir Michael Somare did not attend the first meeting of the Parliament in 2011 which occurred in January 2011.

24. Sir Michael attended the second meeting of Parliament in 2011, which occupied one sitting day, namely 25 February 2011.

25. On 29 March, Sir Michael travelled to Singapore and on 30 March was admitted to hospital because of heart failure.

26. Sir Michael remained hospitalized in Singapore continuously from 30 March 2011 until at least 26 August, 2011. During such period Sir Michael:
    a. Had aortic valve replacement surgery on 21 April;
    b. Had a cardiac arrest, and had to be resuscitated and underwent emergency surgery on 4 May 2011;
    c. Underwent further emergency surgery on 11 May 2011;
    d. Had acute renal failure and was dialysed;
    e. Was unable to breathe unassisted and required ventilation;
    f. Suffered serious infections.

27. Sir Michael remained in Singapore continuously from 24 March 2011 until 4 September 2011.

28. During the whole of the period referred to Sir Michael was absent from Papua New Guinea.

29. During the period from 24 March to September 2011, the Parliament sat on the

following dates:

(a) On 10, 11, 12, 13,17, 18, 20, 24, 26 and 27 May, 2011.

(b) On 14, 16, 17, 21, 22, 23 and 24 June 2011.

(c) On 2 and 9 August, 2011.

30. Sir Michael did not attend any day of sitting set out in paragraph 30 above.

31. On the first day of the May meeting, 10 May 2011, the May 2011, The Hon. Sam Abal made a statement to the Parliament on the health of Sir Michael Somare as a matter of public importance. He said that:

> *"The people of Papua New Guinea have been praying for our people for our Prime Minister since he was admitted to hospital for surgery in Singapore. Mr Acting Speaker, in the interest of the people of Papua New Guinea, I take the opportunity to explain to Parliament the condition of the Prime Minister, Grand Chief Sir Michael Somare.*
>
> *Following Sir Michael's suspension from Office last month, he took leave to address a condition in his heart last month that has prevailed over a long period of time. Sir Michael had a successful valve replacement surgery. The surgery was successful but Sir Michael developed complications in the post operative period that required corrective surgery. Consequently, corrective surgery has taken place and Sir Michael is in recovery. Due to the nature of the surgery, the period of recovery will be longer than anticipated.*
>
> *Mr Acting Speaker, our senior cardiologist and Dean of the University of Papua New Guinea Medical School, Professor Isi Kevau who has been managing Sir Michael's valves over many years is involved in the management decisions in a consultative manner with his /Singapore cardiologist and the nursing staff. Professor Kevau is satisfied with the progress so far and has informed me that the medical staff are providing good medical care and good progress is being made at this time".*

32. On the fifth day of the May meeting, Acting Prime Minister, Hon. Paul Tiensten

without notice, moved a motion, passed by the Parliament, that:

> *"That leave of absence be granted to the Prime Minister Sir Michael Somare for the duration of this meeting."*

33. That motion of 17 May 2011 was not revoked or varied by the Parliament.

34. Sir Michael did not obtain any other leave from the Parliament other than the leave granted 17 May 2011.

35. On about 28 July 2011 the Hon. Sam Abal submitted a business paper to the NEC.

36. On 28 July 2011, pursuant to the recommendation of the Hon. Sam Abal the NEC communicated to the Governor General the advice.

37. On 1 August, 2011, the Governor General pursuant to advice from the NEC by instrument requested the Papua New Guinea Medical Board to appoint two medical practitioners to examine Hon. Sir Michael.. The Governor General did not suspend Sir Michael from office.

38. No doctors were appointed pursuant to the instrument of the Governor General on 1 August, 2011.

39. On 2 August, 2011 Hon. Belden Namah moved for the suspension of Standing Orders of Parliament which was granted and then moved that Parliament declare a vacancy in the Office of the Prime Minister. The motion was carried and passed.

40. Hon. Namah then nominated Hon. Peter O'Neil to be Prime Minister. As no other nomination was received, Parliament voted 70 – 24 to elect Hon. O'Neil as Prime Minister.

41. Parliament also elected Hon. Belden Namah as Deputy Prime Minister.

LEADERSHIP TRIBUNAL PROCEEDINGS OF MARCH 2011

42. In order to understand the totality of this matter, I think it is appropriate to start from the Leadership Tribunal Proceeding.

43. On 21 February 2011, a Leadership Tribunal was appointed by the Chief Justice to inquire into and determine allegations of misconduct in office against Prime Minister Sir Michael Somare.

44. The Tribunal commenced its inquiry on 10 March 2011 and on 21 March 2011 found Sir Michael guilty of breaches of s.4 of the Organic law on Duties and Responsibilities of Leadership.

45. On 24 March 2011 the Tribunal recommended that Sir Michael be suspended from Office of the Prime Minister without pay for a period of 14 days.

46. On 24 March 2011, the Governor General suspended Sir Michael Somare without pay to take effect from 14 to 28 April 2011, in accordance with the decision of the Tribunal.

47. The findings of the Tribunal and the penalty imposed were not appealed against.

48. The effect of the findings of the Tribunal were that Sir Michael Somare was guilty of misconduct as a leader in Office of the Prime Minister and as a Member of Parliament.

49. The further effect of the findings of the Tribunal were that Sir Michael Somare had :-
    (a) Demeaned the Office of the Prime Minister
    (b) Allowed the integrity of the Office of the Prime Minister to be called into question.
    (c) Allowed his personal integrity to be called into question.
    (d) Diminished respect for and confidence in the integrity of government in Papua New Guinea. (see s.27 of the Constitution)

50. A Prime Minister in a democracy anywhere else in the world, found guilty of even the slightest misdemeanor would by convention resign for breaking the laws of his

country, even without the urging of the Tribunal. To emphasise the point on 17 November, 2011 Community Coalition Against Corruption issued a Press Statement published in the Post Courier on 18 November 2011 which hit the nail on the head when it said :

> "*In a democratic Society, a leader, even with the slightest misdemeanor, would step down from the position in order to retain integrity of the office he or she holds. In PNG too much precedence has been set; democracy would survive if our leaders make the change*".

In PNG with regret and respect, this is foreign language and unheard of.

51. To resign from Office of the Prime Minister after being found guilty of misconduct in office charges would be the most honorable thing to do, to protect and save the integrity of the Office of the Prime Minister and the integrity of the Government in Papua New Guinea. This point cannot be stressed anymore than what has been stated above and with respect I make this statement as a general statement, as a general rule to good governance and conduct.

52. Sir Michael did not resign from the office and as such his continued occupation and grip on the Office of Prime Minister and power, in my opinion further diminished the respect for and integrity of the Office of Prime Minister. He in my respectful opinion by convention ought to have resigned and led by example, but in my respectful opinion by not resigning from office is setting a bad precedent. In PNG I have not seen any evidence of a public official including leaders voluntarily resign or step aside from office after being criminally charged or charged under the Leadership code. "Innocent until proven guilty" is the catch word in Papua New Guinea. On the other hand, I am mindful that it is an individual's right to resign or not to resign and it is a fundamental tenet of law that a person charged is innocent until proven guilty. There must be a balance somewhere for people to respect the offices they hold by stepping aside or resigning.

SIR MICHAEL'S ABSENCE FROM PARLIAMENT IN 2011

53. Sir Michael has had aortic valve disease for 10 to 15 years and in March 2011, he started to feel more breathless than usual.

54. This was the beginning of heart failure which led to him flying to Singapore on 29 March 2011.

55. On 30 March 2011, Sir Michael was admitted to the Ward at the Raffles Hospital in Singapore.

56. In consultation with Sir Isi Kevau and Sir Michael's family and with the consent of Sir Michael it was agreed that Sir Michael should have an open heart surgery involving aortic valve replacement.

57. From 21 April 2011, Sir Michael underwent the open heart surgery.

58. On 28 April 2011 he was discharged from the ICU to the general ward where he made good progress and was said to be alert and mobile.

59. On 4 May 2011, Sir Michael developed a cardiac arrest and had to be resuscitated and rushed to the operating theatre for emergency surgery.

60. Bleeding in the chest cavity was the course of this catastrophic event and this was corrected surgically managed at ICU and was improving.

61. On 11 May 2011 he developed another bleeding episode and was rushed to the operating theatre and again the surgeon discovered the source of bleeding and ligated the leaking blood vessel.

62. There were many subsequent complications but Sir Michael displayed an amazing innate strength to recover.

63. On 28 September 2011, Sir Isi Kevau travelled to Singapore and met Sir Michael and accompanied him on a series of consultations and examinations with the doctors who operated on him and who treated him at Raffles Hospital.

64. Sir Michael's speech on that occasion was said to be normal and was said to be sharp and alert and walking around unaided.

65. The above events explain Sir Michael's absence from Parliament in 2011 but he was not discharged from Raffles Hospital until 27 or 28 August 2011, but since his discharge he has returned to Singapore on a number of occasions for review.

66. This evidence came out in the course of these proceedings and mostly not disputed.

67. Sir Michael never informed PNG through the National Executive Council or through the Acting Prime Minister that he would be undergoing a life threatening open heart surgery at any time up to and including 2 August, 2011. Might I also add that resignation or retirement was never anywhere in his thoughts just before having the surgery.

68. On 27 May 2011, the last day of the May sitting of Parliament a question was asked on the floor of Parliament as to whether there was any reason the procedure under s.142(5) (c) of the Constitution could not be invoked given the long absence of the Prime Minister for health reasons.

69. A then senior Minister in Government prevented further discussion on the question when he rose up to raise a point of order that the question was out of order. The Deputy Speaker ruled that the question put was out of order and that was the end of that attempt to discuss the Prime Minister's health concerns.

70. Between 6 August and 6 September 2011 Sir Michael did not make any request to the Parliament in respect of his absences from Parliament Meetings in 2011 or provide any information to Parliament in respect of his likely future attendances at meetings of Parliament.

71. Parliament never received any medical reports nor was it ever informed of Sir Michael's medical condition or status or when he might return to work, at any time it met.

72. There were a number of visits to Sir Michael in Singapore paid for by the Executive. Those who made the visits paid for by the Executive may have reported Sir Micheal's health condition to the Executive but the Executive never informed Parliament. They were not obliged to report to Parliament anyway. Any medical report to Parliament would be the report from the two doctors commissioned by the Governor General under s.142(5)(c).

73. Hon. Arthur Somare, a then senior Minister in Government made 3 visits to his father in Singapore paid for by the Executive between April and September 2011.

74. Whether Hon. Arthur Somare after returning from each of those times briefed the National Executive Council of the health condition of his father is only known to him and the NEC. Again whatever he reported was of no consequence because Parliament could only receive the reports of the 2 doctors. If the Executive was going to send anyone to Singapore to report on Sir Michael's health it ought to have been the two medical practitioners under s.142(5) of the Constitution.

STEPS TAKEN BY THE NATIONAL EXECUTIVE COUNCIL REGARDING SIR MICHAELS ABSENCE AND HIS HEALTH.

75. Questions must be asked as to what the NEC did in relation to effectively monitoring the health condition of Sir Michael and what it did to properly communicate that to the people of Papua New Guinea through Parliament. The NEC could only do that through s.142(5)(c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act.

76. The Executive power to the people of Papua New Guinea is vested in the Head of State who will only exercise power on advise from the NEC.

77. The Executive is accountable to the people of Papua New Guinea through Parliament s.141 of the Constitution provides:-

    141. Nature of the Ministry: collective responsibility.

    The Ministry is a Parliamentary Executive, and therefore—

> ***(a)*** ***no person who is not a member of the Parliament is eligible to be appointed to be a Minister, and, except as is expressly provided in this Constitution to the contrary, a Minister who ceases to be a member of the Parliament ceases to hold office as a Minister; and***
>
> ***(b)*** <u>***it is collectively answerable to the People, through the Parliament, for the proper carrying out of the executive government of Papua New Guinea and for all things done by or under the authority of the National Executive; and***</u>
>
> ***(c)*** ***it is liable to be dismissed from office, either collectively or individually, in accordance with this Subdivision. (emphasis added)***

78. As alluded to earlier the Parliament was never properly informed by the NEC of Sir Michael's health condition. The Acting Prime Minister tried to obtain frequent reports of Sir Michael from the time Sir Michael went to hospital in Singapore. He received two reports, one from Hon Arthur Somare and another from Hon. Timothy Bonga, but with respect these two men are not specialist doctors who attended to Sir Michael. The report of Sir Michael's health could only come to Parliament by invoking s.142(5)(c) of the Constitution and s.6 of the Prime Minister and the National Executive Council Act.

79. The Acting Prime Minister briefly reported to Parliament on 10 May 2011 but his report was not a report under s.142(5)(c) and s.6.

80. Hon. Arthur Somare made a press statement on 28 June 2011 on behalf of the Somare family that the family was retiring their father from politics.

81. It must be understood that it was not necessary for Sir Michael to address the nation. All that was needed at the least was for a report by two medical practitioners to be made or tabled in Parliament about the health of Sir Michael. It was the responsibility of the NEC to get a report and table it on the floor of Parliament to inform the people of PNG about the health of their Prime Minister.

82. It was absolutely necessary and urgent for the NEC to inform Parliament of the Prime Minister's health state. The NEC must be accountable to the people but on this important issue it was silent and did not perform its role. The Opposition tried to make it accountable but was defeated on numbers.

83. It could not treat Sir Michael's health matter as a secret to the Somare family only or the NEC only. Sir Michael's health was not only a matter of great public and national interest and importance but also a matter of Constitutional Law compliance.

84. The NEC took this matter so lightly that they failed to realize they were not complying with s.142(5)(c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act.

85. The Referror submitted that the s.142(5)(c) process had started and that the NEC did comply with the Constitutional Law and process but the fact remains that the process commenced belatedly.

PERTINENT FINDINGS BY CANNING, J

86. Parliament sat in May, June and August of 2011. Hon. Sir Michael Somare missed the 3 sittings, but was granted leave of absence for the May sittings and he did not seek leave of absence for the June and August sittings. This means that Hon. Sir Michael Somare missed only 2 sittings of Parliament without leave of absence from Parliament.

87. On my part I accept the finding that Hon. Sir Michael was away for two consecutive sittings without leave of Parliament.

88. On 27 May 2011, the last day of the May sitting of Parliament the then Opposition raised a question and asked as to whether there was any reason the procedure under s.142(5) of the Constitution and s.6 of the Prime Minister and National Executive Council Act could not be invoked given the absence of the Prime Minister for health reasons.

89. Instead of seriously considering the issue in all honesty and truthfully and allowing debate on the issue Hon. Paul Tienstein interjected by saying the question was out of order. The Deputy Speaker who was in the Speaker's chair then, ruled the question out of order. That is a matter this Court cannot inquire into as it is a matter for Standing Orders.

90. Here was an opportunity missed for the then Government to consider the process under s.142(5)(c) of the Constitution and Section 6 of the Prime Minister and National Executive Council Act. Up to today there is no report to present to Parliament.

91. Had these provisions been invoked soon after Sir Michael's hospitalization or after the May sittings of Parliament events of 2 August 2011 might not have been. This is the reality of the matter. NEC's inaction equals events of 2 August, 2011.

92. During the course of the hearing of this matter there is no direct medical evidence of any examination as to the medical fitness of Hon. Sir Michael Somare. The Court is made to assume he is still recovering. There is no evidence from Professor Isi Kevau that Hon. Sir Michael Somare is now fully recovered and that he is now mentally and physically fit to carry out his duties as a member of Parliament and that he is able to manage his own affairs and the affairs of the country.

93. Perhaps the most pertinent of the findings of Cannings, J on this issue is this; and I reproduce it for a better understanding of the magnitude of the matter on page 25 of his decision. It reads :-

> *(c) During what period, if any, was Sir Michael unable to perform the duties of the Office of the Prime Minister?*
>
> *He was admitted to hospital as a matter of urgency, when he started experiencing breathlessness. He remained in hospital for five months. He underwent major surgery on three separate occasions and for long periods was unable to communicate. In these circumstances I find that during the whole period of hospitalization, from 30 March to late August 2011, Sir Michael was unable to perform the duties of the Office of Prime Minister.*

94. The evidence of Hon. Sir Michael Somare's various doctors Dr Ekachai Dapanich is that Sir Michael's renal function on 1 August 2011 significantly improved. There is no evidence whether there is or will be complete recovery for his renal functions.

95. The evidence of Dr Sim Kwang Wei Eugene is that the aortic valve replacement surgery has healed and that when he last examined Sir Michael on 29 September 2011, his wounds had healed well and that he has completely recovered from the surgery and is fit to resume duties.

96. The evidence of Dr Ng Wai Lin is that on 29 September 2011, Hon. Sir Michael was back to his "*pre-morbid state prior to hospitalization apart from slight physical weakness due to wasting of quadricept muscle: full recovery is to be expected…*"

97. From all these medical evidence it is not unreasonable to conclude that Sir Michael while in a good recovery mode still needed time for a proper and full recovery, but again on my part I am satisfied that Sir Michael was not of unsound mind as contended by the First Intervenor and intervenors aligned to it.

98. Cannings, J also found Hon. Sir Michael was not capable of performing the duties and functions of the office of Prime Minister for 5 months and if the month of September was to be included it would be 6 months.

99. Did an occasion arise on 2 August 2011, for the appointment of a Prime Minister under s.142(2) of the Constitution. Bearing in mind that by then the NEC had not presented any medical report to Parliament pursuant to s.142(5)(c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act.

100. The motion by Hon. Belden Namah on the floor of Parliament on 2 August was principally pursuant to s.142(2) of the Constitution, that is that a motion without notice was put that Parliament declare there is a vacancy in the office of the Prime Minister.

101. Moving a motion without notice on the floor of Parliament is governed by Standing Orders of Parliament and is not justiciable. The Court cannot inquire into legality of it. See Haiveta v Wingti (NO 2) (1994) PNGLR 160. A motion without notice is and was not a motion of no confidence which has a special constitutional and separate process and significance. A motion of no confidence is that – there is no confidence in the Prime Minister or the government. This motion was different and brought about by the fact that that Prime Minister had been absent from Office for 5 months already and there was no indication when he might return and the fact that there was no medical report to Parliament to inform it, or explain the long absence.

102. What is justiciable is whether the procedure under s.142(5)(c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act were complied with.

103. It is not disputed that the NEC did not start the Constitutional process of dismissing the Prime Minister from Office until belatedly on 29 July 2011.

104. Had the Executive advised the Head of State (Governor General) to invoke the provisions of s.142(5)(c) and s.6, as early as March or April of 2011, I have no doubt in my mind that the two doctors would have made similar findings as found by Cannings, J.

105. As the story goes the NEC did not advise the Head of State and the Head of State did not request for the two doctors to examine the Prime Minister and consider whether he was physically and mentally fit to hold office. The Constitutional process leading to a vacancy in the Office of the Prime Minister was thus frustrated by the inaction of the NEC.

106. Parliament was accordingly moved without notice to declare the vacancy in the Office of the Prime Minister when the Constitutional process to declare a vacancy was frustrated.

107. In the light of the inaction, by the NEC to invoke s.142(5) (c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act as soon as possible, can the then Government fairly “cry” over something they brought

on themselves? Have they come to court with clean hands? The answer is "no" they have not come with clean hands.

108. In colloquial terms can they "have their cake and eat it?" Again the answer is "no".

109. There is nothing in the Constitutional Law or the Prime Minister and National Executive Council Act as to what happens where the National Executive Council failed to invoke s.142(5)(c) and s.6 provisions as soon as possible and where the Constitutional process is frustrated.

110. The next question then is can the Court sanction the actions of Parliament on 2 August, 2011? The answer to this question lie in my respectful opinion in the Standing Orders of Parliament and whether the process under s.142(2) of the Constitution is justiciable.

111. In my view there is a gap in the law and it is a fundamental gap because the NEC could manipulate the process for political convenience rather than act in the best interest of the country. I address the issue of the gap in another part of my decision and the consequences that should follow.

EVENTS OF 2 AUGUST 2011

112. It is not disputed that Hon. Sam Abal was the Acting Prime Minister when Sir Michael left PNG for Singapore on 29 March 2011. Hon. Peter O'Neil, Hon. Don Polye and Hon. William Duma, some of the key players were part of that Government.

113. On the afternoon of 2 August 2011, Parliament declared upon a motion without notice, that there is a vacancy in the Office of the Prime Minister .

114. Parliament upon making that declaration immediately moved to elect Hon Peter O'Neil as the Prime Minister.

115. Hon. Peter O'Neil was sworn in as Prime Minister by the Head of State the same afternoon.

116. It is noted here that majority of the members of the then Government whose leader was Hon. Sir Michael Somare voted to declare the vacancy in the Office of the Prime Minister and also voted to elect Hon Peter O'Neil as the Prime Minister. It is pertinent to note that Hon. Sam Abal and Hon. Sir Arnold Amet took part in the vote by opposing the motion. This is Parliamentary and Constitutional democracy in action or at play in my view.

117. It is noted that National Alliance is an intervenor in these proceedings after it was granted leave to be an intervenor although on hindsight now, leave should not have been granted to it. Be that as it may it never adduced evidence during the hearing of the Reference about how and why it lost its majority membership and how many members it has left now and whether it can govern now with the members remaining in the party. Some of its members are now in the current Government and some remain in the other camp. The Court allowed an intervenor which was and is still in disarray.

118. There is nothing showing in the Hansard, and understandably so, why Hon. Belden Namah moved a motion without notice that Parliament declare there is a vacancy in the Office of the Prime Minister. This process is allowed under Standing Orders of Parliament. The then Opposition was very insignificant with about 20 to 22 members. It is a tactic to test the strength or weakness of the government. It is a healthy Parliamentary process..

ISSUES

A VACANCY IN OFFICE OF PRIME MINISTER.

119. Was there a vacancy in the Office of the Prime Minister on 2 August 2011 and did an occasion arise for the appointment of a Prime Minister? The answer to this question depends on whether the declaration by Parliament on 2 august 2011 was valid.

120. Before answering the question it is worth noting that s.142(2) of the Constitution is the only provision that empowers Parliament to appoint a Prime Minister.

121. On a closer scrutiny of s.142(2) Parliament is limited to only two occasions it can exercise the power to appoint a Prime Minister.

122. Firstly, it exercises the power at the first meeting of Parliament after a General Election, and secondly it can appoint a Prime Minister "**otherwise from time to time as the occasion for the appointment of a Prime Minister arises**".

123. In my respectful opinion, an occasion can only arise if there is a vacancy.

124. A fair and liberal meaning of it would be any vacancy due to unavailability of the Prime Minister for whatever reason.

125. Section 142(5)(c) of the Constitution is materially concerned with the process of removal of the Prime Minister who has serious health concerns which in the end may lead to a vacancy in the office of the Prime Minister.
However it is not limited to being the only instance when an occasion arises for the appointment of a Prime Minister.

126. This is because in my view, there will be situations when a vacancy occurs without a process due to unavailability of the Prime Minister. Such instances include unforeseen circumstances where death or loss at sea and even when any process prescribed under Section 142(5)(c) is **frustrated or the body responsible to invoke the process refuses or abuses its powers**.

127. In this case it is my respectful opinion that, this is one such case where s.142 (5)(c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act processes were frustrated and abused.

128. In my respective opinion, considering the entire circumstances of the case, the Prime Minister being critically ill for over 5 months and therefore unable to perform

the duties of Prime Minister, a vacancy arose.

129. With respect, all the prerequisite ingredients for the removal of the Prime Minister thereby creating a vacancy were present save for the process to be duly executed without delay. That Constitutional process was frustrated.

130. Therefore in all fairness and in reality, a vacancy existed only to be formally declared under the s.142(5)(c) and s.6 process..

131. With respect Parliaments declaration of the vacancy on 2 August was valid because the NEC abused the Constitutional process and frustrated it.

132. The next question is, is the word "occasion" in s.142(2) confined to matters described under s.142(5)(c). I do not think so. If that was the case then the phrase "otherwise from time to time" will not be there.

133. Even the CPC did not limit the term "occasion" when it stated at paragraph 25 of the CPC Report Ch. 7 at page 3 as follows:-

> *25. We recommend that the Parliament itself should elect the Prime Minister by means of an ordinary resolution when Parliament meets after a general election. !f a vacancy occurs at other times the election of a new Prime Minister by the same procedure would take place at the next sitting if Parliament is in session, or, if it is not, at a meeting to be convened within fourteen days of the vacancv.*

134. The CPC was not specific as to a particular vacancy caused by a particular occasion. The CPC did not intend that the term "occasion" under s.142(2) will be restricted to when circumstances or provisions under s.142(5) come into play.

135. This off course is common sense, as there are also some other unforeseen situations that may come into play that warrants a vacancy and thus calls for an occasion to appoint a Prime Minister.

This may include the death of the Prime Minister, or loss at sea or forest, or as a result of a decision by Parliament as in this case.

136. Section 142 in dealing with the tenure of Office of Prime Minister and vacancy of Office of Prime Minister, is not inconsistent in any manner or form to the proposition that an occasion can occur from time to time due to other reasons that may create a vacancy.

For instance where he resigns (S 146) or where he dies (S. 147).

137. The CPC did consider this question when it considered Section 142 of the Constitution in its Recommendations contained in the CPC Report Ch. 7 p. 10 paragraph 19 and 21 when it recommended the following :-

Tenure of office of Prime Minister

19. The Speaker shall revoke the appointment of the Prime Minister

(a) If he ceases to be a member of the National Parliament for any reason other than that there has been a dissolution of the Parliament;

(b) If he delivers to the Speaker a signed letter of resignation from that office;

(c) If another person is elected Prime Minister at the first meeting of the National Parliament following a general election,·

(d) If a motion of no confidence in the National Executive Council in which a new Prime Minister is designated is passed by an absolute majority of the National Parliament under recommendation 20 *below,·*

(e) If a motion for the removal of the Prime Minister from office, 111 which a new Prime Minister is designated is passed by

(i) A simple majority of the National Parliament under recommendation 16(2)(c) above, or

(ii) An absolute majority of the National Parliament under recommendation 25(2) below. (emphasis added)

(f) If his removal from office is ordered by the tribunal provided for in Part E of chapter 8 as a result of a breach of the Leadership Code.

Vacancy in Office of Prime Minister

21.(1) Subject to recommendation 22 below, if a vacancy occurs in the office Prime Minister due to-

(a) his ceasing to be a member of the National Parliament for any reason other than that there has been a dissolution of the Parliament.

(b) his resignation from that office; or

(c) his removal from office as a result of a breach of the Leadership Code.

there shall be an election of a new Prime Minister by ordinary resolution of

the Parliament as provided for in clause (2) below.

138. What is "Vacancy"? Ordinarily vacancy means a job or position is available to be filled by another, because the person occupying the job or position is not available. This definition was adopted by Injia, DCJ (as he then was) in the case of Peter Launa v Alphonse Willie (2004) N2595.

139. In the case of Peter Launa v. Alphonse Willie (2004) N2595**,** His Honour made in roads into considering what a vacancy is in an office and what the term *"otherwise disqualified by law"* is.

140. In that case, the Plaintiff was the Provincial Member for Simbu Province in the National Parliament. He was elected to office in a by-election on July 2004 following the death of the then incumbent Provincial Member for Simbu, Fr. Louis Ambane. At the time of his death, Fr. Ambane was also the "Governor" of Simbu, by virtue of S.17(2) of the Organic Law on Provincial and Local Level Governments

("OLPLLG"). Upon his death, on 16th June 2003, the Simbu Provincial Assembly "elected" the Defendant as the Governor of the Province. At the time of his election, the Defendant was and he still is, the member for the Kerowagi Open Electorate in the National Parliament.

141. Upon his election. the Plaintiff assumed office as a member of the National Parliament and participated in the business of the National Parliament. He also expressed his willingness to accept the office of the Governor of the Province under s.17(2) of the OLPLLG on the basis that upon his election, he automatically assumed office as the Governor of the Province, by operation of law. The Defendant refused to allow the Plaintiff to assume that office following receipt of legal advice to the contrary. Therefore, the Plaintiff instituted proceedings seeking orders inter alia, that the Defendant ceased to be the Governor of the Province, and that he (Plaintiff) be declared the Governor of Simbu Province.

142. In his judgment, His Honour stated the following:-

> *"It is necessary to set out SS.17, 19, 20 and 21 which I consider to be relevant, in full".*
>
> *Section 17(2) of OLPLLG states:*
>
> *1. The Provincial Government –*
>
> > *(4) An office of the Provincial Governor in each province is hereby established.*
> >
> > *(5) Subject to this Organic Law, the Member of the National Parliament representing the provincial electorate shall be the Provincial Governor."*

Section 19 states:

19. Vacation of office of the Provincial Governor.

> *(1) If the Provincial Governor –*
>
> > *(a) Is dismissed from office in accordance with Section 20; or*

(b) Is appointed –

(i) a Minister or a Vice-Minister in the National Government; or

(ii) the Speaker or Deputy Speaker of the Parliament; or

(iii) the Leader or Deputy Leader of the Opposition in the Parliament; or

(iv) the Chairman of the Permanent Parliamentary Public Works Committee; or

(v) the Chairman of the Permanent Parliamentary Public Accounts Committee; or

(vi) to an office which has powers and privileges equivalent to those of a Minister; or

(c) resigns his office by written notice to the Minister responsible for provincial government and local-level government matters; or

(d) is, in the opinion of two medical practitioners appointed for the purpose by the National Authority responsible for the registration or licensing of medical practitioners, unfit, by reasons of physical or mental incapacity, to carry out the duties of his office; or

(e) deliberately and persistently disobeys applicable laws, including the Constitution, an Organic Law (including the Organic Law) or any national legislation applying in the province; or

(f) is negligent in exercising his powers or performing his functions, duties and responsibilities; or

(g) does an act that is or is likely to bring into disrepute or call into question the integrity of his office;

the Provincial Assembly may, by a two-thirds absolute majority vote dismiss the Provincial Governor or Deputy Provincial Governor.

(2) The dismissal of the Provincial Governor or the Deputy Provincial Governor shall be by motion –

(a) *which shall be expressed to be a motion to dismiss the Provincial Governor or the Deputy Provincial Governor, as the case may be; and*

(b) *of which not less than one week's notice signed by the number of members of the Provincial Assembly, being not less than one quarter of the total number of seats in the Assembly, has been given in accordance with the procedures of the Assembly.*

Section 21 states:

Election of the Provincial Governor in the event of vacancy.

(1) *Subject to Subsection (3),if the Provincial Governor vacates his office in accordance with Section 19(1), or is dismissed from office in accordance with Section 20, the Provincial Assembly shall, from amongst the members of the Assembly who are Members of the Parliament, elect the Provincial Governor.*

(2) *Subject to Subsection (3), if the Provincial Governor elected under Subsection (1) vacates his office in accordance with Section 19(2), or is dismissed from office in accordance with Section 20, the Assembly shall elect another Member of the Parliament to be the Provincial Governor.*

(3) *If—*

(a) *a vacancy exists in the office the Provincial Governor; and*

(b) *all of the Members of the Parliament—*

(i) *are appointed to any of the offices referred to in Section 19(1)(b); or*

(ii) *are otherwise disqualified by law,*

the Assembly shall, from amongst the members referred to in s.10(3)(b) and (c), elect the Provincial Governor.

The same reasoning applies to SI9(2)(e). A person who is a member of Parliament elected under S 21(1) or (2) who dies in office creates a vacancy in the office under S 19(2)(e) which must be filled by an election held under S21.

The second important issue is whether the election of the Defendant as the Provincial Governor was proper and lawful. In my view. for reasons I have stated above. the Defendant was du1y elected under S21 (1) to fill a vacancy in the office of the Provincial Governor created by the death of the late Governor Fr. Louis Ambane under S 19(1)(e).

The third important issue is whether by virtue of the Plaintiff's automatic assumption of office as the Provincial Governor under S 17(2), the Defendant is deemed to have vacated office as the Provincial Governor, under any of the situations in S 19(2).

In my view, the situation is clearly covered by S 19(2)(e). That is, the incumbent Provincial Governor elected under S21 (1) holds office, until he is "otherwise disqualified by law": Also see Simeon Waia v Fr Louis Ambane, supra. ***The phrase "otherwise disqualified by law" has a broad meaning. It is intended to cover situations not enumerately in S 19(1). It is no different from the phrase otherwise disqualified by "operation of law" from holding office as the Provincial Governor. In my view, a person elected as the Provincial Member in a By-Election or General Election, automatically assumes office by virtue of S 17(2). As a result, by operation of law, the incumbent Governor elected under S21(1) to fill a vacancy arising under S19(1)(e) or any of the situations enumerated in S 19(1) for that matter, is disqualified from holding office under S19(2)(e). His disqualification from holding office comes by operation of law. In other words, the assumption of office by the new***

Provincial Member is automatic, by virtue of the operation of both S 17(2) and also under S 19(2)(e). *In this situation, the election provision in S21 is irrelevant or inapplicable. Also, S 19(4) which refers to an "election" under S21, is inapplicable. The new Provincial Member cannot go through another election process in the Provincial Assembly under S 21(1), (2) or (3) because he is the Provincial Member and the Provincial Governor, having been so elected directly by the people of the entire Province. He is not an ordinary member of the National Parliament representing an Open electorate or an ordinary member of the Provincial Assembly, who has to go through an election by the Provincial Assembly to become the Governor (to fill a vacancy left by an Open Electorate Member) under the three (3) different election procedures enumerated in S21. Indeed, there is no longer any vacancy in law, for the new Provincial Member to fill, nor should he be required to create an opportunity of a vacancy for himself, by resorting the vacancy provisions in s. 19 or any other provision in the OLPLLG or even the Standing Orders of the Provincial Assembly". (emphasis added).*

143. Hence, when the term "otherwise" is used in a provision it is meant to give a broad meaning to cover situations not enumerated under that particular provision.

144. In the case of Peter Launa v Alphonse Willie (supra) the court also considered s.19 of the OLPLLG which is similar to s.142(5) of the Constitutions.

145. Under s.142(2) a Prime Minister shall be appointed at the first meeting of the Parliament and "otherwise from time to time" as the occasion for appointment arises.

146. Accordingly, a vacancy that arises otherwise from time to time would have a broad meaning to cover situations not enumerated under s.142 of the Constitution.

For example s.142(5)(c), s.146 (resignation), s.145 (motion of no confidence), s.147 (normal term of office).

B. THE VOTE ON THE FLOOR OF PARLIAMENT

147. I now embark on some discussions as to the validity of Parliament's action on the floor of Parliament on 2 August, 2011.

148. I start off with s.134 of the Constitution. The provision has been set out in full earlier but the starting words say:-

> ***"Except as is specifically provided by a Constitutional Law the question, whether the procedures prescribed for Parliament or its Committees, have been complied with, is non justiciable ………"***
>
> Simply put, everything that goes on in Parliament is prima facie non justiciable, unless the Constitutional Law specifically says the procedure in a Constitutional law must be followed by Parliament.

149. Sheehan, J in Haiveta v Wingti (No 1) (1994) PNGLR 160 said:

> *"Where a procedure for the conduct of an action of the Parliament is provided by a Constitutional Law, the question, whether that procedure is followed is justiciable, by virtue of the words introducing s.134 of the Constitution (Except as is specifically provided by a Constitutional Law)…."*

150. With respect I agree with the summation of s.134 of the Constitution by Sheehan, J and I am of the same view with respect.

151. This summation is also consistent with s.115 of the Constitution namely subsection (1) and (2) which provide :-

> *115. Parliamentary privileges, etc.*
>
> *(1) The powers (other than legislative powers), privileges and immunities of the Parliament and of its members and committees are as prescribed by or under this section and by any other provision of this Constitution.*

> (2) *There shall be freedom of speech, debate and proceeding in the Parliament, and the exercise of those freedoms shall not be questioned in any court or in any proceedings whatever (otherwise than in proceedings in the Parliament or before a committee of the Parliament).*

152. Moreover Schedule 1.7 of the Constitution states that "non justiciable" means that "where a Constitutional law declare a question to be non justiciable, the question may not be heard or determined by any court or tribunal.

153. The question to be asked now is whether the motion without notice on the floor of Parliament moved by Hon. Belden Namah is justiciable. Pursuant to s.115 (1) and (2)and s.134 of the Constitution the suspension of standing orders and the moving of a motion are matters or processes and procedures governed by the Standing Orders of Parliament and are non justiciable.

154. The reasons for the motion by Hon. Belden Namah in my opinion are with respect matters of process of Parliament. There is nothing in the Constitutional laws that require reasons to be given for moving a motion without notice on the floor of Parliament. In the same vein there is nothing in the Constitutional Laws that prohibits a declaration of a vacancy in the Office of the Prime Minister for whatever reason in a motion without notice. This is a Parliamentary tactic to test the strength of the government. With respect those matters are non justiciable and the Court should stay clear from invading Parliaments arena.

155. Section 142(2) provides for the appointment of a Prime Minister after a General Election. It also provides for the appointment of a Prime Minister at other times when an occasion arises. An "occasion" in that context would in my view mean when there is a vacancy in the Office of the Prime Minister.

156. S.145 of the Constitution provides for a vote of no confidence and for the Parliament to remove a Prime Minister by a vote of no confidence. Sheehan J said that the converse, that is a vote of confidence was always possible as well and

available but that it had never been done or tried before in PNG – See Haiveta v Wingti (No.1)

157. In the same vein in my respectful view it has always been possible to move a motion without notice that Parliament declare a vacancy in the Office of Prime Minister for whatever reason, in the same way as a vote of no confidence. It is just that no one had ever tried it before. This is to test the strength of the government in any democracy and it is a perfectly legitimate Parliamentary practice in my opinion. Usually that motion would be defeated by a strong government or a government which has no lingering issues within it.

158. Section 143(1) provides for an Act of Parliament to provide for appointment of an Acting Prime Minister to perform the powers, functions, duties and responsibilities of the Prime Minister when, among other circumstances there is a vacancy in the Office of the Prime Minister.

159. Parliament in passing a vote of no confidence motion creates an immediate vacancy in the Office of the Prime Minister and an immediate replacement.

160. In the same way Parliament may pass a motion without notice to declare a vacancy in the Office of Prime Minister but a new Prime Minister is not immediately appointed to fill in the vacancy. That vacancy is to be filled in accordance with s.142(3) or s.142(4) of the Constitution – see Standing Orders 7A and 7B.

161. It is a legitimate democratic way to test the strength of a government on the floor of Parliament. The events of 2 August 2011 generated a lot of interest because it has never been done before and this is the first time to happen. It is also a test to the Constitution and an opportunity to develop our own Constitutional Law.

162. Is it legitimate? Of course it is perfectly legitimate and Constitutional in my view. I do not see anything wrong with it. This process is not prohibited by Constitutional Law.

163. The event of 2 August 2011 on the floor of Parliament is more than sufficient proof that PNG is a thriving Parliamentary and Constitutional democracy. Events of 2 August happened for reasons but this Court has no jurisdiction to inquire because they are not justiciable in my view.

164. The purpose of s.145 of the Constitution is to establish whether or not there is confidence in the government. Similarly, the purpose although not specifically stated for moving a motion without notice in Parliament for a declaration of a vacancy in the Office of the Prime Minister who was critically ill for 5 months in hospital and an Acting Prime Minister who had been acting for 5 months, was "to test the waters" so to speak or to test the strength of the government.

165. Therefore, the motion on 2 August, 2011 was in my respectful opinion a perfectly legitimate way to establish if the government was stable and strong.

166. As it turned out the government was found to be wanting and lost the crucial vote, thereby loosing its majority to govern.

167. In the overall circumstances of the case I am persuaded that the motions without notice moved and passed for Parliament to declare a vacancy in the Office of Prime Minister on 2 August 2011 were permissible and in order and in my view valid because firstly what happened in Parliament was not justiciable and secondary it is a democratic process.

168. The Court is assisted by s.6 of the Prime Minister and National Executive Council Act as to how long a Prime Minister can be absent.

169. The CPC Report is also be helpful in that regard as well when in its report it recommended that:

"24. Subject to 25 below, the Deputy Prime Minister shall act on behalf of the Prime Minister:

(a) ***when empowered in the written document signed by the prime Minister to do so;***

(b) ***when the National Executive Council, after considering a written report signed by two medical practitioners, has resolved that the Prime Minister is physically or mentally incapable of performing the tasks of his office; or***

(c) ***in an emergency situation, when effective communication with the Prime Minister is impossible.***

25. ***(1)*** ***If it appears to the National Executive Council that the Prime Minister may not be able to resume the duties of his office within three months of the Deputy Prime Minister assuming his duties under recommendation 24 (b) above, the National Executive Council may fix a time at which the Speaker shall summon the National Parliament in accordance with the Constitution, and shall report on the situation on the first day of the Parliament's meeting;***

<u>But in any event</u>, the Speaker shall summon the National Parliament to meet within fourteen days of the expiration of a period of three months after the Deputy Prime Minister has assumed the duties of the Prime Minister under recommendation 24 (b) above;

<u>And</u> the first item of business at any meeting of the National Parliament called under this provision shall be consideration of whether the Deputy Prime Minister shall continue to act on behalf of the Prime Minister for a further period of not more than three months.

(2) ***<u>In the circumstances provided in clause (1) above, a motion for the removal of the Prime Minister and designating his successor may be moved at any time</u>, provided that***

> ***(a)*** ***the motion is signed by at least one-tenth of the total membership of the Parliament; and***
>
> ***(b)*** ***at least one week's prior notice of the intention to move such a motion is given.***"

These recommendations found their way into s.6 of the Prime Minister and National Executive Council Act.

170. It is clear from the above recommendations what our founding fathers thought should happen should a Prime Minister not be able to resume duties within 3 months of absence or ill health. Those recommendation found their way into s.6 of the Prime Minister and National Executive Council Act.

171. In May 2011 even when Hon. Sam Abal informed Parliament of the serious health state of the Prime Minister, the NEC never acted on the process under s.6 of the Prime Minister and National Executive Council Act.

172. The process under s.6 was not even initiated by the NEC with due diligence in April or May 2011. The situation was allowed to be prolonged without any good reason. Such delay is to be construed to be for political expedience and advantage.

173. CPC however made no recommendation as to what should happen if the NEC failed to invoke the process under s.142(5)(c) and s.6 without reasonable speed, thus the Constitution itself does not say what should happen in the event that no such report is presented to Parliament.

174. The scheme under s.6 of the Prime Ministers and National Executive Council Act is such that the Executive could delay the process for political expediency or advantage.

175. All the Members of Parliament like a lot of other Papua New Guineans were aware that Sir Michael had been found guilty of misconduct in Office by a Leadership Tribunal and that he had been given a penalty of 14 days suspension from Office without pay.

176. All the Members of Parliament were aware from newspaper reports and rumors circulating at that time that Sir Michael was seriously ill.

177. All Members of Parliament were also aware of the Press Statement made on behalf of the Somare family on 28 June, 2011 by Hon. Arthur Somare that they were retiring their father from politics for reasons of serious ill health. Hon. Arthur Somare at the time of the announcement knew the critical health condition of his father. He was privy to his father's real physical condition. That announcement should not be taken lightly even by Sir Michael himself.

178. While Sir Michael was seriously ill and absent from the country, it is apparent that majority of the members of the then Government wanted a change in the leadership of the government, given the mass exodus from the previous government to the new government – in reality within itself.

179. Let us not forget that at the same time there was a strong leadership issue in the ruling National Alliance Party between Hon. Sam Abal and Hon. Don Polye as to who was the legitimate Deputy Leader of the National Alliance Party. Hon. Don Polye was deputy leader of NA Party. The then Prime Minister Hon. Sir Michael Somare appointed Hon. Sam Abal as Acting Prime Minister when under the NA Constitution, Hon. Don Polye should have been appointed as Acting Prime Minister. There was that infighting and struggle for power at the NA camp.

180. The leadership issue led to one faction of the party sacking Hon. Sam Abal and another faction of the party sacking Hon. Don Polye. This is part of the history of this case in my respectful view.

181. Moreover, during the time Hon. Sam Abal was Acting Prime Minister and at the height of the leadership tussle Hon. Sam Abal removed Hon. Don Polye from the Works Ministry to Foreign Affairs which did not go down well with Hon. Don Polye.

182. At that time too Hon. Sam Abal removed Hon. Peter O'Neil from the important senior Finance and Treasury Ministry to Public Service Ministry.

183. Hon. Sam Abal also removed Hon. William Duma from the Mining and Petroleum Ministry to a lesser important Ministry.

184. All these events created a perfect opportunity for Hon. Peter O'Neil, Hon. Don Polye and Hon. William Duma to start negotiating with the small Opposition to over throw the government.

185. The rest is now history. On 2 August 2011, the motion was moved and passed for the declaration of the vacancy in the Office of the Prime Minister.

186. After Parliament declared there was a vacancy in the office of Prime Minister s.142(3) came into play and as Parliament was in session the appointment of the Prime Minister should take place on the next sitting day as was held by the Supreme Court in Haiveta v Wingti (No 3) (1994) PNGLR 197. In this case s.142(3) process was by passed. The net result is that while the declaration of a vacancy in the Office of Prime Minister was valid the appointment of Hon. Peter O'Neil as Prime Minister was not. Refer to Standing Orders 7A and 7B..

Mandatory and Directory Provisions. Is s.6 of the Prime Minister and National Executive mandatory or directory?

187. In coming to that conclusion in the above paragraph this issue, I find support in the following authorities:-

(1) In their book DC Pearce and RS Geddes, Statutory Interpretation in Australia, Fourth Edition, 277 the authors discuss the following cases:-

"The Privy Council ill Montreal Street Railway Co v Normandin [1917] AC 170 said at 175:

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts

done in neglect of this duty would work serious general inconvenience, or injustice to person who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only.

This statement was applied by the NSW Court of Appeal in Attomey-General; Ex rel Frallklins Stores Pty Ltd v Lizelle Pty Ltd [1977] 2 NSWLR 955. The Court held that a requirement that a council consult with the State Planning Authority before dealing with a development application was directory only as it was beyond the power of the applicant to control the action of the council. Like thinking underlies the decisions reached in Australian Broadcasting Corp v Redmore Pty Ltd (1989) 98 ALR 199 and Yates Security Services Ply Ltd v Keating (1990) 98 ALR 68. A similar approach was adopted by the High Court in Clayton v Heffron (1960) 105 CLR 214 in regard to the procedure for passing a Bill to abolish the New South Wales Legislative Council. The court said at 247: 'the performance of a public duty or the fulfillment of a public function by a body of persons to whom the task is confided is regarded as something to be contrasted with the acquisition or exercise of private rights or privileges'. The former was to be regarded prima facie as directory while the latter was more probably mandatory"

(2) In the case of **Safe Lavao v. The Independent State of Papua New [19781 PNGLR 15,** the court adopted the following principles:

"Secondly, Lord Penzance, in Howard v Bodington (1877) 2 PD 2003 at 211 said:

I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject - matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general

object intended to be secured by the Act, and upon a review of the case in that aspect decides whether the matter is what is called imperative or only directory. "

(3) Perhaps the principles applied by Brunton J in the case of NCDIC V Crusoe Pty Ltd [19931 PNGLR at p. 152 would clarify better the rule relating to directory and mandatory provision especially in the scope of a Public Duty and Private Duty. He said:

"It is noted that these broad principles have been applied in planning cases.

In SS Constructions Ply Ltd v. Ventura Motors Ply Ltd [1964/ VR 229 at 2237, Gillard J said:

"In order to decide whether legislative provisions are mandatory and directory it would appear there are certain guides to indicate, but there is no conclusive test to decide into which category legislation may fall. The scope and object of the statute, it is said in the cases, are of primary and possibly of vital importance. Secondly, provisions creating public duties and those conferring private rights or granting powers must be distinguished. The former generally are regarded as directory, whereas the latter are generally accepted as mandatory (emphasis mine), particularly where conditions are attached to the exercise of the duty or the power, as the case may be. Thirdly, in the absence of an express provision, the intention of the legislature has to be ascertained by weighing the consequences of holding a statute to be directory or imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at that same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the

neglect of them, though punishable, not affecting the validity of the acts done."

188. Is s.6 of Prime Minister and National Executive Council Act Directory or Mandatory as far as the NEC is concerned.

189. When the Parliament lays down a statutory requirement for exercise of legal authority it expects its authority to be obeyed. However, it is the Courts that have to decide the consequences in case of a breach of a statutory requirements. The consequences of a breach of procedural requirement is decided by classifying into mandatory or imperative and directory or regulatory.

190. In the Old English case of Howards. Bodington (1877) 2 P.D 203, Lord Penzence explained the classification of mandatory and directory distinction and said :-

> *"Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey, but still that is the recognized language and I propose to adhere it. The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequences if it is not done? In the case of statues that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the courts hold a provision to be directory, they say that, although such provisions may not have been complied with, the subsequent proceedings to do not fail, still whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject matter to which they refer as that the legislature could have intended that the non-observance of them should be followed by a total failure*

of the whole proceedings. on the other hand, there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that substantially follow must come to an end."

Lord Penzance further at p.21 discussed certain criterias that must be used when he said:-

"I believe, as far as any rule is concerned, you cannot safely go farther than that in each case you must look to the subject-matter,' consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act,' and upon a review of the case in that aspect decide whether the matter is what is called Imperative or only directory. "

191. From what I discussed above, the health of the Prime Minister is of paramount importance to the people of Papua New Guinea. The CPC contemplated that a vacancy in the Prime Minister's office must be filled quickly. It is an important subject matter and I would classify s.6 as an imperative mandatory provision.

192. To fortify this proposition it is also anticipated that the Acting Prime Minister does not act away for more than three months. Moreover, s.6 is the framework for implementing s.142(5)(c) of the Constitution.

193. Thus, s.6 is an important provision and non adherence to it would cause serious general inconvenience and injustice to the people of Papua New Guinea.

194. That being so if the provision is not strictly complied with the whole proceedings that substantially follow is invalid and must come to an end. In this case the net effect of the process started under s.142(5)(c) and s.6 is that it is of no consequence because the process has been frustrated by the NEC through its inaction and wreckless negligence. That means the process started by the NEC on 29 July 2011 is invalid for non compliance.

Did the NEC exceed, and abuse its powers?

195. Under s.6 of the Prime Minister and National Executive Council Act, the NEC had failed to exercise its powers in due time when it was aware of the health of the Prime Minister. This had the effect of undue delay and thus contrary to s.142(5)(c) and s.6

196. When it decided to delay the process it was in fact exceeding its powers because the statute does not give it that power to delay the process of advising the Head of State as soon as it is aware of a matter relating to the health of the Prime Minister.

197. Accordingly, any action after the delay is null and void and of no effect because it had commenced on the wrong footing not allowed by law – see s.11 of the Constitution.

198. It would be foolish for this Court to allow or condone the process in the manner the NEC had adopted. In fairness, in this case the first wrong was committed by the then NEC between April and July 29, 2011 when it deliberately failed to invoke s.142(5)(c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act.

199. Section 142(2) is not a stand alone provision. It does not give Parliament any power to declare a vacancy under that Provision. However, in my opinion, the more relevant provision might have been s.142(5)(c) of the Constitution itself and s.6 of the Prime Minister and National Executive Commission Act on the basis that the NEC had failed to comply with those provisions.

200. I make this point at the outset that under s.11(i) of the Constitution, the Constitution and the Organic Laws are the Supreme Laws of PNG and subject to s.10 (Construction of written laws) all acts (whether legislative, executive or judicial) that are in consistent with them come to the extent of the inconsistency, invalid and ineffective.

201. In this case s.142(5)(c) of the Constitution and s.6 of the PM & NEC Act are laws made by Parliament. The Executive's actions concerning its non compliance are therefore inconsistent with the dictates of laws. Their actions in non compliance is unlawful and therefore not valid.

202. Section 99 of the Constitution talks about the Structure of Government and that the Government consist of the National Parliament which subject to the Constitution itself has unlimited law making powers; the National Executive and "(c) the National Judicial System consisting the Supreme Court of Justice and a National Court of Justice of unlimited jurisdiction, and other Courts."

203. The Supreme Court is the highest Court in this land with unlimited jurisdiction and pursuant to s.155(2) it is the final court of appeal and has all other jurisdiction and powers as are conferred on it by this Constitution – s.155(2)(c).

204. Section 155(4) gives the Supreme Court "inherent power to make, in such circumstances as seem to them proper, order in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case".

205. In this case the NEC prolonged the process for examination by two medical practitioners of Sir Michael thereby not having any medical report ready.

206. What is the Parliament to do in those circumstances? Apply for mandamus and then prolong the matter further?

207. Can this Court make orders under s.155(4) of the Constitution to do justice? I think so in the circumstances. The NEC failed to comply with s.142(5)(c) of the Constitution and s.6 of the Prime Minister and National Executive Council Act, thereby depriving Parliament and people of Papua New Guinea the right to have the medical reports of their Prime Minister.

208. Events have overtaken the NEC's duty in that Cannings, J has made findings of fact that Sir Michael from march 2011 up to 2 August was incapable of managing his affairs and the affairs of the nation and had been so for 5 months beyond the time

anticipated by s.6 of the PM and NEC Act which is 3 months. He has found that Sir Michael was mentally and physically incapacitated to perform the role of the Office of the Prime Minister. His findings are based on medical reports of doctors who attended to Sir Michael and the physical presence of Sir Michael before the Court.

209. Up to the time of Cannings, J findings in October 2011, Sir Michael was still recovering. Considering the lengthy time of uncertainty other events have occurred. This Court has inherent powers under s.155(4) to make orders that are necessary to do justice in a particular case.

210. Parliaments primary right to receive the medical reports of 2 medical practitioners under s.142(5)(c) of the Constitution and s.6(6) of the PM and NEC Act have been frustrated by the NEC for its own expediency and are proving difficult to obtain.

211. Parliaments and Members of Parliament are entitled to receive the reports of the medical practitioners, but the obtaining of the reports have been frustrated and denied and the saga goes on.

212. In the circumstances I have decided to invoke the inherent powers under s.155(4) of the Constitution, given to the Court that Sir Michael being incapable of managing the affairs of the Nation I declare that Sir Michael was mental and physically unfit to run the country and declare that Parliament's decision on 2 August 2011 was in order or in the alternative again under s.155(4) of the Constitution, I order that the report of Cannings, J be tabled before Parliament for Parliament to make a decision on fitness or otherwise of Sir Michael Somare. I rely on the Supreme Court authority on the case of Aiva Aihi v The State.

213. The Courts have power to control Executive acts and take up such issues without fear or favour within the strict confines of the powers given by the Constitution, bearing in mind that the Courts are co agents of the people. Where the Constitution or a statute gives the NEC powers and it acts outside those powers a Court action may lie against it. Abuse of power by the NEC must not be tolerated by the Court. See Haiveta v Wingti (No 3) (supra), Supreme Court Reference No 3 of

1999 Special Reference by the Ombudsman Commission v the Independent State of Papua New Guinea (supra) and Burns Philip (PNG) Ltd v The State & Ors (supra).

214. Thus, if the process under s.142(5)(c) and s.6 has commenced, as advocated by the Referror, it is illegal and null and void because s.6 is mandatory and imperative.

215. From the facts this was a clear case where s.6 of the Prime Minister and National Executive Council Act 2002 should have been put into motion for the request for two medical practitioners to examine the Prime Minister, without delay.

216. The body that will put this process in motion is the NEC because the Head of State will act on "advice". However, before it does that the NEC must be satisfied that there is "a matter relating to the health of the Prime Minister."

217. From evidence the NEC, like all other Papua New Guineans was aware of a matter relating to the ailing health of the Prime Minister before and as soon as he left the country on 29th March 2011 or if not the moment he was admitted on 30th March 2011.

218. The next issue is how long should it take for the NEC to advise the Head of State of the health of the Prime Minister.

219. Under Schedule 1.9 of the Constitution where no time is prescribed or allowed within which an act is required, or permitted by a Constitutional Law to be done, the act shall or may be done, as the case maybe, with all convenient speed and as often as the occasion arises.

220. In this case if the NEC was truly serious and accountable to the people of PNG it would have initiated the process under s.6 of the Prime Minister and NEC Act straight away or within a few days at the most after admission to Raffles Hospital. However, this was not the case here.

221. Irrespective of that, two factors are clear as per the findings of Cannings J that Sir Michael was unfit physically for duty and in addition he was unavailable.

222. Thus, it became a matter of necessity to refer the matter to Parliament when it became obvious that s.142(5)(c) and s.6 processes had been frustrated by an irresponsible NEC and that a medical report would not be forthcoming sooner. It has been suggested that Hon. Namah could ask the court for a mandamus order. In all seriousness that process would be cumbersome and time consuming. That was not a serious option. Why then should the NEC become a beneficiary of its wrongful conduct? It defies logic and common sense and ultimately justice.

223. Parliament accordingly declared a vacancy in the Office of Prime Minister. It determined the issue of the sick Prime Minister swiftly in a democratic manner and in my view lawfully. Parliament in my view should be able to do that.

D. SHOULD PARLIAMENT HAVE ADJOURNED TO THE NEXT SITTING DAY AFTER 2 AUGUST, 2011?

224. The factual circumstances in this case differ to the factual circumstances in the Haiveta v Wingti (No 3) case.

225. In the Wingti case Parliament was taken by total surprise. Wingti resigned discreetly and was only informed that day of the resignation and on the same day again re-elected him as Prime Minister.

226. The scenario here is different, every Member of Parliament including a lot of other people in the country and overseas knew Sir Michael was critically ill in hospital, in Singapore and the country was kept in suspense as to his health status over the entire period he was in hospital.

227. Parliament passed the motion that a vacancy existed. Should Parliament have adjourned to the next sitting day to give an opportunity for all political parties to consider nominating a candidate or for the Head of State to invite a party with majority members to form a government. In my view if the vacancy existed before 2 August 2011 then Parliament was in its right to elect the Prime Minister that same

day. If the vacancy was only created on 2 August then Parliament should adjourn to the next sitting day.

228. This process in my view is consistent with the precedent in the Wingti case and is the most fair one.

229. In the circumstances of this case the legislative scheme is that a Prime Minister may be absent for at least 3 months. In this case he was absent for 5 months and there was no medical reports from doctors tabled in Parliament as to his health. Parliament and the people of PNG were kept in suspense. In those circumstances and because no medical reports were forthcoming from the NEC to Parliament, Parliament was forced to decide on the matter after the NEC frustrated the process. Parliament created a vacancy by its vote and it ought to have adjourned to the next sitting day.

PARLIAMENTARY PRACTICE IN ENGLAND

230. O. Hood Philips Constitutional and Administrative Law, Fifth Edition in his book at page 280 – 281 under the Topic of Cabinet and the Prime Minister highlighted several occasions when in England a Prime Minister resigned as a result of ill health. The learned Author stated as follows: -

> *"In 1923 Bonar Law, the conservative Prime Minister was so ill that he sent his resignation to George V. the choice of successor lay between Lord Curzon, Foreign Secretary and former Viceroy of India, a statesman of brilliant gifts and vast experience; and Mr Baldwim who, although recently appointed Chancellor of the Exchequer, had little political experience and was not so well known either inside or outside the House. After the King or his Private Secretary had consulted Lord Balfour (former Prime Minister) and Lord Salisbury (Lord President of the Council) and members of the government party, the King chose Baldwin both on personal grounds and because he was in the Commons, although the latter reason was emphasized in breaking the news to Curzon.*
>
> *When Sir Anthony Eden, Conservative Prime Minister, resigned in 1957 because of serious ill-health, the succession lay by common consent*

between Mr R A Butler (Lord Privy Seal and leader of the House of Commons) and Mr Harold Macmillan (Chancellor of Exchequer). All that was publicly known was that the Queen consulted two elder statesmen of the conservative Party – Lord Salisbury (Lord President of the Council and son of the adviser of 1923) and Sir Winston Churchill, the former Prime Minister and selected Macmillan. We now know that they both recommended Mr Macmillan, and that only one member of the Cabinet supported Mr Butler.

In 1963 (after the Peerage Act had been passed Mr Macmillan became ill, entered hospital for an operation and announced his intention to resign. In accordance with the practice of the conservatives at that time "soundings" were taken in the party. The result of these soundings were communicated by the Lord Chancellor to the Prime Minister, who then sent letter of resignation to the Queen, presumably intimating that he had advice to give if requested. The Queen (who is not known to have sought any other advice) visited Mr Macmillan in hospital, and immediately afterwards sent for Lord Home and invited him to form an Administration. (She might have invested him with office straight away, as was done with Eden and Macmillan). A day or two later Lord Home informed the Queen that he was able to form an Administration.

In 1964 the Conservatives adopted a new method of selecting their party leader. A ballot is taken of the party in the Commons. The candidate so selected is then presented for election at a party meeting. On Sir Alec Douglas – Home's resignation (out of office this led to the election of Mr Heath.

It ought to be possible, if a Prime Minister dies or resigns on personal grounds and the succession is not clear, for the government party to be allowed a few days in which to elect a new leader, without appearing to force the Sovereign's hand. This would keep the Crown out of politics in a delicate situation, and has been the practice in Australia and New Zealand.

231. The factual situation in this case has been stated and given the practices of Parliament in the Westminster System of government which PNG "partly" adopted the question arises, did "an occasion for appointment of a Prime Minister arise" as envisaged in s.142(2) of the Constitution. The answer is : Yes, but through a process under s.142(5)(c) of the Constitution and s.6 of the PM NEC Act which the NEC failed to carry out with speed.

232. The Referror and the Interveners aligned to it submitted that Sir Michael was ill but was recovering well and therefore there was never an occasion for appointment of a Prime Minister. While that may be correct, the Parliament and the people of PNG were never told of his medical state, in fact that is the information that should be before Parliament in a certified medical report by 2 medical practitioners.

233. The Referror and the Interveners aligned to it submitted that an occasion for appointment of a Prime Minister only arises on those occasions under s.142(5)(c).

234. The Referror and the Interveners aligned to it further submitted that the process under s.142(5)(c) is that 2 medical practitioners be appointed to report on the fitness or otherwise of the Prime Minister, had just begun and that it should be allowed to be completed.

235. How long further was the country going to wait. The country had waited 5 months already for this to happen but there was no sign of urgency on the part of the Executive to do anything speedily. The Executive was prepared to take a casual approach to this matter of urgency as no time lines are specifically imposed under s.6 of the Prime Ministers and National Executive Council Act. This leads me to the next matter of the Courts power to control executive acts.

THE COURTS POWER TO CONTROL EXECUTIVE ACTS

236. This issue raises the question as to whether this Court can enter the arena of politics where issues in law relate to political considerations. The Court has held in numerous cases that the Supreme Court can do so within the confines of the Constitution.

237. This was seriously considered in the case of Christopher Haiveta, v. Pius Wingti, (No 3) [1994J PNGLR 197.

238. This was a case where the Prime Minister of the day decided to resign and on the same day got himself re-elected. The relevant provision to be interpreted was Section 142(3) of the Constitution on the issue of*"next sitting day"*. It was contended strongly by the NEC that the Courts should not intervene into the political arena and parliamentary practice and procedure. Nevertheless, the Court was of the view that the NEC was accountable to the Parliament because it appointed the Prime Minister. Thus, the Parliament must have adequate notice and is fully informed of the reasons and time to deliberate upon the very important issue and question of who the Prime Minister should be. Amet CJ *(as he then was)* at page 206 explained the judiciaries role in the following manner:

> *"In some Constitutions, it is left to the legislature to interpret the meaning of these principles, but in other types of constitutions, of which ours is one, the Judiciary is clothed with the power and charged with the duty of ensuring, upon the application of aggrieved parties, that the legislature and the executive, and, indeed, the judiciary as well, do not transgress the limits set upon their powers.*
>
> *In Papua New Guinea it has come to be accepted that the judiciary is the guardian of the Constitution. Sections 18 and 19 provide for the original interpretative jurisdiction of the Supreme Court. Sections 22 and 23 provide for the enforcement of constitutional rights and sanctions, respectively, and ss 57 and 58 then complete these powers by providing for enforcement of guaranteed rights and freedoms and compensation, respectively. Section 11 declares that the Constitution is the Supreme Law of Papua New Guinea, and subject to s10 (construction of written laws), all acts, whether legislative, executive, or judicial, that are inconsistent with it are, to the extent of the inconsistency, invalid and ineffective".*

239. A similar question was further addressed in the case of Supreme Court Reference No 3 of 1999, Special Reference Pursuant to Constitution S. 10 Re Calling

of Parliament, Reference By The Ombudsman Commission SC 628. In that case, Special Reference was made by the Ombudsman Commission under Section 19 of the Constitution. The reference arose out of a decision by the National Parliament on 2nd December 1998 to adjourn its meeting to the 13th July 1999. Important constitutional questions had arisen as to the duty of the Parliament to perform its duty under Section 124 of the Constitution and consideration of the powers of the National and Supreme Courts to enforce such a duty *(if any)* under Section 22 and Section 23 of the Constitution. His Honour Kapi DCJ *(as he then was)* made a bold statement at page 11 when he said the following:

> *"I remind myself of the nature of the question with which this Court is asked to deal with. As I said so in earlier reference, the decision as to the number of days the Parliament sits is by nature of question of politics. That is to say, it is determined by voting in the Parliament. It is no secret that this type of decision is taken on political grounds.*
>
> *That is no reason for this Court to turn a blind eye and come to the view that it should not enter the arena of politics. This is a proper caution that this Court must bear in mind when faced with the issues involving political considerations. I gave this caution in Kapal v. The State 0987/ PNGLR 417 at 429-426. The Constitution has made this clear in adopting the doctrine of separation of powers under s 99 of the Constitution. The independence of each of the three arms of government is fundamental. This Court must observe and uphold this principle.*
>
> *However, the Constitution of Papua New Guinea is unique in many respects. It has subjected many political or policy issues to the scrutiny of the Courts. It is the duty of this Court to take up these issues without fear and favour within the strict confines of the powers given by the Constitution. This Court has had a proud tradition of addressing such issues: becoming involved in the policy decisions on television broadcasting (see The State v. NTN Pty Ltd & Another [1992J PNGLR*

1); *resignation and appointment of the Prime Minister (see Haiveta v Wingti (No* 3) *[1994J PNGLR* 197 *to mention only but few."*

240. Los J also expounded on this at page 29 by saying:-

> *"We who constitute the Judiciary hold no sword or purse but it is comforting to know that like the National Executive Council and the Parliament we are mere agents of the people. We as agents have no greater power and the authority than the people. The Judiciary should not therefore shrink from declaring breaches of the constitutional duties by the Parliament irrespective of its enforceability. "*

241. In case of Public Service Commission v The Independent State of Papua New Guinea [1994J PNGLR 603, at page 607 I described the Courts power to control Executive acts in the following manner:

> *"It is not Courts' function to interfere with the functions of the National Executive Council to carry out its duties. However, the Courts, as guardians of the law, are duty bound to ensure that the letter of the law is adhered to."*

242. Bredmeyer J also in the case of Burns Philip (PNG) Ltd v The State & Ors N769 stated as follows:-

"There is no general rule of law that the Head of State is immune from control by the Courts. That was decided by the Supreme Court in Kila Wari and Others v. Gabriel Ramoi and Sir Kingsford Dibela [1986J PNGLR 112. *Likewise, the National Executive Council is not inviolable from control by the courts. If the Constitution or a statute gives it limited powers and it acts outside those powers then Court orders will lie against it. In the State v Philip Kapal [1987J PNGLR 417, Kidu CJ and Woods J at 420-421 held that judicial review would lie against the National Executive Council where it had (a) exceeded its powers, (b) abused its powers, or (c) made a decision which no reasonable authority could have made. "*

243. The Courts of PNG are given a predominant role in interpretation of the Constitution of the Country. Interpretation of Constitutional Law is one fundamental responsibility of the judiciary. The Supreme Court has that power under Sections 18, 19 & 162 (1) (a) of the Constitution to do so.

244. In the case of Haiveta v. Wingti (No.3) *(supra)* at p. 207, His Honour Amet CJ *(as he then was)* brushed aside doubt about the judicial intervention in circumstances of interpretation of constitutional provisions when he said:

Constitutional Interpretation:

So long as there is law, there must always be the need for interpretation. The task of interpretation is more acute in interpreting a written constitution such as ours. Judicial interpretation and pronouncements are as important as the decisions and policies of the executive and the legislature. When the judiciary makes a decision and pronounces it, it is laying down a standard for the community. The judiciary, therefore, cannot divorce itself from the consideration of public national interest

One task of judicial interpretation is to uphold the cause of justice. What is the interpretation that will best achieve a sense of fairness and justice? The test or standard must be an objective one. It is not what I believe to be right. It is what I may reasonably believe that ordinary Papua New Guineans, of normal intellect, understanding, and conscience might reasonably look upon as right. It must be interpretation that gives cognizance to, and accords with, the ordinary person's objective perception of the public or national interest. The national and public interests are, in this context, synonymous.

Because constitutional interpretation is the sole preserve of the Supreme Court, the highest judicial authority in the nation, as delegated by the People to it through the Constitution, the Court has to be responsive to the constitutional values. The social philosophy of the Constitution must inspire the judicial decision-making process to adopt a broad goal-oriented and purposive approach directed towards advancing the constitutional objectives when interpreting the Constitution."

245. In this case it is apparent from the facts that the then National Executive Council down played the urgency of the matter of the ill Prime Minister as it ought to have under s.6 of the Prime Minister and National Executive Council Act.

246. The then National Executive Council under the leadership of Acting Prime Minister Hon. Sam Abal with respect failed to attend speedily to address the matter under s.142(5)(c) and s.6 of the Prime Minister and National Executive Council Act.

247. As a result of the inaction by the NEC some of the members of the NEC together with a bulk of the then Government members determined that they would change the leadership in their own camp and went on to decide that they would ask Parliament to declare a vacancy in the Office of Prime Minister.

248. Sir Michael left PNG due to ill health at the end of March 2011, and his hospitalisation and absence for 5 months, yet Hon. Sam Abal delayed submitting a Statutory Business Paper in relation to the question of whether the NEC should advise the Head of State pursuant to s.6 of the Prime Minister and NEC Act until end of July 2011.

249. With respect I agree with the submission of the First Intervenor when he submitted that :

The Business Paper signed by the Acting Prime Minister recommended that :-

1. *The NEC take note of the contents of this Saturday Business paper; and*
2. *The NEC pursuant to Section 6 of the Prime Minister and National Executive Council Act 2002 (the Act), advise the Head of State to, also pursuant to s.6 of the Act, request the PNG Medical Board to appoint two specialist experienced doctors to conduct medical examination of the Prime Minister and to report to him within 28 days, on the physical and mental capacity of Prime Minister to carry out the duties of his office.*
3. *The NEC to advise the head of State not to suspend the Prime Minister following the request to the PNG Medical Board, pending the medical examination and report to him, since Parliament has on may 17, 2011 granted leave of absence to the Prime Minister and he is currently on such leave of absence to recover from medical surgery."*

250. Recommendation No 3 was based on an incorrect statement and premise. That is, Sir Michael was only granted leave of absence for the duration of the May meeting on the ground of ill health. He was not "currently" on any granted leave of absence.

251. On 27 May 2011, the last day of the May meeting, a question was asked in the chamber whether there was any reason why the procedure in s.145(5)(c) could not be invoked given the absence of the Prime Minister for health reasons. The question was ruled out of order by the Deputy Speaker.

252. Honourable Sam Abal swore that:

1. *I am member for Wabag and was the Acting Prime Minister until the 2 August, 2011 whilst the Prime Minister Rt. Honourable Grand chief Sir Michael Somare was in ill-health and undergoing treatment and surgery from March 2011.*
2. *On the 28 of June 2011, Hon. Arthur Somare on behalf of Lady Veronica Somare and the family made a public announcement that it was his family's collective desire that Sir Michael Somare be allowed to recover at his own pace, and therefore retire on medical grounds. I am advised by Mr Somare that the Grand Chief was in hospital and was in no mental and physical condition to make a statement on his own to the nation.*
3. *This announcement triggered the need to initiate a process that could clearly deal with the question of the future of Grand Chief Sir Michael Somare as Prime Minister given his medical condition. This is captured in Statutory Business Paper No 58 of 2011.*

253. Honourable Sam Abal gave no explanation as to why, notwithstanding he knew that Sir Michael Somare was in serious life threatening ill health from March 2011, the process of appointing two medical practitioners was not sought to be utilized earlier.

254. There is also no explanation as to why there was such delay between 28 June 2011 and the NEC decision of 1 August, 2011. In my view this was a serious mistake by the NEC. This court cannot ignore that mistake but must take it into account in the overall flow of events from that failure to the events of 2 August, 2011.

255. It is clear that the provisions of s.142(5)(c) of the Constitution and s.6 of the Act can be and were subject to misuse and abuse.

256. The problem with s.6 of the Act, as set out below, is that there are no time limits applicable relating to the commencement and conclusion of the process. The process could have extended beyond the date of the 2012 National Elections. For example, there is no minimum time limit imposed on the Medical Board appointing two medical practitioners when it receives the request from the Head of State to appoint two medical practitioners. Additionally, there is no minimum time limit provided under s.6(6) of the Act for the Head of State to forward the two medical practitioners' report and certification to the Speaker.

257. The delay in this case by the Honourable Sam Abal in submitting the Business paper at the end of July 2011 to the NEC and the delay in the NEC providing advice to the Head of State under s.6 of the Act, some five months after he became aware of Sir Michael's illness, was very considerable.

258. In those circumstances, reliance cannot be placed on the process under s.6 of the Act being properly utilized. Understandably, in light of such delay; the failure to keep Parliament informed as to the health of Sir Michael Somare; the Ruling as out of order, a question in Parliament on 27 May 2011 as to why the procedure in s.142(5)(c) could not be followed; the lack of any time frame to complete any process under section 6 of the Act, one could have no confidence in the said process when one considers that in this case there was deliberate delay by the NEC. Thus when the process did belately commence, it was invalid and null and void – see s.11 of the Constitution.

AUTOCHTHONOUS CONSTITUTION

259. In the case of ***Kila Wari and Seven Others v. Gabriel Ramoi*** and ***Sir Kingsford Dibela (1986) PNGLR 12***, Amet J (as he then was) in the course of handing down his decision highlighted the unique feature of our Constitution in that it is an Autochthonous Constitution. He said:

"We start from the premise asserted in the Preamble to the Constitution "that all power belongs to the people". As Frost CJ said in The State v Mogo Wonom [1975] PNGLR 311 at 315-306:
"The Constitution itself is a truly autochthonous Constitution established, as the preamble recites, by the will of the people, to whom 'all power belongs '. Its authority is thus original and in no way derivative from any other source. Unlike the case of Australia where the first settlers brought with them the common law there is, to use the words of Sir Owen Dixon speaking of the America Constitution, 'no anterior law providing the source of juristic authority' for the institutions of government now established."

In the words of Pratt j in SCR No 1 of 1982; Re Bouraga (1982) PNGLR 178 at 202:
"…The Powers wielded by any servant of the public, be he Minister civil servant, judge or whatever stems from a delegation from the people …"

I add that the Head of State similarly is delegated powers and functions from the people, the source of all powers, through the Constitution. Thus s. 138 of the Constitution on Vesting of the Executive Power – provides:-

"Subject to this Constitution, the executive power of the People is vested in the Head of State, to be exercised in accordance with Division V.2 (functions, etc., of the Head of State)."

Under s 139 the National Executive consists of :
(a) The Head of State acting in accordance with advice; and
(b) The National Executive Council.

The executive power of the people in reality is vested in the National Executive Council, which in many instances acts through the Head of State. In my view therefore, whenever the National Executive Council performs an executive act through the Head of State, or put another way, when the Head of State performs an executive act upon advice from the National Executive Council, he is in fact acting on behalf of the people of Papua New Guinea who are collectively known by their corporate name as "The State."

"Pursuant to the Constitution, s 99, also, the power, authority and jurisdiction of the People is to be exercised by the National Government which consists of the National Parliament, the National Executive and the National Judicial System. Consistently with this it was held in The State v Mogom that:

"the judicial authority of the people is vested in the National Judicial System ... The power of judicature in this country lies in the people at large. This has been invested by the people in the Courts established under the Constitution ... it is appropriate that proceedings be brought by the people in their collective corporate name 'The State' (s 1)."

The Court thus held that the criminal prosecution upon indictment should be in the collective corporate name of the people from whom the power to prosecute for offences against it is derived, that is "The State"

It is in my view also, therefore, that because the executive power exercised by the Head of State, in accordance with the advice of the National Executive Council, is vested in him by the People through the Constitution, it is appropriate that proceedings brought against the exercise of that executive power by the Head of State on behalf of the People, should be against the People in their collective corporate name "The State". This view is, I consider, affirmed by the Claims By and Against the State Act (Ch No 30), which by s 2 and s 3, provides for suits against and by the State respectively to be brought in the name of "The State". Consistently

with this spirit of the autochthonous nature of the Constitution is the ruling I have referred to earlier in The State v Mogo Wonom".

260. In this case the Executive power of the people was abused when the NEC failed to invoke s.142(5)(c) of the Constitution and s.6 of the Prime Minister and NEC Act. That deliberate failure must now be seen as an abuse and misuse of the people's power, such that it must now be left to this Court to find that there is a vacancy in the Office of the Prime Minister. The NEC incapacitated the s.142(5)(c) and s.6 process and the Court cannot resurrect it. The court however must look for some ingenious solutions and in my view the actions of Parliament on 2 August shows parliamentary ingenuity. It is democratic and transparent, and within the law.

GAP IN LAW

Sch 2.3 Development, etc, of the underlying law

(1) If in any particular matter before a court there appears to be no rule of law that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System, and in particular of the Supreme Court and the National Court, to formulate an appropriate rule as part of the underlying law having regard
   (a) In particular, to the National Goals nd Directive Prnciples and the Basic Social Obligations; and
   (b) To Divison III. 3 (basic right), and
   (c) To analogies to the drawn from relevant statutes and custom, and
   (d) To the legislation of, and to relevant decisions of the court of any country that in the opinion of the court has a legal system similar to that of Papua New Guinea, and
   (e) To relevant decisions of courts, exercising jurisdiction to or in respect of all or any part of the country at any time.

   and to the circumstances of the country from time to time.

(2) If in any court other than the Supreme Court a question arises that would involve the performance of the duty imposed by Subsection (1), then, unless the question is trivial, vexatious or irrelevant.
   (a) In the case of the National Court the court may; and
   (b) In the case of any other court (not being a village court) the court shall,

   refer to matter for decision in the Supreme Court, and take whatever other action (including the adjournment of proceedings) is appropriate.

In the case SC Reference No 4 of 1990 Special Reference Pursuant to Section 19 of the Constitution in the Matter of a Reference By The Acting Principal Legal Adviser

Re Meeting of Parliament, Kapi DCJ (as he then was) at page 156-157 discussed vividly the method of the Judiciary filling in a gap in the course of interpreting Constitutional provisions. He said:

"I have reached the conclusion that, as a matter of interpretation, there is a gap in the law. In Papua New Guinea, we are not left without a remedy. Schedule 2.3 of the Constitution empowers this Court to formulate a rule of law to jill the gap. This Court has already done this in SCR No 4 of 1980,' Re Petition of Somare (No 1) [1981/ PNGLR 265. In formulating this rule, Kidu CJ said at 272 that the court may have regard, amongst other things:

(c) to analogies to be drawn from relevant statutes and custom; and
(d) to the legislation of. and to relevant decisions of the courts of. any country that in the opinion of the court has a legal system similar to that ofPapua New Guinea. ..

Ordinarily, where there is a gap in a legislation, such as in this case, it would not be proper to fill the gap by way of jurisdiction act. It would be more appropriate to enable the Parliament to fill the gap (Sch 2.4 *of the Constitution). See State v* ***Kay 11983/ PNGLR*** 24. *The Parliament could do this by amending s* 124 *of the Constitution, enacting an Act of Parliament, or including this in the Standing Orders (s* 124(3) *of the Constitution).*

However, in this case, I would fill the gap for the following reasons. First, there is an urgent need to do something to determine the current period. Ifthe Parliament does not like the formulation, they can always abolish the rule of law (underlying law) by legislation. Second, as I have pointed out earlier, the National Parliament considered the issue on 9 *November* 1989. *The Speaker, recognizing the gap, advised the Parliament:*

The first question to address concerns in each period of 12 months. My advice is that this period should refer to the 15th July, the date of return of writs until 14th July in the next year. Members should note that whilst each is not specific, it does not refer to any period.

The advice was not challenged by any member of the present Parliament. Therefore, I have some indication as to what the Parliament would do.

As required under Sch 23(1)(c) of the Constitution, I may have regard to analogies from relevant legislation. I have already indicated that s.41(3) of the Papua New Guinea Act 1947 – 73 adopts the first meeting of the Parliament as the commencement of the 12 months period and not the day after the date of the writs.

Under Sch 2.3 (1) (d), I may have regard to legislation and decisions of any country that has a legal system similar to Papua New Guinea. There are no relevant decisions, but there is legislation from the Commonwealth countries which are relevant. I have examined constitutions in Australia, the Caribbean countries, and African countries which can be said to have a similar legal system to PNG and, without having to refer to all of them, they adopt the first sitting of the Parliament as the commencement of the 12-months period. Only from this date can the Parliament fix any other meeting of the Parliament. There can be no meeting of the Parliament before the first meeting. See s I of the Organic Law on the Calling of Meetings of the Parliament. Therefore, it would be more appropriate to commence the period from the first meeting of the Parliament.

However, it has been pointed out that if the period of 12 months begins from the first sitting of the Parliament, the last period in the life of Parliament will fall short of 12 months. The same can be said of the first period if the 12 months begins from the day after the return of writs after a general election.

There is *very little difference in effect between the day after the return of the writs and the first sitting of the Parliament after the general election. It* is *a difference of, at the most, 21 days. If I rule that the period begins from the day after the return of the writs, the Parliament only has II months 10 days to fit the three meetings in the first period of 12 months. If I rule that the period begins to run from the first meeting of the Parliament after the general election, the parliament will have only II months 10 days to have the three meetings in the last 12 months period.*

As to the third alternative, that is, *"any period of 12 months beginning with one meeting of the Parliament and ending with the third meeting of the Parliament* ", *it* is *uncertain and may not be consistent with the term of Parliament*

As to fourth alternative, that is, "the period of 12 months commencing 1st January and ending 31st December in each ", as the term of the present Parliament begins on 15 July 1987, it would not be possible to fit in all the 12 months period within the whole term of this Parliament.

Having regard to the fact that the majority adopts the day after the return of the writs as the commencement date, I would formulate the rule that the 12months period referred to in s 124 of the Constitution should begin from the day after the return of the writs after a general election.

I have come to this conclusion not by way of interpretation but by way of judicial legislation permitted under Sch 2.3 of the Constitution. "

261. In this instance and from the circumstances of the case when the NEC decided to unreasonably delay the s.142(5)(c) of the Constitution process and the s.6 of the Prime Minister and the NEC Act it exceeded the authority and power given it by the people.

262. By dong so the NEC allowed the process to be circumvented. Had the NEC allowed the process to be carried out with due speed, there is no doubt in my mind that the two medical practitioners would have found Hon. Sir Michael Somare unfit for duty as Prime Minister and therefore unavailable as found by Cannings, J, thereby creating a vacancy in the Office of the Prime Minister.

263. For the foregoing reasons, I am persuaded that a vacancy was created by the deliberate failure of the NEC to act on Hon. Sir Michael Somare's ill health. However, there is in my view a gap in the Prime Minister and National Executive Council Act in that there is no provision as to when there is non compliance. Should non compliance be referred to Parliament or to the Court.

PROCEDURE IN PARLIAMENT - JUSTICIABILITY

264. Section 134 of the Constitution

134 Proceedings non-justiciable.

Except as is specifically provided by a Constitutional Law, the question, whether the procedures prescribed for the Parliament or its committees have been complied with, is non-justiciable, and a certificate by the Speaker under Section 110 (certification as to making of laws) is conclusive as to the matters required to be set out in it.

265. In the matter of Kaseng v Namaliu (1995) PNGLR, 481 at page 515-516, Hinchliffe & Andrew JJ discuss Section 134 of the Constitution and laid down the definition of "Procedures". They said:-

These submissions immediately raise the question of whether or not these are matters which are justiciable. Section 134 of the

Constitution provides:-

134. Proceedings non-justiciable

Except as is specifically provided by a Constitutional Law, the question, whether the procedures prescribed for the Parliament or its committees have been complied with, is non-justiciable, and a certificate by the Speaker under Section 110 (certification as to making of laws) is conclusive as to the matters required to be set out in it.

There has never been a definition of what is "procedures" or procedural in this context.

Firstly, it has been emphatically laid down that the settled practice is to refuse to grant relief in respect of proceedings within Parliament which may result in the enactment of an invalid law, and that the proper time for the Court to intervene is after the completion of the law-making process: see Hughes & Vale Pty Ltd v *Gair* (1954 *90 CLR 203; Clayton* v *Heffron (1960) 105 CLR 214 at* 235; *and per Gibbs J in Cormack* v *Cope* (1974) 131 *CLR* 432 *at 467.*

The courts in the United Kingdom have traditionally refrained from any interference in the law-making activities of the Parliament. But in Papua New Guinea (and in Australia), the law-making process of the Parliament is controlled by a written Constitution. It has been pointed out by the Privy Council in unequivocal language in the case of Bribery Commissioner v. *Ranasinghe* [1965*J AC* 172, *that where the law-making process of a legislature is laid down by its constituent instrument, the courts have a right and duty to ensure that the law making process is observed; per Barwick CJ in Cormack* v *Cope (supra) at p* 452 *and further at p* 453: *"where the Constitution requires that various steps be validly taken as part of the law-making process .... the Court has a duty to see that the Constitution is not infringed and to preserve it inviolate ... it has the right and duty to interfere if the*

constitutionally required process of law making is not properly carried out."

It is a firmly established principle that this Court may declare or treat as invalid any law of the Parliament made without the authority of the Constitution. The exercise of this authority includes the completion of the parliamentary process to turn a bill into an act. See also Victoria v *The Commonwealth* (1975) 134 *CLR* 81 *at* 92. *Further,* s *109 of the Constitution provides that the general law-making power of the Parliament is subject to the Constitution and the authority of SCR No* 2 *of*1982; *Re Organic Law (supra) makes it quite clear that the requirements of* s 14 *of the Constitution are mandatory.*

But whilst this Court has jurisdiction in matters involving the constitutionality of the law-making process, including the amendment of the Constitution itself, it does not have jurisdiction to enquire into what has been described as "intramural" deliberative activities of the Parliament or the intermediate procedures of Parliament. These are matters which are procedural of the proceedings of Parliament, and whilst there has never been a complete definition of this term, in its wider sense it has been used to include matters connected with, or ancillary to, the formal transaction of business in the Parliament: see Halsbury Laws of England (4th edn) vol 34 *para* 1486. *The power to make the law, as it has emerged from the law-making process, is one thing, but the actual process of law-making is another thing. "*

Standing Orders of Parliament.

266. Section 284 (2) provides:-

"In deciding any question relating to procedure or the conduct of the business of Parliament in the absence of sessional or other orders or practice of the Parliament, Mr Speaker may resort to the usage and practice of the House of Representatives in the Parliament and not

inconsistent with these Standing Orders or with the practice of the Parliament."

267. Given the situation that the Constitution does not envisage an Acting Prime Minister to act forever s.142(2) is a wide provision.

Simultaneously, the scheme under the Constitution is that the Prime Minister must not be way for more than three months.

It is my view that s.142(2) is wide enough to cover situations where the Prime Minister is unavailable to perform his duties for some reason or other causing an emergency or necessity situations.

268. There may be a situation where the Prime Minister has been kidnapped or is lost at sea for more than 3 months and the negotiators will take a while to negotiate his release from the kidnappers. This is palatable with the view that the incumbent does not own the office, but it is the peoples' office.

269. To interpret otherwise would be to allow an Acting Prime Minister to rule for a longer period than allowed by the Constitution.

270. Hon. Sam Abal was Acting Prime Minister at the material time and had been so, up to that time for about 5 months.

271. How long was Hon. Sir Michael Somare, Parliaments mandated Prime Minister going to be unavailable and how long was Hon. Sam Abal going to act as Prime Minister for. The founding fathers of the Constitution never envisaged that the peoples mandated Prime Minister would be absent for so long without an explanation and that an Acting Prime Minister would act for no specified period for as long as it took.

272. The fact that on 10 May 2011 the Acting Prime Minister made a statement in Parliament as to the Prime Minister's health is not what is envisaged under s.142(5)(c). The Acting Prime Minister's duty with respect was to invoke s.142(5)(c) and s.6 of the PM and NEC Act at the earliest and advise the Governor

General to request 2 medical practitioners to report on the health of the Prime Minister.

273. Those reports with the certifications are to be then forwarded to the Speaker by the Governor General and the Speaker is to present to the Parliament the reports. If the reports indicate that the Prime Minister is unfit or unable by reason of physical or medical incapacity to carry out the duties of his office and the unfitness or inability will, in their opinion continue to exist for a period of more than 3 months from when they examined him, the Prime Minister is suspended from Office until Parliament has dealt with the matter.

274. The facts as they appear are that the NEC was playing "wait and see what happens" to Sir Michael in other words playing a waiting game.

275. The Office of the Prime Minister does not belong to one man, or one family, or a particular group. It is an important public office such that there must be no time to be playing a waiting game.

276. An incumbent holder of the Office of the Prime Minister is only a custodian of that office and the number one servant of the people. He must let go of the office if he is physically unable to perform the duties of that office for over 3 months.

277. It is an agreed fact that no doctors had been appointed. It was the NEC's duty to have the medical report presented to Parliament but it failed to comply with s.142(5)(c) and s.6.

278. The reports of the two medical practitioners might have established a basis for the removal of the Prime Minister pursuant to s.142(5)(c) of the Constitution, as it is manifestly clear that on 19 October 2011, Cannings J made findings of fact that Hon. Sir Michael Somare was during the whole period of hospitalization from 30 March 2011 to late August 2011 unable to perform the duties of the Office of the Prime Minister. Cannings, J also found that Hon. Sir Michael Somare was incapable of communicating, incapable of managing his affairs and lacked capacity to carry out the functions and duties of Prime Minister and that he was not capable of making an informed decision whether or not to resign from office.

279. In those circumstances I am satisfied on the evidence that a situation of necessity arose in the office of the Prime Minister such that Parliament was now asked to step in to rectify the matter.

280. The procedure under s.142(5)(c) and s.6 in my view, has now been superceded by the findings of Cannings, J. Other events have overtaken the process under s.142(5)(c).

281. The motion by Hon. Belden Namah on the floor of Parliament for Parliament to declare a vacancy was in effect a motion to remove the Prime Minister from office to create a vacancy. The Parliament's decision was then conveyed to the Head of State and the Head of State then removed the Prime Minister from office.

282. No utility will be served to allow the process started by NEC to proceed because simply put Cannings J has made the findings based on medical evidence produced before him. While I appreciate that this evidence was not before the Parliament in the form it is before the Court, the general knowledge of the evidence by all Members of Parliament of the critical health condition of Sir Michael Somare in my view was sufficient.

283. Parties and the Court are now stuck with Cannings, J's findings which must suffice to declare that Sir Michael was and is incapable of managing the affairs of the nation and as such a vacancy was created on 2 August, 2011.

284. Debra Angus, the Deputy Clerk of the House of Representatives in New Zealand in a Professional Development Seminar in Norfolk Island said:

"The rationale for non-justiciability of Parliamentary proceedings is an aspect of the broader principle of comity between the judicial and legislative organs of government."

285. The principle is grounded on the need for the Courts to avoid creating tension and intruding unwisely into the workings of the legislature or in other words acknowledging the separate roles of the Judiciary and Parliament.

286. In the matter of Haiveta v Wingti (No 3) (1994) PNGLR 197, the issue of justiciability was not directly raised but the issues determined in that case did concern justiciability issues.

287. The Court in the Wingti case simply assumed it had jurisdiction to deal with issues presented before it and was never an issue there.

288. In that case the Court was dealing with the appointment of the Prime Minister after Parliament was informed that the incumbent had resigned and whether the appointment of the Prime Minister on the same day as opposed to "the next sitting day" was constitutional or not.

289. The court ruled there that the appointment of the Prime Minister on the same day by Parliament was unconstitutional.

290. In effect the Court by inference ruled that Parliaments actions in appointing the Prime Minister on the same day was justiciable because s.142 of the Constitution lays down the procedure for appointment of a Prime Minister.

291. Similarly, the issue of justiciability was not specifically argued and discussed in the Kaseng case. Counsel had informed the Court that justiciability was not an issue. The Wingti case was never mentioned or discussed in the Kaseng case.

292. The Supreme Court in the Kaseng case said :-

"The Supreme Court can exercise jurisdiction where it is alleged that the requirements of the Constitution relating to constitutional amendments are breached, but where it is alleged that the passage of amendments through the parliament breached parliamentary procedures, these matters are non-justiciable under s.134 of the Constitution."

293. On the issue of "Opportunities of debate" in the Kaseng case Amet CJ said:

"Whether or not debate in fact, takes place and, if so, for how long and

by whom and what the subject matter of that debate is, are matters that are non-justiciable as pertaining to internal procedures of Parliament. Further issues as to whether attempts were made to gag debate and the motion and vote to end debate are also matters of internal procedures of Parliament that cannot be the subject of scrutiny by the Court.

294. With respect I agree with the statement with the exception stated in s.134 of the Constitution, that is where the Constitutional Law itself specifically provides for a procedure to be followed as in s.142. In this case there is no such direction by Constitutional Law.

295. As discussed earlier there is no Constitutional Law prohibition for such a motion to create a vacancy in the Office of Prime Minister to be moved in Parliament. It is in my respectful opinion therefore that what took place in Parliament are internal procedures of Parliament and are not subject to the scrutiny of the Court.

296. Having said that the net effect is that a vacancy was created on 2 August, 2011 in the position of Prime Minister by Parliament, and that occasion for a "vacancy in the Office of Prime Minister are not limited to circumstances enumerated in s.142(5), s.143, s.145, s.146 and s.147 of the Constitution.

297. In relation to the issue of unsoundness of mind under s.103(3)(b) of the Constitution, I agree with my other brothers that Sir Micheal was of sound mind.

298. In relation to the issue raised under s.104(2)(d), that is disqualification from being a Member of Parliament after missing 3 consecutive Parliament sittings, I also agree with my brothers on that issue that Sir Michael only missed two full sittings of Parliament without leave. Although he did miss 3 full sittings of Parliament he was granted leave of absence for the May sittings. This means he is still a Member of Parliament.

299. In relation to the onus of proof the law on this issue was settled in the Southern Highlands Reference on the State of Emergency in and being a part of the Court think that is good law.

300. Herein is a summary of how I have answered the Reference questions. Refer to annexure.

1. **KIRRIWOM, J**.: I have read the draft judgment by the Chief Justice and I am in agreement with His Honour on his reasoning and conclusions. However, I wish to add a few thoughts and observations of my own.

2. This Special Reference under section 19(3) of the Constitution seeks the interpretation of this Court on the constitutionality of the election of Hon Peter O'Neill as the Prime Minister of Papua New Guinea on 2nd August 2011 by the Parliament during the absence of Sir Michael Somare, the serving Prime Minister, who was in Singapore Raffles Hospital seeking medical attention.

3. The East Sepik Provincial Executive, an authority referred to under subsection 3(eb) of section 19 of the Constitution filed this Reference on 5th of August, 2011 after the Provincial Executive Council voted by majority of the members present at its meeting on 4th August, 2011 to take this course. The Reference was amended several times during the directions hearings as Intervenors joined the Reference amongst whom included the Attorney General and Minister for Justice Hon Dr Allan Marat MP, the Speaker of National Parliament, Hon Jeffrey Nape, MP, the Ombudsman Commission, Hon Sam Abal MP as the deposed Deputy Prime Minister and Acting Prime Minister in the Somare-Abal Government, the Prime Minister, Hon Peter O'Neill, MP, Deputy Prime Minister and the architect of the events of 2nd August, 2011, Hon Belden Namah, MP, National Alliance Party, the majority political party in the Somare-Abal Government in power before the overthrow of that regime and belatedly joining the team

after initially declining involvement in the proceeding was the deposed Prime Minister Grand Chief Hon Sir Michael Somare, MP.

4. The questions in the Special Reference ultimately agreed to by all the parties are as follows:

A. The original questions:

(1) On 2 August 2011 was there a vacancy in the Office of the Prime Minister within the meaning of *Constitution* Section 142?
(2) If "yes" to Question (1), how and when did that vacancy arise?
(3) Did the resolution of the Parliament on 2 August 2011 that there is vacancy in the Office of Prime Minister have and (and if so, what) constitutional validity, force or effect?
(4) Was the Honourable Mr Peter O'Neill validly appointed to the office of Prime Minister on 2 August 2011 pursuant to Constitution section 142 (2), Schedule 1.10(3) or at all?
(5) Does Sir Michael Somare continue to hold the office of Prime Minister, and does the Honourable Sam Abal continue to be the Acting Prime Minister?

B. The following questions were added as per the orders of the court dated the 1st September 2011.

Section 104

(6) What meetings of the Parliament have been held since 1 March 2011 within the meaning of S.104(2)(d) of the Constitution?
(7) Was Sir Michael Somare absent from the whole of any, and if so which, of those meetings of the Parliament?
(8) Do the meetings of Parliament identified in answer to paragraph (7) above include three consecutive meetings of the Parliament?
(9) If the answer to paragraph (8) is "yes", did Sir Michael Somare have leave of the Parliament in respect of any, and if so which, of those three consecutive meetings of the Parliament?
(10) In the event Sir Michael did not have the leave of Parliament in respect of his absence for all three of those consecutive meetings of the Parliament, was he absent without that leave during the whole of three consecutive meetings of the Parliament within the meaning of Section 104 (2)(d) of the Constitution?
(11) Did Sir Michael cease, and if so when, to be a member of the Parliament?

Section 103

(12) What are the laws referred to in s.103 (3)(b) of the Constitution as "any law relating to the protection of the persons and property of persons of unsound mind'?
(13) What is the meaning of the expression "unsound mind" in the laws identified in answer to paragraph (12)?
(14) Has Sir Michael Somare been of "unsound mind" within the meaning of the law referred to in s.103 (3)(b) at any time in the period from April 2011 to the present time?

(15) In the event the answer to (14) is yes, when in the said period has he been of unsound mind?

(16) In light of the answers to (14) and (15) when did Sir Michael Somare become unqualified to remain a member of the Parliament within the meaning of s.103 (3)(b) of the Constitution?

(17) Did Sir Michael Somare cease to be a member of the Parliament on the date identified in paragraph (16) by reason of S.104(2)(f) of the Constitution?

Section 142 (occasion for decision)

(18) Does the office of Prime Minister become vacant, by the operation of s.141(a) of the Constitution or otherwise, when the incumbent ceases to be a member of the parliament by the operation of s.104 (2)(d) of the Constitution?

(19) If the answer to (18) is yes, having regard to the answers to (14) and (15) above, did the office of Prime Minister become vacant in August 2011, and when?

(20) Does the Office of Prime Minister become vacant by the operation of S.141(a) of the Constitution or otherwise when the incumbent becomes unqualified to be a member of the Parliament pursuant to s.103 (3)(b) and s.104 (2)(f) of the Constitution?

(21) If the answer to (20) above is yes, having regard to the answers to (16) and (17) above did the office of Prime Minister become vacant on or prior to 2 August 2011?

(22) If the answer to (23) is yes, when did it become vacant?

(23) If the answers to (18) and (20) are both no, did the Parliament nevertheless have power or authority pursuant to s.142 (2) and Schedule 1.10(3) of the Constitution or otherwise, to declare that the office of Prime Minister was vacant on 2 August 2011?

(24) If the answers to (19) and (21) are both no, was there nevertheless an occasion for the appointment of a Prime Minister within the meaning of S.142(2) of the Constitution by 2 August 2011.

Section 142 (next sitting day)

(25) Was the Parliament required to consider the question of appointment of a Prime Minister on 2 'August 2011 under one of s.142 (3) or 142 (4) of the Constitution?

(26) If the answer to (25) is yes, was the Parliament in session when a Prime Minister was to be appointed within the meaning of S.,142 (3) and s.142 (4) of the Constitution?

(27) What is the meaning of the expression "the next sitting day" where used in s.142 (3) of the Constitution?

(28) What is the meaning of the expression "the next sitting day" where used in s.142 (4) of the Constitution?

(29) If the answer to (25) is yes, is the requirement in either, and if so in which, of S.142 (3) and s.142 (4) of the Constitution that the question of the appointment be considered on the "next sitting day" mandatory?

Appointment

(30) Was the appointment of Mr. Peter O'Neill as Prime Minister by the Head of State on 2 August 2011 in accordance with a decision of the Parliament?

Justiciability

(31) Is the question whether the consideration of the Parliament to appoint Mr. Peter O'Neill to the Office of Prime Minister occurred on "the next sitting day" within the meaning of s.142 (3) or s.142(4) of the Constitution justiciable?

(32) Is the question whether there was a proper basis for the appointment of the Prime Minister as Head of State justiciable having regard to Section 86(4) of the Constitution?

(33) Is the question whether there was a proper basis for the appointment of the Deputy Prime Minister by the Head of State justiciable having regard to Section 86(4) of the Constitution?

Other

(34) Ought the Court decline to answer any question in the reference pursuant to S.19[4][c] of the Constitution and Order 4 Rule 16 of the Supreme Court Rules having regard to the circumstances including any of the following:

i. The vote of the Parliament on 2 August 2011 deciding to appoint the Honourable Peter O'Neill Prime Minister by majority of 70 votes to 24;

ii. The answers to any of the questions above;

(35) iii. The time by which the next election is to be held in accordance with s.105 of the Constitution; the terms of s.145 of the Constitution." Whether, on a true construction of the words 'without leave of the Parliament during the whole of the three consecutive meetings of the Parliament', as such words are contained in section 104(2)(d) of the Constitution such words mean:

(a) Firstly, that the grant of leave at any meeting of the Parliament pursuant to such section shall be for the duration of that meeting only, or alternatively;
(b) Secondly, that the grant of leave at any meeting of the Parliament pursuant to such section may be for one or more meetings, or laternaively;
(c) Thirdly, that the grant of leave at any meeting of the Parliament pursuant to such section shall be for 'the whole of three consecutive meetings'?

(36) Given the determination of the Speaker on 6 September, 2011 that the East Sepik Provincial Seat in the Parliament (held by Sir Michael) had become vacant, was Sir Michael nevertheless entitled to remain as elected member for the said seat until such time as the Parliament:

(a) Had given to Sir Michael a reasonable opportunity, in accordance with section 59 of the Constitution, to provide a 'satisfactory reason' to the Parliament for his absences; and thereafter;
(b) Decied , after considering such reasons, whether to "waive" pursuant to section 104(2)(d) of the Constitution the rule that the said seat was vacant by reason of such absences?

(37) If the answer to Q36 is in the affirmative, whether Sir Michael remained a member of Parliament notwithstanding the decisions of the Speaker and the Parliament under section 104(2)(d) of the Constitution on 6 September, 2011?

(38) Is the jurisdiction of the National Court to determine any question as to the qualifications of a person to remain a member of the Parliament under section 135 of the Constitution exclusive or is the power to do so shared by the Parliament?

5. The facts and circumstances leading up to and culminating in the Parliament's controversial election of Hon Peter O'Neill MP as the Prime Minister for Papua New Guinea on 2nd August 2011 can be surmised from the following agreed facts:

(i) The last general election to the Parliament occurred in 2007. At that election Sir Michael Somare was elected to the seat of East Sepik Provincial.

(ii) Sir Michael Somare was appointed Prime Minister at the first meeting of the Parliament after the 2007 general election pursuant to s.142(2) of the Constitution and in accordance with a decision of the Parliament.

(iii) On 24th March 2011 Sir Michael travelled to Singapore for medical consultation and returned to PNG on 28th March(sic) 2011.

(iv) As at 2nd August Sir Michael had not been removed or dismissed from the office of Prime Minister within the meaning of s.142(5) of the Constitution.

(v) After prayers at the commencement of the sitting of the Parliament on 2nd August 2011, the first day of the August meeting, the member for Vanimo Green, the Hon. Belden Namah, asked the Speaker for leave to move a motion without notice. Leave was granted. Mr. Namah then moved a motion that so much of the standing orders be suspended as would prevent the moving of a motion without notice. That motion was carried on the voices.

(vi) Mr. Namah then moved a second motion in terms to the following effect: *"pursuant to s.142(2) of the Constitution and Schedule 1.10(3) of the Constitution, and the inherent powers of the Parliament that we declare the Office of the Prime Minister be vacant, and that consequently, in accordance with the provision of s.142(2), this Parliament proceed forthwith to elect and appoint a new Prime Minister."* This motion was then carried on the voices.

(vii) The Speaker then called for nominations for the election of the Prime Minister. Mr. Namah moved a motion nominating the Hon. Peter O'Neill, member for Ialibu Pangia Open, as Prime Minister.

(viii) The motion for the election of the Prime Minister was voted on by a head count involving the members standing and being counted. Seventy (70) members voted in favour of the motion that Mr. O'Neill be elected as

Prime Minister. Twenty-four (24) members voted against the motion, including the Hon. Sam Abal and the Hon. Sir Arnold Amet.

(ix) Mr. Namah then moved a motion to the effect that Parliament be adjourned to the ringing of the bells to allow Mr. O'Neill to present himself to the Governor General to be sworn in as Prime Minister.

(x) The East Sepik Provincial Executive is a provincial executive council established by the ***Organic Law on Provincial and Local Level Governments, s.23***.

(xi) The next general election, pursuant to s.105 of the Constitution, must be held within the 3 month period before the 6th August, 2012.

(xii) Sir Michael Somare did not attend the first meeting of the Parliament in 2011 which occurred in January 2011.

(xiii) Sir Michael attended the second meeting of Parliament in 2011, which occupied one sitting day, namely 25th February 2011.

(xiv) On 29th March, Sir Michael travelled to Singapore and on 30th March was admitted to hospital because of heart failure.

(xv) Sir Michael remained hospitalized in Singapore continuously from 30th March 2011 until at least 26th August 2011 in that during such period Sir Michael:

a. *Had aortic valve replace*ment surgery on **21st April**;

b. Had a cardiac arrest, had to be resuscitated and underwent emergency surgery on **4th May 2011**;

c. Underwent further emergency surgery on **11th May 2011**;

d. Had acute renal failure and was dialysed;

e. Was unable to breathe unassisted and required ventilation;

f. Suffered serious infections;

(xvi) Sir Michael remained in Singapore continuously from **24th March 2011** until **4th September 2011**.

(xvii) During the whole of the period referred to Sir Michael was absent from Papua New Guinea.

(xviii) During the period from **24th March to September 2011** the Parliament sat on the following dates:

a. On 10, 11, 12, 13, 17, 18, 20, 24, 25, 26 and 27th May 2007;
b. On 14, 16, 17, 21, 22, 23 and 24th June 2011;
c. On 2nd and 9th August 2011.

(xix) Sir Michael did not attend any day of sitting set out in paragraph 18 above.

(xx) On the first day of the May meeting, **10th May 2011**, the Hon. Sam Abal made a statement to the Parliament on the health of Sir Michael Somare as a matter of public importance. He said that: -

"The people of Papua New Guinea have been praying for our Prime Minister since he was admitted to hospital for surgery in Singapore. Mr. Acting Speaker, in the interest of the people of Papua New Guinea, I take the opportunity to explain to Parliament the condition of the Prime Minister, Grand Chief Sir Michael Somare.
Following Sir Michael's suspension from Office last month, he took leave to address a condition in his heart last month that has prevailed over a long period of time. Sir Michael had a successful valve replacement surgery. The surgery was successful but Sir Michael developed complications in the post operative period that required corrective surgery. Consequently, corrective surgery has taken place and Sir Michael is in recovery. Due to the nature of surgery, the period of recovery will be longer than anticipated. Mr. Acting Speaker, our senior cardiologist and Dean of the University of Papua New Guinea Medical School, Professor Isi Kevau who has been managing Sir Michael's valves over many years is involved in the management decisions in a consultative manner with his Singapore cardiologist and the nursing staff. Professor Kevau is satisfied with the progress so far and has informed me that the medical staff are providing good medical care and good progress is being made at this time."

(xxi) On the fifth day of the May meeting, **17th May 2011**, the Hon. Paul Tiensten without notice, moved a motion, passed by the Parliament, that:

"That leave of absence be granted to the Prime Minister Sir Michael Somare for the duration of this meeting."

(xxii) That motion of 17th May 2011 was not revoked or varied by the Parliament.

(xxiii) Sir Michael did not obtain any leave from the Parliament other than the leave granted 17th May 2011.

(xxiv) On about 28th July 2011 the Hon. Sam Abal submitted a business paper to the NEC a copy of which is Annexure SA1 to the affidavit of Mr. Abal made 8th August 2011.

(xxv) On 28th July 2011 the pursuant to the recommendation of the Hon. Sam Abal the NEC communicated to the Governor General the advice which is Annexure SA5 to the said affidavit of Mr. Abal.

(xxvi) On 1st August 2011, the Governor General pursuant to the advice from the NEC by instrument requested the Papua New Guinea Medical Board to appoint two medical practitioners. The Governor General did not suspend Sir Michael from office.

(xxvii) No doctors were appointed pursuant to the instrument of the Governor General on 1st August 2011.

6. Chief Justice has meticulously, as he always does, covered all the points of contentions from the perspective of all the parties in his judgment. I do not intend to do that as I see no practical utility in embarking on such an academic exercise. My judgment is therefore focussed directly on the first five questions in the Reference. These questions in my view are broad and have far-reaching considerations for the court to even address many of those issues raised by the First Intervenor and those supporting him.

7. What triggered this court proceeding stems from a decision of the Parliament. On 2nd August, 2011 when the Parliament convened its session, a motion, carefully crafted by its architect Hon Belden Namah MP, was moved for the purpose it did achieve as designed, and the Parliament by majority of 70-24 elected Hon Peter O'Neill, MP from Ialibu/Pangia Electorate as the Prime Minister of Papua New Guinea. The motion was sponsored by the Opposition but supported overwhelmingly by Members in the Government who crossed the floor and voted in support of the motion.

8. There is no doubt that what transpired in the Parliament on August 2, 2011 was the culmination of frustration and anxiety that had built up in the past several months since Sir Michael's hospitalisation in Singapore Raffles Hospital suffering from serious medical conditions for which he underwent three difficult surgeries. It did not help when the extent and degree of his condition since the operations remained

unclear and his possible return to office continued as a matter for speculation as well. This anxiety was further fuelled by Hon Arthur Somare MP Member for Angoram Open Electorate in East Sepik and son of Sir Michael speaking on behalf of the family on the floor of the Parliament when he purported to *'retire'* Sir Michael from politics, claiming it to be the wish of the family based on his poor health and to relieve him of the pressure to recover in peace. This announcement was subsequently contradicted or rebutted by the extended family members of Sir Michael. Even this conflicting information coming from the family did not help otherwise rising concerns around political circles.

9. The pressures to have Sir Michael replaced on medical grounds by virtue of his unfitness to hold office picked up momentum in the days preceding the events of August 2, 2011 when the Cabinet appointed two medical officers to examine Sir Michael in Singapore and to provide their opinions to the Parliament, a process for removal of a Prime Minister provided under section 142(5)(c) of the Constitution.

10. Section 142(5) (c) provide the following:

> "(5) The Prime Minister—
>
> (a) shall be dismissed from office by the Head of State if the Parliament passes, in accordance with Section 145 (motions of no confidence), a motion of no confidence in him or the Ministry, except where the motion is moved within the last 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election; and
>
> (b) may be dismissed from office in accordance with Division III.2 (leadership code); and
>
> (c) **may be removed from office by the Head of State, acting in accordance with a decision of the Parliament, if the Speaker advises the Parliament that two medical practitioners appointed by the National Authority responsible for the registration or licensing of medical practitioners have jointly reported in accordance with an Act of the Parliament that, in their professional opinions, the Prime Minister is unfit, by reason of physical or mental incapacity, to carry out the duties of his office."**

11. Unfortunately, the ink on the paper facilitating this process had hardly dried up after the Governor General signed the instruments on 1st August, 2011 when the Parliament was overwhelmed by a mischievous motion purporting to originate from the Constitution under section 142(2) and Schedule 1.10 of the Constitution and akin to a no confidence motion was successfully moved and a new Prime Minister was elected.

12. A part of the Hansard records the following of what transpired in Parliament:

`“**SUSPENSION OF STANDING ORDERS**

Motion (by Mr Belden Namah) agreed to-

(a) That so much of the Standing Orders be suspended as would prevent me from moving a motion without notice.

(b) That pursuant to section 142, sub-section 2 of the Constitution and schedule 1.10, sub-section 3 of the constitution, and in the inherent power of the Parliament that we declare the Office of the Prime Minister be vacant and consequently in accordance with the provisions of section 142, subsection 2 this Parliament proceeds forthwith to elect and appoint a new Prime Minister.

NOMINATION AND ELECTION OF PRIME MINISTER

MR BELDEN NAMAH – I nominate the Member for Ialibu Pangia, Honourable Peter O’Neill to be the alternate Prime Minister.

MR SPEAKER – Do you accept the nomination?

MR PETER O’NEILL – Yes, I humbly accept the nomination.

MR WILLIAM DUMA – I second the nomination

MR SAM BASIL – I move the nominations be closed

MR JOHN BOITO – I second the nomination for the nominations be closed.

The Parliament voted (the Speaker, Mr Jeffrey Nape, in the Chair)

MR SPEAKER – Honourable Members, the results of the vote are as follows:

AYES – 70
NOES - 24

MR SPEAKER – Honourable Members, the Prime Minister-elect will now present himself to the Governor-General at the Government House.

Motion by (Mr Belden Namah) agreed to-

That the Parliament be suspended until the ringing of the bells so as to allow the Prime Minister-elect to present himself at the Government House to be sworn in as the Prime Minister of Papua New Guinea.

Sitting suspended from 3:10pm."

13. The issues arising in the Reference from my perspective are basically these:

(i) Are the events of 2nd August, 2011 on the floor of Parliament non-justiciable that the Supreme Court be precluded from hearing the Reference and considering the questions posed?

(ii) Can the Supreme Court choose not to answer the question in the Reference because since being appointed Hon. Peter O'Neil has already performed in the chair of the Prime Minister and that the General Election is less than a year away?

(iii) Was there a vacancy in the office of the Prime Minister on 2nd August, 2011?

(iv) Does section 142(2) provide power to the Parliament to both remove and appoint a Prime Minister as a stand-alone provision?

(v) Are the requirements to comply with section 142(3) and/or 142(4) of the Constitution in reading and applying the law in conjunction with section 142(2) mandatory?

(vi) Is Sir Michael Somare's dismissal as Member for East Sepik Regional by the Speaker on 6th September, 2011 valid and effective?

14. I set out for the benefit of the reader the relevant provisions of the Constitution law for the purpose of this Special Reference from the way I see the issues in this case:

A. On Standing and Jurisdiction including Justiciability

i. 19. **Special references to the Supreme Court.**

(1) Subject to Subsection (4), the Supreme Court shall, on application by an authority referred to in Subsection (3), give its opinion on any question relating to the interpretation or application of any provision of a Constitutional Law, including (but without limiting the generality of that expression) any question as to the validity of a law or proposed law.

(2) An opinion given under Subsection (1) has the same binding effect as any other decision of the Supreme Court.

(3) The following **authorities** only are **entitled to make application** under Subsection (1):—

(a) the Parliament; and

(b) the Head of State, acting with, and in accordance with, the advice of the National Executive Council; and

(c) the Law Officers of Papua New Guinea; and

(d) the Law Reform Commission; and

(e) the Ombudsman Commission; and

(ea) a Provincial Assembly or a Local-level Government; and

(eb) **a provincial executive**; and

(ec) a body established by a Constitutional Law or an Act of the Parliament specifically for the settlement of disputes between the National Government and Provincial Governments or Local-level Governments, or between Provincial Governments, or between Provincial Governments and Local-level Governments, or Local-level Governments; and

(f) the Speaker, in accordance with Section 137(3) (Acts of Indemnity).

(4) Subject to any Act of the Parliament, the Rules of Court of the Supreme Court may make provision in respect of matters relating to the jurisdiction of the Supreme Court under this section, and in particular as to—

(a) the form and contents of questions to be decided by the Court; and

(b) the provision of counsel adequate to enable full argument before the Court of any question; and

(c) cases and circumstances in which the Court may decline to give an opinion.

(5) In this section, "proposed law" means a law that has been formally placed before the relevant law-making body.

ii. **133. Standing Orders.**

The Parliament may make Standing Orders and other rules and orders in respect of the order and conduct of its business and proceedings and the business and proceedings of its committees, and of such other matters as by law are required or permitted to be prescribed or provided for by the Standing Orders of the Parliament.

iii. **134. Proceedings non-justiciable.**

Except as is specifically provided by a Constitutional Law, the question, whether the procedures prescribed for the Parliament or its committees have been complied with, is **non-justiciable**, and a certificate by the Speaker under Section 110 (certification as to making of laws) is conclusive as to the matters required to be set out in it.

iv. **135. Questions as to membership, etc.**

The National Court has jurisdiction to determine any question as to—

(a) the qualifications of a person to be or to remain a member of the Parliament; or

(b) the validity of an election to the Parliament.

B. Vacancy, Appointment, Next Sitting Day, Grounds for Removal

v. **141. Nature of the Ministry: collective responsibility.**

The Ministry is a Parliamentary Executive, and therefore—

(a) no person who is not a member of the Parliament is eligible to be appointed to be a Minister, and, except as is expressly provided in this Constitution to the contrary, a Minister who ceases to be a member of the Parliament ceases to hold office as a Minister; and

(b) it is collectively answerable to the People, through the Parliament, for the proper carrying out of the executive government of Papua New Guinea and for all things done by or under the authority of the National Executive; and

(c) it is liable to be dismissed from office, either collectively or individually, in accordance with this Subdivision.

vi. **142. The Prime Minister.**

(1) An office of Prime Minister is hereby established.

(2) The Prime Minister shall be appointed, at the first meeting of the Parliament after a general election and otherwise from time to time as the occasion for the appointment of a Prime Minister arises, by the Head of State, acting in accordance with a decision of the Parliament.

(3) If the Parliament is in session when a Prime Minister is to be appointed, the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day.

(4) If the Parliament is not in session when a Prime Minister is to be appointed, the Speaker shall immediately call a meeting of the Parliament, and the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day.

(5) The Prime Minister—

(a) shall be dismissed from office by the Head of State if the Parliament passes, in accordance with Section 145 (motions of no confidence), a motion of no confidence in him or the Ministry, except where the motion is moved within the last 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election; and

(b) may be dismissed from office in accordance with Division III.2 (leadership code); and

(c) may be removed from office by the Head of State, acting in accordance with a decision of the Parliament, if the Speaker advises the Parliament that two medical practitioners appointed by the National Authority responsible for the registration or licensing of medical practitioners have jointly reported in accordance with an Act of the Parliament that, in their professional opinions, the Prime Minister is unfit, by reason of physical or mental incapacity, to carry out the duties of his office.

(6) The Prime Minister may be suspended from office—

(a) by the tribunal appointed under an Organic Law made for the purposes of Section 28 (further provisions), pending an investigation into a question of misconduct in office within the meaning of Division III.2 (leadership code), and any resultant action; or

(b) in accordance with an Act of the Parliament, pending an investigation for the purposes of Subsection (5)(c), and any resultant action by the Parliament.

(7) An Organic Law made for the purposes of Subdivision VI.2.H (Protection of Elections from Outside or Hidden Influence and Strengthening of Political Parties) may provide that in certain circumstances a member of the Parliament is not eligible to be appointed to or hold the office of Prime Minister.

vii. **143. Acting Prime Minister.**

(1) Subject to Subsection (2) an Act of the Parliament shall make provision for and in respect of the appointment of a Minister to be Acting Prime Minister to exercise and perform the powers, functions, duties and responsibilities of the Prime Minister when—

(a) there is a vacancy in the office of Prime Minister; or

(b) the Prime Minister is suspended from office; or

(c) the Prime Minister is—

(i) absent from the country; or

(ii) out of speedy and effective communication; or

(iii)otherwise unable or not readily available to perform the duties of his office.

(2) Where a Prime Minister is dismissed under Section 142(5)(a) (the Prime Minister) the person nominated under Section 145(2)(a) (motions of no confidence)—

(a) becomes the Acting Prime Minister until he is appointed a Prime Minister in accordance with Section 142(2) (the Prime Minister); and

(b) may exercise and perform all the powers, functions, duties and responsibilities of a Prime Minister.

(3) The question whether the occasion for the appointment of an Acting Prime Minister or for the exercise or performance of a power, function, duty or responsibility by an Acting Prime Minister, under this section has arisen or has ceased, is **non-justiciable**.

viii. **144. Other Ministers.**

(1) There shall be such number of Ministers (other than the Prime Minister), not being less than six or not exceeding 32 from time to time, as is determined by or under an Organic Law.

(2) The Ministers, other than the Prime Minister, shall be appointed by the Head of State, acting with, and in accordance with, the advice of the Prime Minister.

(3) A Minister, other than the Prime Minister, may be suspended from office in accordance with an Organic Law made for the purposes of Section 28(2) (further provisions).

(4) A Minister other than the Prime Minister—

(a) shall be dismissed from office by the Head of State if the Parliament passes, in accordance with Section 145 (motions of no confidence), a motion of no confidence in him; and

(b) may be dismissed from office—

(i) by the Head of State, acting with, and in accordance with, the advice of the Prime Minister; or

(ii) in accordance with Division III.2 (leadership code).

(5) An Organic Law made for the purposes of Subdivision VI.2.H (Protection of Elections from Outside or Hidden Influence and Strengthening of Political Parties) may provide that in certain circumstances a member of the Parliament is not eligible to be appointed to or hold the office of Minister.

ix. **145. Motions of no confidence.**

(1) For the purposes of Sections 142 (the Prime Minister) and 144 (other Ministers), a motion of no confidence is a motion—

(a) that is expressed to be a motion of no confidence in the Prime Minister, the Ministry or a Minister, as the case may be; and

(b) of which not less than one week's notice, signed by a number of members of the Parliament being not less than one-tenth of the total number of seats in the Parliament, has been given in accordance with the Standing Orders of the Parliament.

(2) A motion of no confidence in the Prime Minister or the Ministry—

(a) moved during the first four years of the life of Parliament shall not be allowed unless it nominates the next Prime Minister; and

(b) moved within 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election shall not be allowed if it nominates the next Prime Minister.

(3) A motion of no confidence in the Prime Minister or the Ministry moved in accordance with Subsection (2)(a) may not be amended in respect of the name of the person nominated as the next Prime Minister except by substituting the name of some other person.

(4) A motion of no confidence in the Prime Minister or in the Ministry may not be moved during the period of eighteen months commencing on the date of the appointment of the Prime Minister.

x. **146. Resignation.**

(1) The Prime Minister may resign from office by notice in writing to the Head of State.

(2) A Minister other than the Prime Minister may resign from office by notice in writing to the Prime Minister.

xi. **147. Normal term of office.**

(1) Unless he earlier—

(a) dies; or

(b) subject to Subsection (2), resigns; or

(c) subject to Subsection (3), ceases to be qualified to be a Minister; or

(d) is dismissed or removed from office,
a Minister (including the Prime Minister) holds office until the next appointment of a Prime Minister.

(2) Notwithstanding Subsection (1)(b)—

(a) a Prime Minister who resigns; and

(b) a Ministry that resigns collectively,
shall continue in office until the appointment of the next Prime Minister.

(3) Notwithstanding Subsection (1)(c), a Minister who—
(a) ceases, by reason of a general election, to be a member of the Parliament; but

(b) remains otherwise qualified to be a member of the Parliament,
shall continue in office until the next appointment of a Prime Minister.

xii. **103. Qualifications for and disqualifications from membership.**

(1) A member of the Parliament must be not less than 25 years of age.

(2) A candidate for election to the parliament must have been born in the electorate for which he intends to nominate or have resided in the electorate for a continuous period of two years immediately preceding his nomination or for a period of five years at any time and must pay a nomination fee of K1,000.00.

(3) A person is not qualified to be, or to remain, a member of the Parliament if—

(a) he is not entitled to vote in elections to the Parliament; or

(b) he is of unsound mind within the meaning of any law relating to the protection of the persons and property of persons of unsound mind; or

(c) subject to Subsections (4) to (7), he is under sentence of death or imprisonment for a period of more than nine months; or

(d) he is adjudged insolvent under any law; or

(e) he has been convicted under any law of an indictable offence committed after the coming into operation of the Constitutional Amendment No 24—Electoral Reforms; or

(f) he is otherwise disqualified under this Constitution.

(4) Where a person is under sentence of death or imprisonment for a period exceeding nine months, the operation of Subsection (3)(d) is suspended until—

(a) the end of any statutory period allowed for appeals against the conviction or sentence; or

(b) if an appeal is lodged within the period referred to in paragraph (a), the appeal is determined.

(5) The references in Subsection (4), to appeals and to the statutory period allowed for appeals shall, where there is provision for a series of appeals, be read as references to each appeal and to the statutory period allowed for each appeal.

(6) If a free pardon is granted, a conviction is quashed or a sentence is changed to a sentence of imprisonment for nine months or less, or some other form of penalty (other than death) is substituted, the disqualification ceases, and if at the time of the pardon, quashing, change of sentence or substitution of penalty the writ for the by-election has not been issued the member is restored to his seat.

(7) In this section—
"appeal" includes any form of judicial appeal or judicial review;

"statutory period allowed for appeals" means a definite period allowed by law for appeals, whether or not it is capable of extension, but does not include an extension of such a definite period granted or that may be granted unless it is granted within that definite period.

xiii. **104. Normal term of office.**

(1) An elected member of the Parliament takes office on the day immediately following the day fixed for the return of the writ for the election in his electorate.

(2) The seat of a member of the Parliament becomes vacant—

(a) if he is appointed as Governor-General; or

(b) upon the expiry of the day fixed for the return of the writs, for the general election after he last became a member of the Parliament; or

(c) if he resigns his seat by notice in writing to the Speaker, or in the case of the Speaker to the Clerk of the Parliament; or

(d) if he is absent, without leave of the Parliament, during the whole of three consecutive meetings of the Parliament unless Parliament decides to waive this rule upon satisfactory reasons being given; or

(e) if, except as authorized by or under an Organic Law or an Act of the Parliament, he directly or indirectly takes or agrees to take any payment in respect of his services in the Parliament; or

(f) if he becomes disqualified under Section 103 (qualifications for and disqualifications from membership); or

(g) on his death; or

(h) if he is dismissed from office under Division III.2 (leadership code).

(3) For the purposes of Subsection (2)(d), a meeting of the Parliament commences when the Parliament first sits following a general election, prorogation of the Parliament or an adjournment of the Parliament otherwise than for a period of less than 12 days and ends when next the Parliament is prorogued or adjourned otherwise than for a period of less than 12 days.

xiv. **105. General elections.**

(1) A general election to the Parliament shall be held—

(a) within the period of three months before the fifth anniversary of the day fixed for the return of the writs for the previous general election; or

(b) if, during the last 12 months before the fifth anniversary of the day fixed for the return of the writs for the previous general election—

(i) a vote of no confidence in the Prime Minister or the Ministry is passed in accordance with Section 145 (motions of no confidence); or

(ii) the Government is defeated on the vote on a question that the Prime Minister has declared to the Parliament to be a question of confidence; or

(c) if the Parliament, by an absolute majority vote, so decides.

(2) The Head of State, acting with, and in accordance with, the advice of the Electoral Commission, shall fix the first and last days of the period during which polling shall take place and the date by which the writs for a general election shall be returned.

(3) In advising the Head of State under Subsection (2), and in conducting the election, the Electoral Commission shall do its best to ensure that—

(a) in a case to which Subsection (1)(a) applies—the date for the return of the writs is fixed as nearly as may reasonably be to the fifth anniversary of the date fixed for the return of the writs for the previous general election; and

(b) in a case to which Subsection (1)(b) or (c) applies—the date for the return of the writs is fixed as soon as may reasonably be after the date of the relevant decision of the Parliament.

xv. **106. By-elections.**

If the office of an elected member of the Parliament becomes vacant otherwise than by virtue of Section 104(2)(b) (normal term of office), an election shall be held to fill the vacancy unless the vacancy occurs—

(a) within the period of 12 months before the fifth anniversary of the date fixed for the return of the writs for the previous general election; or

(b) after the writ has been issued for an election under Section 105(1) (general elections) and before the day fixed for the return of that writ, writs for a general election are issued, the first-mentioned writ shall be deemed to have been revoked.

xvi. **Sch.1.10. Exercise and performance of powers and duties.**

(1) Where a Constitutional Law confers a power or imposes a duty, the power may be exercised, or the duty shall be performed, as the case may be, from time to time as occasion requires.

(2) Where a Constitutional Law confers a power or imposes a duty on the holder of an office as such, the power may be exercised, or the duty shall be performed, as the case may be, by the holder (whether substantive or other) for the time being of the office.

(3) Where a Constitutional Law confers a power to make any instrument or decision (other than a decision of a court), the power includes power exercisable in the same manner and subject to the same conditions (if any) to alter the instrument or decision.

(4) Subject to Subsection (5), where a Constitutional Law confers a power to make an appointment, the power includes power to remove or suspend a person so appointed, and to appoint another person temporarily in the place of a person so removed or suspended or, where the appointee is for any reason unable or unavailable to perform his duties, to appoint another person temporarily in his place.

(5) The power provided for by Subsection (4) is exercisable only subject to any conditions to which the exercise of the original power or appointment was subject.

C. The Office of Speaker of Parliament

xvii. **107. Offices of Speaker and Deputy Speaker.**

(1) There shall be offices of Speaker and Deputy Speaker of the National Parliament.

(2) The Speaker and the Deputy Speaker must be members of the Parliament, and shall be elected by the Parliament by secret ballot in accordance with the Standing Orders of the Parliament.

(3) The Speaker and the Deputy Speaker hold office, and their offices become vacant, in accordance with the Constitutional Laws and the Standing Orders of the Parliament.

(4) No Minister or Parliamentary Leader of a registered political party may be the Speaker or Deputy Speaker, and if a Speaker or Deputy Speaker becomes a Minister or Parliamentary Leader of a registered political party he vacates his office as Speaker or Deputy Speaker, as the case may be.

xviii. **108. Functions of the Speaker and Deputy Speaker.**

(1) The Speaker is responsible, subject to and in accordance with the Constitutional Laws, the Acts of the Parliament and the Standing Orders of the Parliament, for upholding the dignity of the Parliament, maintaining order in it, regulating its proceedings and administering its affairs, and for controlling the precincts of the Parliament as defined by or under an Act of the Parliament.

(2) In the event of a vacancy in the office of the Speaker or his absence from the country or from the Parliament, and otherwise as determined by or under a Constitutional Law, an Act of the Parliament or the Standing

Orders of the Parliament, the Deputy Speaker has, subject to Section 95 (Acting Governor-General), all the rights, privileges, powers, functions, duties and responsibilities of the Speaker.

(3) A Constitutional Law, an Act of the Parliament or the Standing Orders of the Parliament may provide for other powers, functions, duties and responsibilities of the Speaker and the Deputy Speaker.

APPOINTMENT OF PRIME MINISTER

15. As far as the appointment of a Prime Minister is concerned, there is no argument that Section 142 (2) is the relevant provision. And to an extent the appointment of Hon Peter O'Neill MP as the Prime Minister was properly pursued under this section in accordance with the wishes of the Parliament on that day when the Parliament voted to elect him as the Prime Minister. ***The only issue here is whether that election was done in full compliance of the spirit and purpose of the Constitution as provided by section 142 read and applied in its entirety?***

16. This very important event of the election and appointment of Prime Minister in the life of a Parliament can only take place on two occasions under our Constitution. The first of which happens as the consequence of a general election when the writs are returned to the Governor General and a Government is formed, and that only happens once in the life of a Parliament. When I say a life of a Parliament I mean a five-year term of the Parliament after which the country returns to the polls. This is the situation envisaged in Section 142 (2) which provides as follows:

"(2) **The Prime Minister shall be appointed, at the first meeting of the Parliament after a general election and otherwise from time to time as the occasion for the appointment of a Prime Minister arises, by the Head of State, acting in accordance with a decision of the Parliament."**

17. And the second occasion is when a ***vacancy*** arises during the life of a Parliament which is envisaged under Section 142 (3) and (4). This second occasion can happen under so many different circumstances

and as many times as it suits the occasion, for example, as the result of a successful vote of no confidence on the Prime Minister(s .145), when a Prime Minister resigns (s.143), when a Prime Minister is dismissed from office for various reasons including being unfit to hold office (s.142(5)(c)), being of unsound mind (s.103(3)(b)), absent from three consecutive meetings of Parliament (s.104(2)(d)) and so on. All these various occasions create a vacancy thereby necessitating election and appointment of a new Prime Minister.

18. Subsection (3) provides for the occasion when the Parliament *is sitting* when the vacancy arises and it says:

> "(3) If the Parliament is **in session** when a Prime Minister is to be appointed, the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day."

19. And the third scenario is when the Parliament is *not sitting* when such a vacancy arises such as sudden death or disappearance or resignation of a Prime Minister in which case the Speaker upon receipt of advice of such event must call a meeting of the Parliament to address that issue. Subsection (4) thus provides:

> "(4) If the Parliament is **not in session** when a Prime Minister is to be appointed, the Speaker shall immediately call a meeting of the Parliament, and the question of the appointment shall be the first matter for consideration, after any formal business and any nomination of a Governor-General or appointment of a Speaker, on the next sitting day."

20. But what the First Intervenor and those supporting him are contending here is that section 142(2) empowered the Parliament to elect a new Prime Minister. Section 142(2) must be read in conjunction with schedule 1.10 subsection (3) of the Constitution and their combined effect empowered the Parliament to declare the office of the Prime Minister vacant and to proceed to electing a new Prime Minister. Schedule 1.10(3) provides:

> "(3) Where a Constitutional Law confers a power to make any instrument or decision (other than a decision of a court), the power

includes power exercisable in the same manner and subject to the same conditions (if any) to alter the instrument or decision."

21. In my view if the schedule 1.10 were to provide an independent source of power as a substantive provision and not merely as guide to interpretation of the Constitution, subsection (4) is the appropriate provision which states:

> "(4) Subject to Subsection (5), where a Constitutional Law confers a power to make an appointment, the power includes power to remove or suspend a person so appointed, and to appoint another person temporarily in the place of a person so removed or suspended or, where the appointee is for any reason unable or unavailable to perform his duties, to appoint another person temporarily in his place."

22. But it is all very clear that schedules to the Constitution are only to be used as aids or guide to interpretation of a constitutional law. They do not replace a substantive constitutional provision nor do they provide independent an source of power to give enlarged or broadened scope and meaning to clear and unambiguous constitutional provisions.

23. Schedule 1 is headed *"Rules for Shortening and Interpretation of the Constitutional Laws"* and Schedule 1.1 provides as follows:

"Sch.1.1. Application of Schedule 1

(1) The rules contained in this Schedule apply, unless the contrary intention applies, in the interpretation of the Constitution and of the Organic Laws.
(2) Unless adopted by law for the purposes, they do not apply to any other law."

24. In the ***Special Reference by the Attorney General and Principal Legal Adviser to the National Executive Council* (2010) SC1078** the Supreme Court was referred to *Schedules 1.9 and 1.10* of the Constitution by counsel when objection was raised as to signing of the section 19(3) Reference and when dismissing the Reference, the Court said:

> "Mr Donigi urged us to consider Schedules 1.9 (provision where no time prescribed) and 1.10 (exercise and performance of powers and duties) of the Constitution but those aids to interpretation do not lead to any conclusion other than the obvious one: a special reference under Section 19(1) – or more precisely an application to the Supreme Court under Section 19(1) of the

> Constitution – is made when an authority files the reference or application in the Registry of the Supreme Court. On the date of filing, the person making the application must have authority to do so. For the purposes of this case, such authority comes from holding one of the offices in Section 19(3)(c)."

25. This was a case where the Secretary for Justice signed a section 19(3)(c) reference on behalf of the Attorney General but the Court strictly applied the provision of section 19(3)(c) and said that only the Attorney-General was authorised to sign. The effect of this was that Schedule 1.10 was not considered as applicable where the Constitution was unambiguously clear in its intent.

26. In *Haiveta v Wingti (No 3)[1997] PNGLR 197* Sir Mari Kapi described how such vacancy can occur in these terms:

> "The appointment of a Prime Minister by the Head of State involves a number of steps, which must be taken in accordance with the Constitution and the Standing Orders of the Parliament. The occasion which triggers off, or puts into motion, all the steps necessary for appointment of a new Prime Minister by the Head of State is a vacancy in the office of Prime Minister.
>
> In my view, the words *"when a Prime Minister is to be appointed"* appearing in ss 142 (3) and (4) of the Constitution have the same meaning *as "the occasion for the appointment of a Prime Minister arises"* in s 142 (2). That is to say, the occasion which gives rise to the need to appoint a Prime Minister or when a Prime Minister is to be appointed, is a vacancy in the office of Prime Minister. When a vacancy occurs, it can be said *"the occasion for the appointment of a Prime Minister arises"* in accordance with s 142 (2) or *"when a Prime Minister is to be appointed"* in accordance with s 142 (3) and (4).
>
> There are number of ways in which a vacancy may occur. These are:
> 1. dismissal from office in accordance with a vote of no confidence (see s 142 (5) (a)),
> 2. dismissal from office in accordance with the Leadership Code (see s 142 (5) (b)),
> 3. dismissal from office on the grounds of unfitness (see s 142 (5) (c)),
> 4. resignation (see s 146).
>
> Here, we are concerned with a vacancy created by resignation."

27. Experience after thirty six years of Independence tells us that such dispute as this does not ordinarily arise in a case where the Prime Minister is elected following the General Elections. This is not to say

that it never happened. The only time this issue arose was when the election of the Prime Minister followed immediately after the election of the Speaker on the same day in 1977 following the General Elections when Hon James Eki Mopio Member for Kairiku/Hiri Open Electorate filed a Supreme Court reference naming the Speaker as the other party – ***see James Eki Mopio v Speaker [1977] PNGLR 420***, contending that the election of the Prime Minister should follow on the next day under section 142(4) of the Constitution, not on the same day as that of the election of the Speaker. The Supreme Court threw out his application on the basis of non-justiciability.

28. It follows therefore that even the combined application of section 142(2) and Schedule 1.10 (3) or (4) cannot provide a hybrid power source to circumvent clear and specific provisions of the Constitution pertaining to appointment of the Prime Minister whether pursued under section 142(2), (3) or (4). They must be read and applied co-jointly.

CREATION OF VACANCY

29. Other than a section 142(2) situation which is plain enough (which follows straight after the National Elections upon return of the writs to the Governor-General), in any other occasions, it is either section 142(3) or 142(4) as to the timing of the need to elect a new Prime Minister. And this is where the importance of 'vacancy' in the office of the Prime Minister becomes very relevant.

30. That vacancy must be created by any of those circumstances clearly pleaded or stipulated in the Constitution under sections 142(5)(a), 142(5)(b), 142(5)(c), 145, 146, 147(1)(a), 147(1)(b), 147(1)(c), 147(1)(d), 103(3)(a), 103(3)(b), 103(3)(c), 103(3)(d), 103(3)(e), 103(3)(f), 104(2)(a), 104(2)(b), 103(2)(c), 103(2)(d), 103(2)(e), 103(2)(f), 103(2)(g) and 103(2)(h). I don't propose to discuss any of these in detail suffice that Chief Justice has comprehensively covered all these in his judgment.

31. Not even the Parliament with its inherent power can simply ***'declare'*** a vacancy under our Constitution outsmarting all those carefully considered and enacted provisions for convenience sake of changing a government in such a deceptive manner.

32. Be that as it may, from the First Intervenor's perspective, this declaration of vacancy was critical because otherwise the appointment of Hon Peter O'Neill MP as Prime Minister brought to existence one additional Prime Minister besides Hon Sam Abal MP Member for Wabag who was the Deputy Prime Minister and was already the Acting Prime Minister while the duly elected Prime Minister, Right Hon Sir Michael Somare MP Member for Sepik Regional was overseas in Singapore seeking medical attention. Such an appointment would clearly be unconstitutional under section 142.

33. Does this declaration have any legal effect? No, it does not. In my view the declaration of vacancy in the office of the Prime Minister has no legal or constitutional basis and must be declared a nullity for the following reasons:

    i. There was no constitutional basis for such a declaration being made for the election and appointment of a Prime Minister;

    ii. No evidence was tabled in the Parliament showing that one or more of the grounds stipulated in the constitution that give rise to the occasion creating a vacancy in the Office of the Prime Minister existed to warrant this declaration in the Parliament.

    iii. No evidence was tendered in this proceeding proving to the required standard of the existence of any of those grounds provided in the Constitution so as to give rise to an occasion creating a vacancy in the office of the Prime Minister.

34. The above proposition is supported by the decision of the Supreme Court in ***Southern Highlands Provincial Government –v- Somare***

and others [2007] SC854 (1 March 2007). In this case the Supreme Court upheld the application by SHPG to uplift the state of emergency in the Province. The State of Emergency was declared by the Head of State on instructions from the National Executive Council and the Emergency was extended three times by the Parliament.

35. As in this case where the Constitution made specific provisions for situations and circumstances when a Prime Minister's office becomes vacant and needed to be filled, similarly the Constitution made provisions for the occasions and circumstances when state of emergency can be declared anywhere in the country.

36. The Supreme Court noted the definition of *'emergency'* under section 226 of the Constitution includes, without limiting the generality of the expression—

(a) imminent danger of war between Papua New Guinea and another country, or of warlike operations threatening national security; and

(b) an earthquake, volcanic eruption, storm, tempest, flood, fire or outbreak of pestilence or infectious disease, or any other natural calamity whether similar to any such occurrence or not on such an extensive scale as to be likely to endanger the public safety or to deprive the community or any substantial proportion of the community of supplies or services essential to life; and

(c) action taken, or immediately threatened, by any person that is of such a nature, and on so extensive a scale, as to be likely to endanger the public safety or to deprive the community or any substantial portion of the community of supplies or services essential to life.

37. The Court noted that in the case of Southern Highlands Province in the period concerned the State of Emergency was declared not because of any of the above three reasons but due to rampant law and

order problems, poor governance, lack of accountability and civil servants getting paid and not doing any work for their living. The court therefore held that the reason for declaring a state of emergency was not supported by the Constitution.

38. The court further held that no evidence was placed before the Cabinet of any circumstance giving rise to an emergency requiring a state of emergency to be declared before advising the Head of State to declare a state of emergency and no such evidence was even produced in court justifying the declaration of state of emergency.

39. In coming to this decision, the Supreme Court, most importantly, held that the onus was on the National Executive Council, that advocated for the declaration of state of emergency to prove that an emergency as defined under section 226 existed to warrant a state of emergency to be declared. In the absence of such evidence the Court nullified the declaration of the state of emergency as being unconstitutional and said that the situation found in the Province concerning law and order and mismanagement can be handled under the existing legal framework and the laws of the country.

40. With the declaration a of vacancy in the office of the Prime Minister being declared a nullity, there cannot be a valid appointment of another Prime Minister while there already was a Prime Minister who was away overseas seeking medical attention.

Is the election of the Prime Minister *"on the next sitting day"* a *mandatory requirement?*

41. In my opinion, section 142(2) and Sch.1.10(3) or (4) do not provide any alternative stand-alone procedure to complement all those other provisions for removal and appointment of Prime Minister. Sch.1.10 is only a guide and cannot be read into the substantive provisions of the Constitution to replace or substitute any section or subsection of the Constitution that speak to the contrary. To give meaning to section 142(2), it must be construed together with sections 142(3) and (4)

which do not operate in isolation but in conjunction with section 142(2) to give meaning and effect to section 142 as a whole.

42. If it was intended that section 142(2) was capable of being read and applied on its own, to provide an alternative source of power to remove a Prime Minster besides section 145, that would have been clearly stated in the CPC Report. But section 145 which deals specifically with a **motion of no confidence** follows or comes after section 142 headed The Prime Minister in the same Subdivision B under the heading The Ministry and the logical inference by implication is that section 142 (2) was not meant nor intended to have a hidden meaning providing an alternative source of power for the removal of a Prime Minister particularly when there was clearly a separate and distinct provision in section 145 for the removal of Prime Minister by a motion of no confidence.

43. Section 145 provides:

> " **145. Motions of no confidence.**
>
> (1) For the purposes of Sections 142 (the Prime Minister) and 144 (other Ministers), a motion of no confidence is a motion—
>
> (a) that is expressed to be a motion of no confidence in the Prime Minister, the Ministry or a Minister, as the case may be; and
>
> (b) of which not less than one week's notice, signed by a number of members of the Parliament being not less than one-tenth of the total number of seats in the Parliament, has been given in accordance with the Standing Orders of the Parliament.
>
> (2) A motion of no confidence in the Prime Minister or the Ministry—
>
> (a) moved during the first four years of the life of Parliament shall not be allowed unless it nominates the next Prime Minister; and
>
> (b) moved within 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election shall not be allowed if it nominates the next Prime Minister.
>
> (3) A motion of no confidence in the Prime Minister or the Ministry moved in accordance with Subsection (2)(a) may not be amended in respect of the name of the person nominated as the next Prime Minister except by substituting the name of some other person.

> (4) A motion of no confidence in the Prime Minister or in the Ministry may not be moved during the period of eighteen months commencing on the date of the appointment of the Prime Minister."

44. When the intention and purpose of the Constitution is clear and unambiguous, there is no need to read other meanings and interpretations into the law that is already clear enough on record that the Founding Fathers of this supreme law did not envisage nor contemplate. Every Constitutional law and likewise all other statutory laws must be given their fair and liberal meaning and interpretations as we are guided by Schedule 1.5 of the Constitution. Schedule 1.5 provides:

> (1) Each Constitutional Law is intended to be read as a whole.
>
> (2) All provisions of, and all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning.

45. And it is often wise to seek counsel from some of the earlier decisions of this court and listen to their advice. During the eighties when the country was grappling with an increasing law and order situation culminating with the Parliament enacting minimum penalty laws, the Supreme Court was bombarded with section 18 and 19 references to determine the constitutionality of the amendments. Sitting as a member of one of those courts in ***SCR No,1 of 1984 re Minimum Penalties Legislation*** [1984] PNGLR 314, Bredmeyer, J said at pp334-335:

> *"We are not interpreting an ordinary statute but the supreme law of the land,* ***a Constitution which was drafted with great idealism as seen in the words used in the Preamble and the National Goals and Directive Principles. We must give all parts of the Constitution a fair and liberal interpretation...****"*

46. And this is the way we should be interpreting the Constitution twenty plus years on since that noble statement was made by one of our own judges of this court because it is not just an ordinary statute. A great deal of idealism in the work of the Founding Fathers who carefully crafted this supreme law is self evident in the Preamble and nowhere in their work can be found any room for surprise or double meanings to words and phrases chosen to constitute every section of the Constitution. And to make sure that their work was not misconstrued

or misunderstood, by schedule 1.5 they even advised that their work must be given its fair and liberal meaning.

47. And one can appreciate Sir Buri Kidu, CJ's passionate plea on this very issue when delivering his judgement in another Minimum Penalty related Supreme Court Reference matter by way of case stated from the National Court on the applicability of the Child Welfare Act in relation to a person aged between 16 and 21 for purposes of the Minimum Penalty Law in ***Inakambi Singorom v John Kalaut [1985] PNGLR 238*** (19/8/85) when he made the following statement in relation to a fair and liberal approach by the Courts on statutory interpretation:

> "Rules or maxims of interpretation of statutes are only guides and must not be thought of as substantive law. They are not inflexible rules to be applied without question. In this jurisdiction these rules are subject to two very important constitutional provisions: (a) ***fair and liberal interpretation*** (Sch 1.5 (2)) and (b) ***the paramountcy of justice*** (s 158 (2)). Schedule 1.5 (2), I know, relates to the interpretation of constitutional laws, but if constitutional laws, which are higher laws than Acts of Parliament, must be given their fair and liberal meaning, it is my view that that means that ordinary laws must be given their "fair and liberal meaning". Section 158 (2) says that in interpreting laws the courts must "give paramount consideration to the dispensation of justice".
>
> Whatever the rules or maxims of statutory interpretation say, one thing must not be lost sight of and that is that a clear parliamentary intention in legislation cannot be ignored or overruled by the courts. The courts cannot and must not frustrate clear parliamentary intention in any legislation so long as such legislation is constitutionally valid. For Parliament is empowered by the Constitution, s 100, to exercise the legislative power of the people and not the courts. In fact Parliament's legislative power, subject to the Constitution, is unfettered (the Constitution, s 109 (1)), and laws made by Parliament "shall receive such fair, large and liberal construction and interpretation as will best ensure that attainment of the object of the law according to its true intent, meaning and spirit" (s 109 (4)). I have said the above to emphasise that a court cannot go beyond its powers by using maxims of interpretation or rules of interpretation to over-ride clear and explicit parliamentary intent in legislation. This is not saying that I support "the strict literal and grammatical construction of the words, heedless of the consequences" approach to statutory interpretation*: see PLAR No 1 of 1980 [1980] PNGLR 326.*
>
> *The "purposive" rule of interpretation urged by Wilson J and Andrew J in PLAR No 1 of 1980 must not be used by the courts to nullify laws which are clearly constitutional and which clearly and unambiguously state the intentions of the legislature. What I am saying can be stated simply this way:*

Where Parliament says in an Act that "dogs" are to be registered if they are pets, a court cannot say that "dogs" means "pigs" simply because pigs are sometimes raised as pets."

48. Kidu, CJ tells us that when Parliament enacts a law to register all dogs kept at home as pets, the Courts cannot interpret dogs to mean pigs so as to pass as pets for purposes of registration under a municipal law because someone keeps a pig in his yard as a pet. **In other words when the Constitution or statute clearly and unambiguously states the intentions of the Legislature, leave well-enough alone.**

49. While in this case we are not talking about declaring a law to be unconstitutional, I submit that trying to read into a constitutional provision and ascribing to it meaning and intentions contrary to the entire scheme of the section when read in totality with the rest of the provisions in the Constitution is akin to not only misapplying the Constitution, but could even amount to usurping the function of the Legislature by using the inherent power of the Constitution as a sledge-hammer to make a new law.

50. The point made here is that section 142(2) has a limited purpose and that is to appoint a Prime Minister. It cannot operate in isolation of the rest of the provisions within the section to accord to Parliament itself power to remove a Prime Minister, the power it does not have. During the life of a Parliament, before a new Prime Minister is appointed, there must first be a vacancy, a physical vacancy.

51. In this case the motion does not explain and never explained as to how, a vacancy arose in the office of the Prime Minister on 2nd August, 2011 thereby creating a need for the Parliament to elect a new Prime Minister. This is clearly evident from the record of proceedings in the Parliament as recorded in the Hansard show. Whether this information is non-justiciable is different issue and will be examined shortly under a separate heading. But as it is on the record, there is just a bare statement of section 142(2) and schedule 1.10 (3) being the source of power that empowered the Parliament to declare a vacancy

in the office of the Prime Minister and to elect a new Prime Minister. That was all it said.

52. And this why the entire bench in *Haiveta v Wingti (No.3)* (supra) ruled Paias Wingti's subsequent election as Prime Minister by the Parliament following his resignation as unconstitutional. The election was not in accordance with section 142(3) in particular when it was done in such swift and rapid manner . The Supreme Court made it plain that you can never do that.

53. The question of what is meant by the words *'the next sitting day'* in subsections (3) and (4) of section 142 is already settled in *Haiveta v Wingti (No.3)(supra)*. It is immaterial whether the vacancy arises out of subsection (3) or subsection (4) situation because the objective is one and the same - **to eliminate surprise, to allow sufficient time and opportunity to all Members of Parliament and their respective political groupings, however big or small, to discuss and select the right person to be the next Prime Minister.** Amet, CJ (as he then was) said:

> "The consideration and the appointment of a Prime Minister is, nevertheless, not on "the next sitting day" after the question first arises before Parliament. I believe that, *consistent with the general spirit behind the framing of the Constitution, to ensure open democratic parliamentary government and an executive responsible and accountable to Parliament, and to avoid the appearance and accusation of conspiracy, unfairness, and manipulation for personal benefit, the most important question of the appointment of a Prime Minister first arises for consideration when Parliament is informed formally by the Speaker, reading the relevant advice to Members of Parliament on the floor of Parliament, when Parliament is formally sitting. Consistently, then, after Parliament is so informed of the question or the issue of the need to appoint a Prime Minister, the question is deferred until "the next sitting day".* This accords with the need to give Members of Parliament the barest minimum time to consider the issue and the candidate or candidates most suitable to be considered for election to this high office. If Parliament considers that time to be inadequate, then it has the ability within its procedures to enable itself more time, by adjourning — **Standing Order 6.** This, of course, is a matter for the internal procedure of Parliament."

54. And on the same point Sir Mari Kapi, DCJ arriving at the same conclusion said:

> "The third matter which arises for consideration out of the recommendations of the CPC is that the proviso to enable Parliament to adjourn election of Prime Minister for three sitting days at a time was not adopted by s 142 of the Constitution. In my view, when the Constitution left out the proviso dealing with adjournment of the Parliament and by adopting the words "next sitting day", it adopted a compromise situation. And that is that the Parliament should not elect a Prime Minister on the first day of sittings of the Parliament, but the election should take place on the "next sitting day". This gives everyone one day to prepare for the election of the Prime Minister. ***This is not only fair and just but it gives everyone an equal opportunity to participate.***"

55. And Salika, J (as he then was) giving similar opinion as Chief Justice Amet and Deputy Chief Justice Kapi said:

> "That interpretation, in my view, finds favour with s 142 (4) of the Constitution. The procedure under that provision is that when Parliament is not sitting when a Prime Minister is to be appointed, the Speaker is to call a meeting of Parliament immediately. The appointment of the Prime Minister is not on the first day, it takes place on the next sitting day. That procedure is necessary because on the first sitting day Parliament is informed, and then on the next sitting day the Prime Minister is appointed***. The next sitting day is suitable because, on the first sitting day after being informed of the vacancy of the position of Prime Minister, all the other members of Parliament then start the lobbying process and determine who would be possible candidates for the Prime Minister. This procedure makes good sense and is not unfair and unjust on any party.***"

56. Essentially what I have tried to demonstrate here is that the only way a Government changes mid-term before a full term of a Parliament has lapsed is when a vacancy arises according to the Constitution and a new Prime Minister is elected also according to the Constitution. Evidence so far tendered which is uncontested is that the Parliament elected Hon Peter O'Neill as Prime Minister on 2nd August, 2011 and there is also accepted as agreed fact that Grand Chief Sir Michael Somare was the Prime Minister elected by the Parliament in the first Meeting of the Parliament after the 2007 General Election and was

still the Prime Minister at the material time of Hon Peter O'Neill's appointment, albeit he was overseas in Singapore for medical reasons. There is however no evidence that Sir Michael had vacated the seat of Prime Minister before, during or even after the election and appointment of Peter O'Neill as the Prime Minister of Papua New Guinea. The consequence of the above answers is that Grand Chief Sir Michael Somare continues to hold office of the Prime Minister and Honourable Sam Abal also continues to be the Acting Prime Minister.

57. On the other hand, if one was to accept that the motion was based on sound reasons as argued by 1st, 2nd, 5th and 6th Intervenors, namely the change was inevitable and was the wish of the majority due to unexplained and prolonged absence of Sir Michael Somare overseas, the arguments advanced by the parties in support of the 1st Intervenor failed to substantiate those assertions namely, unsoundness of mind and absence from Parliament in 3 consecutive meetings as grounds for removal of Sir Michael. It is only on those constitutional grounds that a Prime Minister can be removed from office or there can be change in the Government. The evidence that was led in respect of these disputed grounds indeed proved the converse of what were asserted by the 1st Intervenor and those supporting him.

58. A change of government or Prime Minister mid-stream in the life of a Parliament must adhere to the established procedures that are founded on a fair, honest and transparent system of governance and that is the essence of section 142 of the Constitution, not by means of surprise and undue speed. I believe that was not what the Founding Fathers of our Constitution contemplated when drafting our mother law. If that were contemplated section 145 would not prescribe such stringent requirement of giving one week notice for a motion of no confidence to move against a Prime Minister. I reiterate the essence of that notice in section 145 by these words:

> (1) '..a motion of no confidence is a motion-
> (a) that is expressed to be a motion of no confidence..; and
> (b) of which not less than one week's notice, signed by a number of members of the Parliament being not less than one tenth of the total

number of seats in the Parliament, has been given in accordance with the Standing Orders of the Parliament.

59. Our Founding Fathers realised and recognised the need to exercise maturity and wisdom in the appointment of the Chief Executive Officer of the country who must be someone whose elevation followed all the legal avenues. The section emphasizes the need to clearly ensure that the motion was understood to be for the purpose of moving a vote of no confidence and must be signed by a number of Members and must be given no less than a week to the Parliament. Contrasting the motion that was moved in this case, which was seeking much the same result or remedy as a motion of no confidence, the motion failed miserably to observe these minimum requirements of transparency and full compliance with the law, namely the Constitution. It was indeed an illegal seizure of government by the Opposition supported by many members of the Government who crossed the floor and voted with the Opposition in the guise of a no confidence motion but with all attendant features and hallmarks of a coup d'etat.

60. So the end result, in my view is that the requirement to comply with section 142(3) in this case, because the Parliament is in session, is mandatory and the motion failed to do that so the resolution of the Parliament must be declared void and the appointment of Hon Peter O'Neill as Prime Minister is therefore unconstitutional.

OVERVIEW OF ASSERTIONS OF INTERVENORS 1, 2, 5 & 6

61. The first, second, fifth and sixth Intervenors' case was based on unsoundness of mind and absences from three consecutive meetings of the Parliament by Sir Michael Somare that gave rise to a vacancy situation thereby justifying the resolution of the Parliament on 2nd August, 2011. I do not accept the argument on the unsoundness of mind put forward by the First Intervenor et al. At the outset, that was not the basis for the motion of 2nd August, 2011. It was an after-thought following the event of 2nd August 2011 on the floor of Parliament when in futile pursuit of reason the First Intervenor and those supporting him obtained a favourable advice from a clinical

psychologist whose professional and expert opinion based on earlier reports of Sir Michael's conditions and treatment given was that Sir Michael was of "unsound mind" when he was in that critical condition in the hospital according to those reports from his Singapore doctors.

62. On the question of Sir Michael's mental condition for the purpose of section 142(5)(c) the manner of soliciting evidence to establish that fact on behalf of the Intervenors relying on this ground was in my mind intrusive, destructive and very demeaning in relation to a person of Sir Michael's calibre. That is not the proper and correct procedure to be adopted to deal with our leaders in Parliament and was therefore already an ill-fated journey that did not assist the Court in the end except unduly persecuted and harassed a sick leader who had undergone three serious life-threatening surgeries that has left him badly scarred and physically and mentally weak. No person in such condition could continue to hold office while this court battle raged on. In ordinary situations in any given democracy where common decency and respect prevailed, no leader of any State anywhere in the world except where there is military rule, would be subjected to such disrespectful and harsh treatment such as to even declare him insane outside the procedures provided by law.

63. I will accept the conclusions reached by Cannings J on this issue and say no more on it as I am firmly of the view that no amount of evidence tendered now and expert opinion obtained describing Sir Michael as being of unsound mind will validate or justify what occurred on the floor of Parliament on 2nd August, 2011. That evidence must be given in accordance with the procedure laid down in the *Public Health Act* 1977 and the expert opinion that Dr Kerr provided must be given in that forum to lay a basis for a Prime Minister to be declared of unsound mind. One must go to that Act to achieve the end result that the First, Second, Fifth and Sixth Intervenors were pursuing, not in this fashion. Otherwise, Chief Justice has already gone into great length to address this issue and I say no more.

64. In saying this, I note for the record that this was not an easy case especially for the lawyers representing 1st, 2nd and 5th Intervenors, namely, the Attorney-General Hon Dr Allan Marat, the Deputy Prime Minister, Hon Belden Namah and the Speaker, Hon Jeffrey Nape, MP who are the three principal parties in this reference. Instructing lawyers and overseas counsel representing these principal parties had the most difficult case and applied every inch and breadth of their wide and extensive experience in the profession to give their best efforts in this hearing on behalf of their clients. They could not have done any better than what they did nor could anyone else have done better. They left no stones unturned as it were to give their clients the best of their legal expertise in this most difficult case.

ABSENT FROM THREE CONSECUTIVE MEETINGS OF PARLIAMENT

65. There are actually two issues under this heading. First is whether Sir Michael Somare missed three consecutive meetings of the Parliament without leave and second is whether Sir Michael's dismissal by the Speaker on 6th of September, 2011 as elected Member for East Sepik Regional is valid? On the first issue, my position is the same as I took earlier on the issue of unsoundness of mind, this is just an after-thought, to give justification to what happened on 2nd August, 2011. This is therefore an irrelevant consideration that unnecessarily protracted the hearing of this matter. Otherwise, for the same detailed reasons given by the Chief Justice with which I endorse I dismiss this assertion as baseless.

66. The second issue was whether the Speaker's action to dismiss Sir Michael on 6th September, 2011 was valid? The action of the Speaker was uncalled for and ridiculed the office of the Speaker and the integrity of that office. This is so when he had earlier acknowledged the presence of Sir Michael in the chamber and secondly when it was known to him that Sir Michael had overcome three consecutive absences by being present on 6th September, 2011.

67. The evidence tendered and as found by Justice Cannings showed clearly that Sir Michael did not miss three consecutive sessions of Parliament. He left for Singapore in March 2011. During his absence overseas there were Parliament meetings held in May, June, August and September. He was given leave in May, and no leave was sought in June and this entire saga commenced in the August sitting. He attended on 6 September, 2011 and was in the Parliament when the Speaker purportedly dismissed him under section 104 (2)(d) as Member of East Sepik Regional for missing three consecutive sessions of Parliament quite contrary to the overwhelming evidence.

68. The relevant law is section 104 of the Constitution which provides:

"**104. Normal term of office.**

(1) An elected member of the Parliament takes office on the day immediately following the day fixed for the return of the writ for the election in his electorate.

(2) The seat of a member of the Parliament becomes vacant—

(a) if he is appointed as Governor-General; or

(b) upon the expiry of the day fixed for the return of the writs, for the general election after he last became a member of the Parliament; or

(c) if he resigns his seat by notice in writing to the Speaker, or in the case of the Speaker to the Clerk of the Parliament; or

(d) if he is absent, without leave of the Parliament, during the whole of three consecutive meetings of the Parliament unless Parliament decides to waive this rule upon satisfactory reasons being given; or

(e) if, except as authorized by or under an Organic Law or an Act of the Parliament, he directly or indirectly takes or agrees to take any payment in respect of his services in the Parliament; or

(f) if he becomes disqualified under Section 103 (qualifications for and disqualifications from membership); or

(g) on his death; or

(h) if he is dismissed from office under Division III.2 (leadership code).

(3) For the purposes of Subsection (2)(d), a meeting of the Parliament commences when the Parliament first sits following a general election, prorogation of the Parliament or an adjournment of the Parliament otherwise than for a period of less than 12 days and ends when next the Parliament is prorogued or adjourned otherwise than for a period of less than 12 days.

69. Was he given any opportunity to explain the reasons for his absence? Did the Parliament hear and consider his reasons for his absence and decide not to waive this rule in his favour? Is the Speaker the Parliament? These are pertinent questions because this *'absence during three consecutive sessions of Parliament'* rule does not accord automatic power of dismissal to the Parliament, let alone to the Speaker to dismiss an elected Member of Parliament at his whim.

70. Even if he did, there is a procedure that must be followed to have a Member scrutinised for being absent from three consecutive meetings of the Parliament. If the Member is dissatisfied with the decision of the Parliament, he is entitled to seek re-dress in the National Court, an avenue provided under section 135 of the Constitution. The Speaker exercises no judicial power to make this determination in denying the people's right to have an elected representative in the Parliament.

71. Section 135 provides as follows:

"**135. Questions as to membership, etc.**

The *National Court has jurisdiction to determine any question* as to—

(a) *the qualifications of a person to be or to remain a member of the Parliament*; or

(b) the validity of an election to the Parliament.

72. Section 135(a) makes it quite plain that question as to *qualifications* of a person to be or to remain a Member of Parliament fall squarely within the jurisdiction of the National Court. Whether the three consecutive absences justified removal as member was clearly a justiciable issue for the court. The Speaker had no discretion in this regard.

73. If the dismissal on 6th September, 2011 had any relation to justifying what happened on 2nd August, 2011, it certainly did not bring any such effect and logically it could not. It was an isolated incident that the Speaker exercised to satisfy his own misguided reasoning.

JUSTICIABILITY

74. The First Intervenor *et al* raised the issue of justiciability or non-justiciability under sections 142(3), 142(4) and section 86(4) of the Constitution. Subsections (3) and (4) per se do not raise any questions of justiciability. Section 86(4) which relates to functions of the Head of State raises justiciability. The relevant section is section 134 which provides:

> *"Except as is specifically provided by a Constitutional Law, the question, whether the procedures prescribed for the Parliament or its committees have been complied with, is non-justiciable, and a certificate by the Speaker under section 110 (certification as to making of laws) is conclusive as to the matters to be set out in it."*

75. The Court was asked to avoid answering the question because the events that happened on the floor of the Parliament on 2nd August, 2011 were non-justiciable and this Court had no jurisdiction to delve into those matters.

76. Under *section 134* of the *Constitution* the Courts are precluded from dwelling into the question of compliance or otherwise of the procedures prescribed for the Parliament or its committees. And *section 143(3)* provides that the question whether the occasion for the appointment of an Acting Prime Minister or for the exercise or performance of power, function, duty or responsibility by an Acting Prime Minister, under this section has arisen or has ceased, is non-justiciable.

77. In invoking this argument the First Intervenor and those supporting him say that the Court cannot question or investigate how the Parliament elected Hon. Peter O'Neil as the Prime Minister because

its processes and procedure of election are outside the jurisdiction of the Courts. And they rely on the case of ***James Eki Mopio v. The Speaker of Parliament [1977] PNGLR 420*** where the Supreme Court (Frost CJ, Prentice DCJ and Williams, J) held that the proceedings by the Plaintiff James Eki Mopio seeking a declaration that the appointment of the Prime Minister was null and void on the ground that *s. 142(4)* of the *Constitution* had not been complied with, involved the question whether the procedure in *section 142(4)* of the *Constitution* had been complied with and also the exercise of the freedom of proceedings of Parliament and the functions and duties of the Speaker, were non-justiciable under *s.134* of the *Constitution* and jurisdiction ought to be refused.

78. Mr. Mopio was questioning the validity of the appointment of Hon. Sir Michael Somare as the Prime Minister, which followed immediately after the election of the Speaker. But the Court while examining the combined operations of *section 115(3)* of the *Constitution* was of the view that those were matters which concern the conduct of the business of the Parliament and its procedure. And as the issues before the Court involve the question whether that procedure has been complied with, and also the exercise of the freedom of proceedings of Parliament and the functions and duties of the Speaker, the Court had no jurisdiction to entertain the case.

79. On the question of justiciability, Mopio was the authority for almost two decades until ***Haiveta v. Wingti (No. 3) [supra]***. In this case Hon Paias WIngti who was then the Prime Minister and fearing an imminent motion of no-confidence resigned as Prime Minister and became re-elected again. As the Leader of the Opposition, Hon Christopher Haiveta filed proceedings in the National Court seeking nullification of the appointment of Paias Wingti under *section 142* and *143* of the *Constitution*.

80. The Referrer and those Intervenors supporting it argue that Mopio is already over-ruled by a Five-Men Bench *in Haiveta v. Wingti (No. 3) (supra)* and is no longer good law. Dr. Duncan Kerr submitted that

Mopio cannot provide an authoritative statement of law on justiciability because the opinion given by the Three-Men Bench can only be described as obiter, the reason being that Mopio was not a person authorized by the Constitution to bring a *section 19(3)* reference. In that case as a layman and appearing without counsel or assistance of a lawyer, Hon. James Mopio, MP filed his application pursuant to *s. 19(3)* of the *Constitution.*

81. The Court in *Haiveta v Wingti (supra)* appears to have taken the view that the issues raised in the Reference were of National interest and justice demanded that the Court needed to go behind or past the immunity wall of the non-justiciability doctrine and held that if the Constitution itself placed a duty on someone to comply with it, it is mandatory for compliance by that authority. Hence, if the Constitution prescribed that the election of a Prime Minister takes place on the next sitting day after the Parliament is informed of the occasion giving rise to this, it is mandatory that the election must take place on the next sitting day.

82. And the same view was held in ***Isidore Kaseng v. Rabbie Namaliu & The State [No.1*] [1985] PNGLR 481** in which the Supreme Court said *'where the Constitution places a duty on a person to comply whether it is natural person or entity, failure to attend to those duties attracts sanction by the Courts.'*

83. So the writing was already on the wall eight years later after *Mopio* was decided, that the tide was changing on the question of justiciability until ***Haiveta v. Wingti (No.1)* [1994] PNGLR 160** when Sheehan, J held that a *specific duty* imposed by the Constitution directing the election of the Prime Minister on the next sitting day must be complied with. A view confirmed by a 5 judge bench of the Supreme Court: *Haiveta v Wingti (No.3)* [1994] PNGLR 197.

84. Since then there have been several cases that went before this Court where matters exclusive to the internal procedures of the Parliament

such as the election of the Governor General were placed before the Court and critically scrutinised such as the ***Re-Election of the Governor General Sir Paulias Matane for Second Term, Reference by Morobe Provincial Executive*** [2010] SC1085. Although no direct objections were raised on the basis of non-justiciability under section 134 of the Constitution, the Court examining what exactly took place on the floor of the Parliament, the evidence from the Hansard showed very clearly that there was something terribly wrong and the Speaker contributed enormously to this error in more than one respect leading to non-compliance with the Constitution. It seems therefore that truth and justice prevailed in that case clearly showing that the public interest, interest of justice and good governance rose above that of non-justiciability.

85. The Speaker's handling of the proceedings in the Parliament on 2nd August, 2011 as per the Hansard has the resemblances of what happened in the floor of Parliament on 25th June 2010 when Sir Paulias Matane, the Government's Nominee for the Governor General for the Second Term, was prematurely elected because the Speaker failed to get proper legal advice. Not only that he did not get proper legal advice, by law he was supposed to be the Acting Governor General when this important constitutional event was taking place and yet he presided as the Speaker while *ex officio* he was the Acting Governor General and was supposed to be in the Government House.

86. In the circumstances, this is an appropriate case where this court's inherent powers and jurisdiction must not be subdued by section 134 of the Constitution in its inquiry into what happened on the floor of Parliament on 2nd August, 2011 in the interest of good governance and in the interest of justice as the truth is revealed.

CONSTITUTION MUST PREVAIL

87. The court was also asked to leave things as they are rather than interfering with all the good work that this Government is doing since Hon Peter O'Neill became the Prime Minister in view of the

overwhelming majority that voted 70-24 on the floor of the Parliament favouring the change and the closeness of the National Elections being to six or seven months away by refusing to answer the questions in the Reference posed by the Referrer in particular. This submission finds its source from what has come to be known as the **Olipac Case** or ***Special Reference By Fly River Provincial Executive Council; Re Organic Law on Integrity of Political Parties and Candidates [2010] PGSC 3; SC1057*** (7 July 2010).

88. The Special Reference by the Fly River Provincial Government was a case in which the Supreme Court declined to answer some questions in the reference because either the questions were too convoluted, ambiguous or unclear. The Supreme Court had made it plain in those cases when it can exercise its discretion to refrain from answering questions in a reference. And this what the Court said:

> "15. The referring authority must state the specific *question* that the Court is required to express an opinion on. **The question must be stated in the reference in the appropriate manner. As a matter of good practice, reference questions should be stated in a clear and concise manner with sufficient particularity by reference to specific sections or parts of sections of a Constitutional law that the law or proposed law is said to be in conflict with. Constitutional questions should not be framed in a general, ambiguous, convoluted and duplicitous manner. Statement of reference questions in this manner makes the Court's task difficult in identifying the precise question to be answered and leads counsel into *"an ambitious goose chase in a jungle of provisions"*, so to speak, that results in the waste of the Court's time. It is in the Court's discretion to strike out such questions or decline to answer the question as offending O 4 r 16 of the *Supreme Court Rules* 1987."**

89. So the basis upon which the Court can decline to answer has been clearly defined as per the above passage. The questions posed by the Referrer are concise and straight-forward to the point with no ambiguity. Truth and honesty must prevail above subversion and disquiet. The case before the court is one of enormous national importance of historical significance that the court cannot shirk from

it's duty to perform its function and suppress its findings by pretending that all is well regardless of what happened. This is a case of an illegal take-over of government in a very clever and carefully crafted motion disguised in terms of the Constitution that could pass the test it did on the uninformed human minds, particularly when the tension on both sides of the Parliament was already high, not only by reason of Sir Michael's prolonged absence in a Singapore Hospital but also exacerbated by the political instability in the country contributed by the leadership tussle in the National Alliance Party, the major political party in Somare-Abal Government.

90. This court has a duty to the people of Papua New Guinea to chart the correct course for our country and by ensuring that the Constitution prevails above everybody and everything else and only those who have met the constitutional requirements lead the nation, must run the country.

THE SPEAKER

91. I would like to make some observations about the position of the Speaker whose office is established by the Constitution, section 107. Under s.108, the Speaker is responsible for upholding the dignity of the Parliament, maintaining order in it, regulating its proceedings and administering its affairs.'

92. As the person responsible for the orderly conduct of the proceedings in the Parliament, the Speaker played a pivotal role in this significant event of 2nd August 2011 because it was his duty to guide the House. If he was not sure he should have sought advice from the Clerk of Parliament.

93. Dismissal of a Prime Minister, election of a Prime Minister or change of government midstream during the life of a Parliament are a most serious business of the Parliament that must be dealt with by having proper notices given and all Members of Parliament afforded

adequate time to study the motion and take appropriate positions in their choice of the most suitable candidate for the job. That is why a motion of no confidence has elaborate procedures to be complied with before such motion can be put to vote. No such motion is moved by suspension of standing orders because of the serious nature of the parliamentary business. Dismissal of a Prime Minister or election of a Prime Minister are not trivial businesses of the Parliament so that it can allow its Standing Orders to be suspended so that this business can be rushed through with the speed of lighting in accordance with a pre-designed plan to win at all costs.

94. The Court must be very careful in determining the legality and constitutionality of what transpired here because we don't want to lay down a precedent for any disgruntled members of Parliament to abrogate the Constitution by hijacking it's no confidence motion procedure in the guise of a section 142(2) procedure.

95. Throughout this proceeding, the Speaker took no particular stance on his involvement and participation in the conduct of the affairs of the Parliament that day. His entire action appeared to have been one-sided and lacking neutrality and impartiality in the discharge of his functions as Speaker. This case illustrates a repeat scenario of the events that unfolded in ***Re-Election of the Governor General Sir Paulias Matane for Second Term, Reference by Morobe Provincial Executive [2010] SC1085*** where the Court was heavily critical of the way the Speaker performed in that event.

96. In my opinion, this sad scenario would not have eventuated if the Speaker remained neutral and impartial and performed his function according to the dictates of the Constitution. Consequently he misled the Parliament by collaborating with the proponents of this motion to over-throw a legitimate government in power when they were not content to await the process already commenced under section 142(5) as the only avenue under section 145 (motion of no confidence) was not open to them.

SUMMARY

97. The upshot of what I am saying in my judgment in summary is this. In so far as the motion itself is concerned, it was not worth anything. It did not convey the serious business for the day's deliberation of the Parliament akin to what should happen in a motion of no confidence in the Prime Minister, as it was patently defective in that it lacked factual support.

98. The declaration of vacancy in the office of the Prime Minister by the Parliament in that same motion was a nullity for a number of reasons:

a. Parliament was devoid of power to make such a declaration;
b. No evidence was placed before the Parliament showing that an occasion giving rise to a vacancy in the office of the Prime Minister as variously stipulated in the Constitution had risen;
c. No such evidence was even tendered in court to justify retrospectively what transpired on 2nd August, 2011.

99. The resolution of the Parliament was a nullity as it emanated from an ill-fated motion that had neither legal nor factual backing for it to be moved.

100. Consequently it followed that subsequent election of Hon Peter O'Neill as Prime Minister was already tainted and though it may have been seen to be in accordance with section 142(2), that appointment cannot stand the test of validity when Sir Michael Somare also continued to remain the Prime Minister in law and in fact. The Constitution does not allow for two Prime Ministers in any one life of a Parliament in any democracy or any government for that matter.

101. Non-compliance with section 142(3) of the Constitution on the requirement for the Parliament to sit on the next sitting day after the Parliament is informed of the vacancy according to ***Haiveta v Wingti (No.3) (supra)*** is conclusive evidence that the appointment of Hon Peter O'Neill as the Prime Minister is legally and constitutionally flawed and as such unconstitutional.

102. All questions posed in the Reference by the Referrer raise issues of public importance and of national interest and are therefore correctly and properly justiciable before this Court, as the highest court of the land. ***Mopio case*** on justiciability does not apply, if not, ***Mopio*** is no longer good law for the reasons given in the judgment.

103. The First Intervenor's relentless efforts to find proof of disqualification of Sir Michael Somare as Prime Minister and as Member of Parliament to sustain his assertion of Sir Michael being of unsound mind and also of having missed three consecutive meetings of the Parliament on 2nd August , 2011 failed to stand up in the end. They have not followed proper processes to adduce evidence to ground these assertions. On the other hand, evidence produced in court showed the opposite.

104. The Speaker was devoid of power to dismiss Sir Michael Somare as Member of Parliament on 6th September, 2011, only the Parliament had power to refer the issue to the National Court for determination. In any event, reliance on section 104(2)(d) of the Constitution to dismiss Sir Michael was a gross misuse of power when evidence clearly showed that Sir Michael avoided missing three consecutive meetings of Parliament by being present in the Parliament on 6th September, 2011, which the Speaker did acknowledge but nevertheless proceeded to dismiss him.

105. The end does not justify the means. The fact that Hon Peter O'Neill since taking office as Prime Minister has performed in that role as Prime Minister and his government has done some good work for the people and the country is not the yardstick to determine this Reference. What is in issue here is what happened to the Constitution: (i) Whether the Constitution was abused and violated or infringed or even sabotaged for the sake of elevating him to the office of Prime Minister? (ii) Whether his assumption of that office fulfiled the aspirations of the Constitution that our Founding Fathers have put together? As a democratic country, any change of Government must comply with the Constitution. To not answer the questions posed is

condoning the breach and setting a bad precedent that can be repeated again in the future.

106. The role played by the Speaker contributed enormously to this crisis. Two cases in the history of this Parliament and since Independence that stand out clearly are ***re Election of Governor General (supra)*** and this case where the Speaker's impartiality left much to be desired.

107. For all these foregoing reasons, I answer the Referrer's five questions as follows:

Q: Was there vacancy in the office of the Prime Minister on 2 August, 2011 within the meaning of Constitution section 142?
A: No. There never was.

Q: If 'yes' to Q.1, how and when did that vacancy arise?
A: Not necessary to answer

Q: Did the resolution of Parliament on 2 August, 2011 that there is a vacancy in the office of the Prime Minister have any and if so what constitutional validity, force or effect?
A: None

Q: Was Hon Peter O'Neill MP validly appointed to the office of the Prime Minister on 2 August, 2011 pursuant to Constitution section 142(2), Schedule 1.10(3) or at all?
A: No. There can be no valid appointment of another Prime Minister without there being valid removal of Sir Michael Somare as the current Prime Minister.

Q: Does Sir Michael Somare continue to hold office of Prime Minister and does Hon Sam Abal MP continue to be the Acting Prime Minister?
A: Yes, but subject to inhibitions illustrated at the hearing of his fitness to resume duties and perform the functions of the office of the Prime Minster and Hon Sam Abal continues as the Acting Prime Minister.

108. For whatever they are worth, my short answers to the questions in the Special Reference appear in the Appendix at the back of the judgments.

1. GAVARA-NANU, J: This is a special Reference made by the East Sepik Provincial Executive ('the Referrer"), an authority referred to in s. 19 (3) (eb) of the *Constitution* for an opinion by the Court on thirty eight (38) questions relating to the interpretation and application of various constitutional law provisions.

Central issues arising from questions posed by the Reference

2. Having had a closer look at the questions posed by the Reference, all these questions in my opinion revolve around two central issues. The two issues in the order of the chronology of the events are firstly - whether the East Sepik Provincial seat held by Sir Michael Somare ("Sir Michael") who is the Eighth Intervener here is vacant as declared or announced by the Speaker on 6 September, 2011. This issue is linked to the question of whether Sir Michael was absent for three consecutive meetings of the Parliament, *viz.* meetings for May, June and August, 2011, without leave of the Parliament. The issue is concerned with the application of s. 104 (2) (d) of the *Constitution.* A related issue is - whether Sir Michael is no longer a Member of the Parliament and secondly - whether the appointment of Mr. Peter O'Neil as Prime Minister on 2 August, 2011, is constitutionally valid. This issue is linked to the question of whether an occasion for the appointment of a Prime Minister arose on 2 August, 2011. The issue also raises the question of whether there was a vacancy in the office of the Prime Minister on 2 August, 2011. This issue is concerned with the interpretation and application of s. 142 (2) of the *Constitution.*

3. The answers given to these two central issues will determine the answers to the questions posed by the Reference.

4. All the questions arising in the Reference ultimately raise one single question – whether Sir Michael is still the Prime Minister.

Brief background facts

5. It is convenient at this juncture to state the background facts of the Reference in brief compass because facts of the case have been covered already by my brothers. Sir Michael was elected as Member for East Sepik in the 2007,

general election. He was subsequently appointed Prime Minister at the first meeting of the Parliament after the general election.

6. On 24 March, 2011, Sir Michael travelled to Singapore for medical consultation. He was the incumbent Prime Minister at that time. In about mid April, 2011, he was admitted at the Raffles Hospital in Singapore and underwent corrective heart surgery. He did not return to Papua New Guinea until on or about 4 September, 2011. On 6 September, 2011, he attended the special sitting of the Parliament. It is to be noted that to attend that sitting, he was pushed into the Parliament in a wheel chair and was seated in the opposition side of the Chamber. He stayed only for a short time then left the Chamber in the wheel chair.

7. These facts are not in dispute.

8. The period between 24 March, 2011 and 6 September, 2011, is critical because the events which gave rise to the issues before the Court occurred during that period.

First central issue - Whether Sir Michael's East Sepik Provincial seat is vacant as declared or announced by the Speaker on 6 September, 2011.

9. In regard to this issue, the first Intervener and those aligned with him claim
that, by operation of s.104 (2) (d), Sir Michael's East Sepik Provincial seat automatically became vacant after Sir Michael was absent for the whole of three consecutive meetings of the Parliament *viz.* meetings for May, June and August, 2011, without leave of the Parliament. The purported consequence of this is that Sir Michael is no longer a Member of the Parliament.

10. The effect of s.104 (2) (d) of the *Constitution* is that if a Member of the Parliament is absent during whole of three consecutive meetings of the Parliament without leave of the Parliament, the seat of the Member will automatically become vacant unless satisfactory reasons are given for such absences, in which case the Parliament may decide to waive the rule in the subsection.

11. The issue of whether Sir Michael was absent from the May, June and August, 2011, meetings of the Parliament without leave of the Parliament requires proper interpretation of s. 104 (2) (d) of the *Constitution* then applying it to the facts of the case.

12. Firstly, it should be noted that, Mr. Marshall Cooke QC of counsel for Sir Michael conceded that Sir Michael was not able to attend the three meetings of the Parliament for May, June and August, 2011, because he was hospitalized at the Raffles Hospital in Singapore to undergo heart surgery and to receive related medical treatment. Mr. Cooke however, qualified his concession by submitting that in regard to the May meeting, Sir Michael was granted leave by the Parliament. Mr. Cooke therefore submitted that, Sir Michael having attended the September meeting of the Parliament, the only meetings Sir Michael was absent from without leave of the Parliament were meetings for June and August, 2011. In other words, Sir Michael was absent for only two meetings without leave of the Parliament, it was therefore submitted further by Mr. Cooke that the decision by the Speaker to declare Sir Michael's East Sepik Provincial seat vacant because Sir Michael failed to attend three consecutive meetings of the Parliament for May, June and August, 2011, was misconceived and had no legal basis. Mr. Cooke therefore submitted that the declaration by the Speaker on 6 September, 2011, that Sir Michael's East Sepik Provincial seat was vacant is null and void and is no legal effect.

13. Mr. Manual Varitimos of counsel for the Fifth and Sixth Interveners had argued that Sir Michael was absent during the whole of the three consecutive meetings of the Parliament for May, June and August, 2011, without leave of the Parliament. He therefore argued that by operation of s. 104 (2) (d), Sir Michael's East Sepik Provincial seat automatically became vacant and as a result Sir Michael is no longer a Member of the Parliament. This argument was in support of the decision by the Speaker to declare the East Sepik Provincial seat vacant for the same reasons.

14. Whether Mr. Varitimos's argument can succeed or not depends on whether the decision by the Speaker on 6 September, 2011, to declare the East Sepik Provincial seat vacant is constitutionally valid. In other words, if the

decision by the Speaker to declare the East Sepik Provincial seat vacant on 6 September, 2011, is invalid and unconstitutional then it would follow that Mr. Varitimos's argument cannot succeed and must fail.

15. The pertinent question therefore is – was Sir Michael absent during the whole of the three consecutive meetings of the Parliament in May, June and August, 2011? In my opinion, the answer to this question lies in the letter written by the Speaker to Sir Michael, which is Annexure *'D'* to Sir Michael's affidavit sworn on 20 September, 2011. In that letter, the Speaker informed Sir Michael, *inter alia,* that according to the Hansard and the attendance records of the Parliament, he (Sir, Michael) was absent from February, 2011, without leave of the Parliament ... *"In those circumstances, the Constitution operates to automatically cause your seat to be vacant."*

16. The Speaker further advised Sir Michael in the letter that the leave granted to him by the Parliament for the May meeting was defective because under s. 104 (2) (d) of the *Constitution,* the leave was supposed to have been granted for three consecutive meetings of the Parliament, not just for the May meeting. In other words, the leave granted to Sir Michael for the May meeting pursuant to s. 104 (2) (d) was meant to be or was supposed to have been granted for the three consecutive meetings of the Parliament for May, June and August, 2011.

17. Other relevant parts of the letter read:

> *"I note that on 17th May 2011, the Parliament granted you leave of absence for the duration of that meeting only. Regrettably, the motion of the 17th May, 2011 was defective, and ineffective to avert the operation of section 104* (2) *(d) of the Constitution, because the only leave of absence contemplated by that section is a leave of absence 'for three consecutive meetings. For reasons best known by your advisers, no such leave was sought, and no such leave was granted. The motion of 17th May, 2011 operated in respect of only one meeting of the Parliament.*
>
> *In deciding whether your seat is vacated by operation of section 104 (2)(d) of the Constitution, I have sought the advice of eminent legal counsel. In accordance with that advice, I ask myself the following question when*

determining this issue; did you have the leave of the Parliament to be absent for three consecutive meetings of the Parliament? Unless you are able to *answer "YES" to that question, your seat is automatically vacated by operation of section 104* (2) *(d) of the Constitution. It follows from the foregoing that if a member is absent for the whole of three consecutive meetings of the Parliament but has been granted leave only in respect of the first of them, his seat is vacant. I also note for the sake of completeness that the Parliament has not decided to waive this rule. "*

18. It is plain from this passage of the letter that the Speaker's decision to declare the East Sepik Provincial seat vacant was made after he had received legal advice or opinion that the leave granted to Sir Michael for the May meeting was defective because it did not comply with s. 104 (2) (d) of the *Constitution.* That advice appears to have been given after the event, *viz.* after Sir Michael had been granted leave for the May meeting of the Parliament. When exactly the advice was given is unclear.

19. The Court in using its power under Order 3 r 3 of the *Supreme Court Rules* directed Cannings J, to conduct a hearing for purposes of taking evidence and to make findings of fact in this Reference, then to state those facts for the Court. The purpose and the rationale behind adopting the procedure provided under Order 3 r 3 of the *Supreme Court Rules* was explained by the Supreme Court in the case of *Enforcement Pursuant* to *Section* 57 *of the Constitution, Application by Francis Gem* (2010) SC 1065. The procedure was adopted for the first time in that case, the purpose of which was for the single judge of the Supreme Court to conveniently and speedily take evidence and make findings of fact for and on behalf of the Court.

20. The findings of fact made by Cannings J, in respect of the disputed facts from the Agreed and Disputed Facts in this Reference were also made for and on behalf of the Court. The hearing before Cannings J, was as such part of the proceedings in this Reference.

21. The Court has a wide discretion in regard to the exercise of its power under Order 3 r 3 of the *Supreme Court Rules* whether to adopt the facts found by Cannings J. In other words, the Court is not bound by the findings made by

Cannings J, regarding facts. This is plain from the directory nature of the *Rule.*

22. The findings of fact made by Cannings J, appear at pages 17 to 35 of his judgment, at pages 35 to 45 of the judgment his Honour gives the summary of his findings on each issue of fact appearing in paragraphs 28 to 75 of the Statement of Agreed and Disputed Facts.

23. Based on the materials before the Court, particularly paragraph 16 and Annexure marked as *"AM-6"* to the affidavit of the Attorney General, Dr Allan Marat, sworn on 13 September, 2011, which is the Hansard for the 27 May, 2011, sitting of the Parliament, it is noted that during that sitting, an attempt was made by the Member for Wewak Open, Honorable Moses Manuwau to raise concerns raised by members of the public regarding Sir Michael's state of health at that time. That attempt was ruled out of order by the Deputy Speaker after a point of order was raised by Honorable Patrick Pruaitch.

24. It is to be noted that between 24 March, 2011 and 6 September, 2011, Sir Michael did not make any requests to the Parliament for leave to be absent from future meetings of the Parliament due to his illness, nor did he provide any information to the Parliament in respect of his likely future absences from the meetings of the Parliament. It is also to be noted further that in the above period, Sir Michael did not provide or release any information to the Parliament or to the people of Papua New Guinea the nature of his illness and the type or types of medical treatment he was receiving and undergoing in Singapore and the likely effect of his illness on his political career and when he was likely to return to work.

25. From the findings of fact made by Cannings J, it is also noted that in the period Sir Michael was hospitalized at Raffles Hospital in Singapore, his son Mr. Arthur Somare paid him at least three visits.

26. Obviously, as a result of Mr. Arthur Somare's personal assessment of Sir Michael's state of health during those visits, on 28 June, 2011, Mr. Arthur Somare made a public statement on behalf of the Somare family through the media, including EMTV that their desire was for Sir Michael to retire from politics on medical grounds. Following that announcement the then Acting Prime Minister, Mr.

Sam Abal took steps to invoke the processes set out under s. 142 (5) (c) of the *Constitution* and s. 6 of *Prime Minister and National Executive Act, 2002*. As part of that process, a Statutory Business Paper No. 58 of 2011 was then prepared for the National Executive Council ("the NEC"). As further part of that process Sir Isi Kevau, who is Sir Michael's personal doctor prepared a preliminary medical report on Sir Michael. On 29 July, 2011, the NEC advised the Governor General, Sir Michael Ogio to request the PNG Medical Board to appoint two specialist doctors to conduct medical examinations on Sir Michael and to not to suspend Sir Michael and for the two doctors to report to the Governor General within 28 days, after the date of their appointment. The Governor General acting with and in accordance with the advice of the NEC, made a decision in those terms on 1 August, 2011, the decision was published in the National Gazette the same day.

27. On or about 4 September, 2011, while still receiving medical treatment at Raffles Hospital in Singapore Sir Michael became aware that a special meeting of the Parliament was scheduled for 6 September, 2011. As a result he travelled to Port Moresby to attend that meeting. According to Sir Michael's affidavit material, it was his understanding that, if he did not attend the 6 September meeting of the Parliament, he would have been absent for three consecutive meetings of the Parliament, *viz.* meetings for June, August and September, 2011, in which case he would have been caught by s. 104 (2) (d) of the *Constitution* thus resulting in his East Sepik Provincial seat automatically becoming vacant. Clearly this understanding was based on his belief that he had been granted leave by the Parliament for the May meeting of the Parliament.

28. When Sir Michael attended the sitting of the Parliament on 6 September, 2011, the Speaker in his speech welcomed him to the meeting. In the same breath though, the Speaker read his letter to Sir Michael dated 6 September, 2011, in which he informed Sir Michael and the Parliament that because Sir Michael had been absent from three consecutive meetings of the Parliament for May, June and August, 2011, his East Sepik Provincial seat had by virtue of s. 104 (2) (d) automatically become vacant. According to Sir Michael, there were interjections in the Chamber by some Members protesting over the letter but those interjections were overruled by the Speaker. The letter was later given to Sir Michael's lawyers, *Posman Kua Aisi* by the Clerk of the Parliament.

29. Following points which arise from the leave granted to Sir Michael for the May meeting of the Parliament and the decision by the Speaker to declare the East Sepik Provincial seat vacant for the alleged failure by Sir Michael to attend three consecutive meetings of the Parliament are worth noting:-

(i). Leave was not requested by Sir Michael, it was granted to him by the Parliament at Parliament's own volition.

(ii). Sir Michael was the incumbent Prime Minister when leave was granted to him and the mover of the motion to grant leave to Sir Michael was Honorable Paul Tiensten who was the Minister for National Planning and Monitoring in the Somare led government. The motion was carried on voices.

(iii). Straight after leave was granted to Sir Michael, the Member for Wewak Open Honorable Moses Manuwau tried to raise concerns raised by the members of the public regarding Sir Michael's state of health but the Member was overruled by the Speaker when another Member in the Somare led government raised a point of order.

(iv). No notice or warning was given to Sir Michael before 6 September, 2011, to inform him that leave granted to him for the May meeting of the Parliament was defective because it did not comply with the requirements of s. 104 (2) (d).

(v). The issue regarding the validity of the leave granted to Sir Michael for May meeting of the Parliament was raised for the first time by the Speaker on 6 September, 2011, on the floor of the Parliament when he
read his letter to Sir Michael informing him that leave granted to him for the May meeting was defective and by operation of s. 104 (2) (d) his seat had automatically become vacant.

(vi). The Speaker also told Sir Michael that the Parliament had not waived the rule in s. 104 (2) (d).

30. The Speaker's speech to the Parliament on 6 September, 2011, is contained in the copy of the Hansard which is annexed to Sir Michael's affidavit as

Annexure *"E"*.

31. Apart from arguing that Sir Michael was not absent for three consecutive meetings of the Parliament, Mr. Cooke also argued that the Parliament had acted in breach of s. 59 of the *Constitution* which embodies the principles of natural justice which are part of the underlying law. Mr. Cooke submitted that s.59 guarantees protection to persons in similar position as Sir Michael by ensuring that they are given the opportunity to be heard. Mr. Cooke argued that as this protection is guaranteed by a constitutional law, the failure by the Parliament to accord Sir Michael the opportunity to be heard before declaring his seat vacant was in breach of the *Constitution.*

32. Mr. Webb SC of counsel for the Second Intervener on the other hand had argued that s. 59 of the *Constitution* does not apply in the circumstances of this case because the rules of natural justice as stated in s. 59 are meant for the control of judicial and administrative proceedings. Mr. Webb argued that proceedings of the Parliament are not proceedings of judicial and administrative character and the law has always been that proceedings of Parliament are not amendable to judicial review. No doubt Mr. Webb advanced these arguments also on behalf of other Interveners who are aligned with his client.

33. Having regard to the factors that arise from the leave granted to Sir Michael for the May meeting of the Parliament to which I have alluded and the other materials before the Court, including submissions made by counsel regarding the application of s. 59 of the *Constitution,* I have come to a conclusion that the East Sepik Provincial seat held by Sir Michael is not vacant. I reached this conclusion on two grounds. Firstly, in my view, upon fair and liberal interpretation of s. 104 (2) (d), which includes due consideration of the purpose for which leave was granted to Sir Michael, and the fact that the only type of leave that the Parliament could grant to Sir Michael under s. 104 (2) (d) was leave for three consecutive meetings of the Parliament, I find that the leave granted to Sir Michael was by operation of law (s. 104 (2) (d)) *deemed* to be for three consecutive meetings of the Parliament, namely meetings for May, June and August 11. Secondly, I am of the firm opinion that the circumstances of the case attracted s. 59 of the *Constitution,* thus I find that the Parliament through the Speaker breached s. 59 of the *Constitution* when the Speaker without giving Sir Michael the opportunity to

be heard declared Sir Michael's East Sepik Provincial seat vacant.

34. Firstly, in regard to the leave granted to Sir Michael, it is to be noted that the decision by the Parliament to grant leave to Sir Michael for the May meeting was a deliberate decision, made pursuant to s. 104 (2) (d) of the *Constitution.* The intention of the Parliament in granting leave to Sir Michael is obvious *viz.* to accord Sir Michael the protection that was available to him under s. 104 (2) (d) so that he did not lose his seat or get disqualified for being absent from the meeting of the Parliament. Indeed that is the purpose of a leave being granted to a Member of the Parliament under s. 104 (2) (d). The important point to note again is that the only type of leave that could be granted to Sir Michael under s. 104 (2) (d) was leave for three consecutive meetings of the Parliament, which in this case were meetings for May, June and August, 2011.

35. In this case Sir Michael was granted leave by the Parliament at Parliament's own volition. Sir Michael did not request the leave. Although the only type of leave the Parliament could grant under s. 104 (2) (d) was for the whole of three consecutive meetings of the Parliament, the Parliament inadvertently or by mistake granted leave for the May meeting only. Therefore, as a matter of law, I find that Sir Michael was given leave for three consecutive meetings of the parliament, namely meetings for May, June and August, 2011.

36. I make this finding pursuant to the inherent power of the Court granted by s. 155 (4) of the *Constitution,* which provides:

> *(4) Both the Supreme Court and the National Court have an inherent power to make, in the circumstances as seems to them proper, orders in the nature of prerogative writs* ***and such other orders as are necessary to do justice in the circumstances of a particular case****.*

37. I therefore find and declare pursuant to the inherent power of the Court under s. 155 (4) of the *Constitution,* that once the Parliament by its deliberate

decision decided to grant leave to Sir Michael by invoking to s. 104 (2) (d), *but for,* the mistake the Parliament made in giving leave for the May meeting only, Sir Michael was entitled to and was granted the type of leave that was available under s. 104 (2) (d), which was leave for three consecutive meetings of the Parliament: *Re Election of the Governor General; Reference by the Morobe Provincial Executive* (2010) SC 1085. . The Parliament was in my view by law bound to grant such leave once it invoked s. 104 (2) (d) by its deliberate decision, because the provision does not prescribe any other form of leave than leave for three consecutive meetings of the Parliament. The case therefore justifies the Court's readiness to exercise its equitable jurisdiction under s. 155 (4) of the *Constitution* to protect Sir Michael's primary right that was availed to him by s. 104 (2) (d), which was the right to have leave for three consecutive meetings of the Parliament, *viz.* meetings for May, June and August, 2011: *Avia Aihi v. The State (No.1)* [1981] PNGLR 81 and *Peter Makeng and Ors v. Timbers (PNG) Limited* N3317. I consider that the finding and the declaration I have made are permitted by the latter part of s. 155 (4) viz. *"and such other orders"*. This is consistent with the approach taken in other cases by the courts to protect rights and equitable interests of parties before them: *Mauga Logging Company Pty. Ltd. V. South Pacific Oil Palm Development PTY. LTD (No.1)* [1977] PNGLR 80. In that case Frost C.J, gave equitable relief to the plaintiff to prevent the defendant from skipping the country with its assets before the trial of a cause of action, the action was based on claim for damages for breach of contract. In *New Guinea Cocoa (Export) Co. Pty. Ltd. v. Basis VedBaek* [1980] PNGLR 205, the court using it inherent power ordered arrest of a ship which owed money to the plaintiff, the arrest order was the interim equitable relief for the plaintiff, pending trial. In *Douglas Charles Dent v. Thomas Kavali* [1981] PNGLR 488, the plaintiff was the holder of a State Lease. The lease was forfeited by the defendant and the forfeiture was duly gazetted. The plaintiff did not appeal the forfeiture as provided under the *Land Act,* instead the plaintiff opted to seek declaration by invoking Order 4 r 11 of the *National Court Rules*. The court held that although the plaintiff did not appeal the forfeiture under the relevant provisions of the *Land Act,* it had power under s. 155(4) to declare the forfeiture void.

38. In coming to the decision that I have reached regarding leave, I have *"deemed"* that leave granted to Sir Michael was by law for three consecutive meetings of the Parliament, in so doing I have construed the word *"deemed"* as meaning *"to be*

treated as" which is the meaning given to the word by *Osborn's Concise Legal Dictionary,* which I adopt. Thus, the leave granted to Sir Michael is to be treated as or 'deemed' as leave for the three consecutive meetings of the Parliament. The end result is that Sir Michael is also deemed or is to be treated as having been absent from May, June and August, 2011, meetings of the Parliament with leave of the Parliament. This is in my opinion consonant with the utterance by this Court in *Avia Aihi v. The State* (supra) per Kearney DCJ at page 91, of the equitable jurisdiction of the courts under s. 155 (4) of the *Constitution* to protect primary rights of parties before them, the Court said:

> *"…Constitution, s. 155(4), involves at least a grant of power to the courts. I consider that the sub-section gives unfettered discretionary power both to this Court and the National Court so to tailor their remedial process to the circumstances of the individual case so to ensure that the primary right of parties before them are protected".*

39. In Peter *Makeng and Ors v. Timbers (PNG) Limited* (supra), Injia DCJ (as he then was) said:

> *"…Section 155 (4) confers jurisdiction on the Court to issue facilitative orders in aid of enforcement of a primary right conferred by statute or subordinate legislation enacted under the enabling statute".*

40. In this case the type of leave conferred by s. 104 (2) (d) is leave for three consecutive meetings of the Parliament. This Court therefore has the power to protect and enforce that primary right as availed to Sir Michael by *Constitution,* s. 104 (2) (d).

41. I am also of the opinion that, even if Sir Michael had been absent for three consecutive meetings of the Parliament without leave of the Parliament, given the serious medical condition Sir Michael had at that time, which the Parliament was fully aware of, it was still within Parliament's power to treat Sir Michael's medical condition as a *"satisfactory reason(s)"* so as to accord Sir Michael the further

protection that was available to him under s. 104 (2) (d), which was for the Parliament to waive the rule in s. 104 (2) (d). Sir Michael's medical condition was a matter which was within public knowledge, including the Parliament, thus Parliament was at liberty and had the discretion to waive the rule under s. 104 (2) (d) if it had wanted to.

42. It is to be further noted that s. 104 (2) (d) does not specify as to who should have provided the *"satisfactory reasons"* for the Parliament to waive the rule, therefore the Parliament having been fully aware that Sir Michael was ill, could have as it did when it granted leave to Sir Michael for the May meeting, on its own volition moved to waive the rule s. 104 (2) (d).

43. The other reason why the Parliament could have exercised its discretion in favour of Sir Michael by waving the rule s. 104 (2) (d) is that the mistake in the type of leave it granted to Sir Michael during its May meeting was made by the Parliament. Therefore fittingly, it was Parliament's responsibility or duty to correct its own mistake and in my view the only fair way for the Parliament to correct the mistake was by waving the rule in s. 104 (2) (d).

44. Whilst I do not wish to engage in drawing speculative conclusions, I think it is reasonable to conclude that given the key issue upon which this case is being fought which is the removal of Sir Michael as Prime Minister by those who are now in the government, Sir Michael's predicament in respect of leave of absence granted to him arose only because of the change in the government. In other words, had the government remained under Sir Michael, the Parliament would have opted to correct its mistake by either extending his leave of absence or waived the rule under s. 104 (2) (d). I should also state that, the actions of the Parliament and the Speaker appear to have been motivated by power and political expediency. I consider their actions as lacking dignity, propriety and decorum.

45. In that regard, I find the actions of the Parliament and the Speaker were pursuant to s. 41 (1) (c) of the *Constitution* harsh and oppressive

and not reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind.

Whether decisions of the Parliament are amenable to judicial review

46. In regard to the argument that decisions of the Parliament are not amenable to judicial review, I find the argument untenable because the Parliament is a public body made up of individual Members who discharge public functions, its decisions are collectively made by that body of Members therefore any decisions made by the Parliament which either go beyond or are outside of its powers are amenable to judicial review. In any case, it suffices to say that there are precedents where this Court has reviewed decisions of the Parliament: *Haiveta v. Wingti (No.3)* [1994] PNGLR 197; *Re Sitting Day*s *of Parliament and Regulatory Powers of Parliament* (2002) SC 722.

Whether Sir Michael had the right to be heard before his seat could be declared vacant

47. Secondly, in regard to the question of whether s. 59 of the *Constitution* which embodies the principles of natural justice has been breached by the Parliament when declaring Sir Michael's East Sepik Provincial seat vacant without giving Sir Michael opportunity to be heard, I am of the firm opinion that there has been such breach by the Parliament. There cannot be any doubt that the declaration has adversely affected Sir Michael's right to hold public office as a Member of Parliament. Needless to say that the decision by the Speaker to declare East Sepik Provincial seat vacant appears to have been made arbitrarily by the Speaker without first informing the Parliament and the issue being debated in the Parliament. This appears to be the case when one looks at the letter written by the Speaker to Sir Michael on 6 September, 2011, and the Hansard which show that the Speaker appears to have had the view that he had power to declare Sir Michael's seat vacant without giving Sir Michael the opportunity to be heard.

48. I consider the actions of the Speaker on 6 September, 2011, contrary to and in direct violation of s. 108 of the *Constitution*, which imposes a duty on the Speaker to be responsible when discharging his functions. The Speaker does not have absolute power to make decisions of the type he made on 6 September, 2011. He has the duty to not only to maintain order in the Parliament which includes ensuring proper and sensible debates of issue by Members, but perhaps more significantly, maintaining the integrity of the Parliament, which includes the manner in which he as the Speaker conducts himself and the business of the Parliament.

49. The fact that Sir Michael's right to hold public office was inevitably going to be affected by his East Sepik Provincial seat being declared vacant, was in my opinion a good reason why the Parliament should have informed Sir Michael that leave granted to him for the May meeting was defective, because it did not comply with s. 104 (2) (d) of the *Constitution*. The Speaker should have done that as soon as he received his legal advice. There is undisputed evidence that Sir Michael believed that leave that was granted to him for the May meeting had met the requirements of s. 104 (2) (d). He was therefore misled by the Parliament to believe that he had missed only the June and August, 2011, meetings of the Parliament, which according to his affidavit material was the reason why he was determined to attend the September, 2011, meeting to avoid missing three consecutive meetings of the Parliament. In the circumstances, the decision by the Speaker to declare Sir Michael's seat vacant without first giving Sir Michael an opportunity to be heard was in clear breach of the principles of natural justice as embodied in s. 59 of the *Constitution*. The decision was also pursuant to s. 141 (a) of the *Constitution* harsh and oppressive.

50. The decision by the Speaker to declare Sir Michael’s East Sepik Provincial seat vacant was binding on the Parliament because the decision related to the leave granted to Sir Michael by the Parliament for the May, 2011, meeting of the Parliament. The Parliament was therefore responsible for the decision made by the Speaker to declare Sir Michael’s seat vacant. The Parliament therefore had the duty to accord Sir Michael the opportunity to be heard by informing him that the leave granted to him was defective and more importantly its consequences. Had Sir Michael been given such an opportunity, he might have for example asked for the leave to be extended to cover the next

two future meetings of the Parliament. Or he could have discussed the matter with the Speaker and the issue could have been resolved amicably. I am sure if Sir Michael was not able to exercise these rights, his agents such as his lawyers or his family members or someone on his behalf would have taken steps to address the issues. Giving Sir Michael the opportunity to be heard was the minimum the Parliament could have done under s. 59 of the *Constitution,* given that its decision would or was likely to have adverse effect on his right to hold public office, which is a right guaranteed by s. 50 of the *Constitution.* It was therefore imperative for the Parliament to inform Sir Michael of the error in the type of leave granted to him before taking the extreme measure by declaring his East Sepik Provincial seat vacant. The Parliament had a duty not only to act fairly to Sir Michael but also to be seen to act fairly to him. Thus the Parliament's failure to give Sir Michael an opportunity to be heard before declaring his seat vacant was in breach of s. 59 of the *Constitution.*

51. For the foregoing reasons I find that the declaration or the announcement made by the Speaker on 6 September, 2011, that Sir Michael's East Sepik Provincial seat was vacant was unlawful and unconstitutional. The end result is that Sir Michael is still the Member for East Sepik.

Second central issue - Was Mr. Peter O'Neil's appointment as Prime Minister on 2 August, 2011, constitutionally valid?

52. This issue revolves around the interpretation and application of s. 142 (2), (3) and (4) of the *Constitution*. Sir Michael was the incumbent Prime Minister when Mr. Peter O’Neil was appointed Prime Minister on 2 August, 2011. Sir Michael as noted was appointed Prime Minister by the Parliament at the first meeting of the Parliament after the general election in 2007, that appointment was made pursuant to what I will hereon refer to as the ‘first leg’ of s. 142 (2). Then on 2 August, 2011, Mr. O’Neil was appointed Prime Minister by the Parliament, that appointment was made pursuant to what I will hereon refer to as ‘the second leg’ of s. 142 (2). In *Ref. No.1 of 1997 by Principal Legal Advisor* [1998] PNGLR 453, Kapi DCJ (as he then was) took a similar approach when discussing and applying s. 142 (2), but in so doing, his Honour referred to what I call the two legs of s. 142 (2) as- *“two sets of circumstances”* or - *“two distinct categories”*. At 459 this is how his Honour applied the subsection:

"One starts with the premise that s. 142 (2) of the Constitution recognizes <u>two distinct set of circumstances</u>; (a) election of the Prime Minister following a general election and (b) election of a Prime Minister from time to time as the occasion for the appointment of a Prime Minister arises. It is important to keep these two distinct categories in mind because as it will be apparent from my reasoning, the provisions of the Constitution treats (sic.) <u>the two categories differently"</u>. (my underlining).

53. I respectfully agree with his Honour that the subsection presents two distinct scenarios, and I adopt a similar approach in interpreting and applying the subsection but I prefer to refer to the two scenarios as 'first and second leg' of s. 142 (2).

54. In regard to the question of whether Mr. O'Neil's appointment as Prime Minister on 2 August, 2011, is constitutionally valid, Mr. Cooke and other counsel representing those Interveners aligned with Sir Michael argued that the appointment was unlawful and unconstitutional, thus it was argued that Sir Michael is the legitimate Prime Minister.

55. Mr. O'Neil's appointment as Prime Minister on 2 August, 2011, was made by the Parliament after the current Deputy Prime Minister Mr. Belden Namah move
d a motion without notice for the Parliament to declare the office of the Prime Minister vacant. The motion was purportedly moved pursuant to s. 142 (2) and Schedule 1.10 (3) of the *Constitution* and the inherent power of the Parliament. When the Parliament voted on the motion, the result was 70 Members voted in favour of the motion and 24 against.

Whether events of 2 August, 2011, are justiciable

56. A preliminary issue relating to the events of 2 August, 2011, arises to be determined first *viz.* the issue of whether the proceedings before the Parliament on 2 August, 2011, including the appointment of Mr. O'Neil as Prime Minister are justiciable. This issue is directly concerned with the interpretation and application of s. 142 (2), (3) and (4) of the *Constitution.*

57. Dr Duncan Kerr of counsel for the Fourth Intervener argued that whether

Mr. O'Neil's appointment as Prime Minister complied with the requirements of s. 142 (3) and (4) raises questions of law, therefore it is justiciable and the Court can look into and determine whether the appointment of Mr. O'Neil on the same sitting day, *viz.* 2 August, 2011, and not "on the next sitting day" on 3 August, 2011, as required by s. 142 (3) and (4) was constitutionally valid. Dr Kerr relied on the more recent decisions of the Supreme Court in *Haiveta v Wingti* (supra) and *SCR No.1 of* 1997 *by the Principal Legal Advisor* [1998] PNGLR 453. In these two cases the Supreme Court held that where a provision of the *Constitution* provides a precondition for the exercise of power either by the Parliament or the Speaker, the issue of whether that precondition has been fulfilled and complied with is a legal issue, thus the issue becomes justiciable. He submitted that this approach was reaffirmed by the Supreme Court in the recent case of *In re Re-Election of the Governor General* [2010] PGSC32; SC 1085.

58. Dr Kerr argued that given the decisions of the Supreme Court in above cases, the early post-Independence decision of the Supreme Court in *Mopio v. Speaker of Parliament* [1977] PNGLR 420 which seemingly stands for the proposition that all proceedings relating to the conduct of the Parliament, regarding *inter alia,* the appointment of a Prime Minister are non-justiciable, was *obiter dicta* and has no binding effect and should not be followed.

59. Mr. Webb on the other hand had argued that the decision by the Supreme Court in *Mopio* that the question of whether the appointment of a Prime Minister or the decision to appoint a Prime Minister occurred the "next sitting day" as stated by
s. 142 (3) and (4) of the *Constitution* is non justiciable being a matter within s. 134 of the *Constitution.* Mr. Webb submitted that they raise matters of procedure, therefore the decision in *Mopio* remains the law and it has not been overturned by *Haiveta v. Wingti*

60. It should be noted that in *Haiveta v. Wingti,* which was an appeal against the decision of the National Court, justiciability was not a ground of appeal. The issue therefore did not arise before the Court, thus any observations made on the issue were *obiter dicta.* This was acknowledged by Amet CJ and Kapi DCJ in their respective judgments.

61. Mr. Webb submitted that the decision in Mopio is the correct statement of the law regarding justiciability and should be followed. In that regard, he argued that s. 142 (4) of the *Constitution* prescribes *"procedures ... for the Parliament"* within the meaning of s. 134 of the *Constitution,* he further submitted that as a matter of procedure s. 142 (4) merely states that the question of the appointment of the Prime Minister is to be **considered** on the next sitting day. Mr. Webb stressed that the subsection does not say the appointment of the Prime Minister is to be made on the next sitting day. This distinction was also stressed by the Court in *Mopio*.

62. In *Mopio,* although the issue of justiciability did not arise directly before the Court, it became the determinative issue because the Court eventually decided the case on this issue. The issue was raised as a preliminary ground of objection to the application made by Mr. Mopio, and the issue was fully considered by the Court. In its final determination of the issue, the Court came to the view that s. 142 (4) raised matters of procedure within the meaning of s. 134, it was therefore non- justiciable. The pertinent part of the Court's judgment appears at page 421 where the Court said:

> *"Mr. Mopio contends that the section* (142 (4)) *goes further than* to *prescribe the order of business for the next sitting day after the meeting of Parliament has been called, and requires that the election of the Prime Minister is* to *be conducted on the day following the appointment of the Speaker.* <u>*If that were the proper construction of the section it would not be the end of the matter because Mr.* Mop*io would then need* to *establish that the section was mandatory and not merely directory* so *that non-compliance would have the effect in law of validating the appointment." (my underlining).*</u>

63. The part of the passage I have underlined appears to me to be the *ratio decidendi* of the decision.

64. At page 423 of the judgment, the Court said:

> *"Section* 142 (4) *provides merely for the time for the question of the appointment of Prime Minister* to *be* <u>*considered,*</u> *and the order of business- - whether on one day or more than one day - in which it is* to *be dealt with by*

the Parliament.

These are matters which concern the conduct of the business of the Parliament and its procedure. Accordingly as *the issues before the Court involve the question whether the procedure has been complied with, and also the exercise of the freedom of proceedings of Parliament and the functions and duties of the Speaker, this Court has no jurisdiction* to *entertain the case now before it."* (my underlining).

65. The Court also relied on s. 115 (3) to say that debates in Parliament and the exercise of powers and functions of the Speaker in regard to the conduct of election of the Prime Minister were non - justiciable. The decision in *Mopio* has been followed in many National Court and Supreme Court decisions. For instance see, *Kaguel Koroka v. Phillip Kapal and Others* [1985] PNGLR 117; *Paul Kipo v. Rova Maha* N1252; *Havila Kavo v. Mark Maipkai* N4094 and *Tom Koraea v. Sepoe Karawa* N791. In *Reference by the Ombudsman Commission* (2010) SC 1027, the Supreme Court also said debates, votes taken in the Parliament and certification of a law by the Speaker are non - justiciable.

66. In *Kaguel Koroka v. Phillip Kapal and Others* (supra), Woods J, in following *Mopio* held that what occurred within the walls of the Western Highlands Provincial Assembly was outside the jurisdiction of the court because they were matters which concerned procedures and business of the Assembly. Thus they fell within s. 134 of the *Constitution* and were non-justiciable. His Honour in that case was hearing an application challenging the result of a vote of No Confidence.

67. In the subsequent case of *Hagai Joshua v. Aron Meya* [1988-89] PNGLR 188, Andrew AJ, held the opposite view. The issue before the court was whether the Members of the Morobe Provincial government were validly suspended and whether a motion for a vote of No Confidence was validly moved. His Honour held that the issue was properly justiciable before the court. His Honour said the court had the power to determine the legality of the vote of No Confidence because the issue was really about the rights of the Members to hold public office and to exercise public functions and duties pursuant to such office, as guaranteed by s. 50 of the *Constitution.* The court distinguished *Kaguel Koroka* and Mop*io* which the court said were about interpretation of procedural matters. The court

also said it had jurisdiction under s. 135 of the *Constitution* to deal with questions relating to the qualification of a person to be or to remain a Member of a Provincial government. This same point was emphasized and pressed by the Referrer and those aligned with it in this case, they argued that the issue of whether Sir Michael is still a Member of Parliament should be decided by the National Court under s. 135. In my opinion, whilst the National Court does have jurisdiction to deal with the matter, it is already properly before this Court and this Court can deal with it. In any case this Court has the inherent power to deal with the matter because it raises constitutional issues.

68. In *Mopio,* the Supreme Court adopted and relied upon a passage from *Dingle v. Associated Newspapers Ltd.* & Ors [1960] 2 Q.B 405 at 410, an English case in which the court applied the *Bill of Right*s 1688, s. 1, art. 9, which is substantially similar in terms to s. 115 (2) of our *Constitution.* In that case, the court also adopted a passage from the head note of an earlier case of *Bradlaugh v. Gossett* (1884)12 Q.B.D 271.The Supreme Court said:

> *"Whilst full recognition is to be given to the autochthonous nature of the Constitution of Papua New Guinea, this passage is helpful in illustrating the meaning of s. 115 (2) It is as follows;*
>
> *"Reference was also made* to *Bradlaugh v. Gossett, and it is sufficient* to *read* a *short portion of the headnote: "The House Of Commons is not subject* to *the control of her Majesty's Courts in its administration of that part of the statute law which h*as *relation t*O *its internal procedure only. What is said* or *done within its walls cannot be inquired into* a *court of law.... There is* a *clear affirmation of the exclusive right of Parliament* to *regulate its own internal proceedings."* (my underlining).

69. In *Hagai Joshua v. Aron Meyer,* Andrew AJ, in distinguishing Mopio and Kaguel *Koroka v. Phillip Kapal and Others,* said:

> *"In my view, the position here is distinguishable from the case of James Eki Mopio [1977] PNGLR 420 for the questions raised go further than the interpretation of procedural matters. They involve rights pertaining to the holding of public office and to the exercise of public functions as guaranteed by s. 50 of the National Constitution. Further, by s. 135 of the Constitution, the*

National Court has an inherent power of review where, in its opinion there are overriding considerations of public policy in the circumstances of a particular case. In my judgment, the issues raised here- the questions are substantial ones involving rights to hold public office which involve the representatives of many persons in government- as a matter of public policy should be reviewed by the National Court. I think the position here is distinguishable from Kaguel Koroka v. Philip Kapal [1985] PNGLR 17 where the result of a No Confidence motion was challenged where all the requirements pertaining to the No Confidence motion had been complied with. Here, as will become apparent later in this judgment, those requirements had not been complied with.

I find that both questions are properly justiciable before the National Court." (my underlining).

70. In my opinion this passage sums up the gist of the argument by the Referrer and those aligned with it, that what happened on 2 August, 2011, is justiciable.

71. Having considered all the arguments put forward by counsel representing both sides of the Reference, I have come to a final view that argument put forward by the Referrer and the parties aligned with it has merit. However, the view I hold does not completely overturn *Mopio.* I consider *Mopio* to be still the correct and good law but only in respect of the matters which relate strictly to procedure and business of the Parliament: *In the Matter of Constitutional Reference by Ombudsman Commission* (2010) SC1027. But in cases where matters arising in the Parliament require compliance with preconditions for the exercise of power either by the Parliament or the Speaker and that such exercise of power will or may result in the guaranteed right or rights of a Member or Members of Parliament to hold public office under s. 50 of the *Constitution,* being adversely affected *Mopio* is to be distinguished, because such matters would not be limited to procedure, they will also raise questions of law.

72. Having regard to the principles applied in the line of cases referred to above, I consider that the events of 2 August, 2011, go further than mere interpretation of procedural matters. In my opinion the events also raise issues of law, thus they are justiciable. The Court therefore has the

jurisdiction to decide whether the appointment of Mr. O'Neil as Prime Minister on 2 August, 2011, was valid and constitutional. This task involves the interpretation and application of s. 142 (2), (3) and (4) of the *Constitution.*

Appointment of Mr. Peter O'Neil as Prime Minister on 2 August, 2011

73. As noted, the motion that was moved by Mr. Namah on 2 August, 2011, for Mr. O'Neil to be appointed Prime Minister was moved pursuant to s. 142 (2), Schedule 1.10 (3) of the *Constitution* and the inherent power of the Parliament. I do not think Schedule 1.10 (3) could grant power to Mr. Namah to move such motion and as it will be seen later, I also do not think the Parliament had the inherent power to move and declare the position of the Prime Minister vacant. But in regard to s. 142 (2), I consider that the second leg of this subsection, which is pertinent to the issue at hand could grant such power. However, I consider that the second leg of Subsection (2) has to be read and applied together with Subsections (3) and (4) of s. 142. The operative words in the second leg of Subsection (2) are: "*....otherwise from time* to *time* as *the occasion for the appointment of* a *Prime Minister arise ...* " In this regard, I consider that the second leg of s. 142 (2) grants power to Parliament to appoint a Prime Minister when an occasion arises and it is an enabling provision to Subsections (3) and (4).

74. The effect of the second leg of Subsection (2) therefore is that it empowers the Parliament to appoint a Prime Minister when the position of the incumbent Prime Minister who was appointed after the general election in accordance with the first leg of Subsection (2) has become vacant (upon an occasion arising). In other words, the second leg of Subsection (2) empowers the Parliament to exercise the same power it exercised when it appointed a Prime Minister after the general election. The second leg of Subsection (2) therefore provides the legal basis for the Parliament to exercise the same power it had exercised when it appointed a Prime Minister after the general election. The process of appointing a Prime Minister under the second leg of Subsection (2) can be repeated whenever an occasion for the appointment of a Prime Minister may arise during the life of the Parliament. In that sense the second leg of Subsection (2) gives a special power to the Parliament to appoint a Prime Ministers at times other than after the

general elections.

75. The precondition for the Parliament to exercise this special power is that an occasion for the appointment of a Prime Minister has arisen or must arise. If no such an occasion arose, the Parliament would have no legal basis to appoint a Prime Minister and if the Parliament were to appoint a Prime Minister without an occasion for the appointment of a Prime Minister arising, such an appointment would be unconstitutional and the appointment would be void of any legal effect. The occasion arising for the appointment of a Prime Minister relates the position of the Prime Minister becoming vacant. In other words, there must be a vacancy in the office of the Prime Minister for the Parliament to exercise its special power of appointing a Prime Minister under the second leg of s. 142 (2).

76. A vacancy in the position of the Prime Minister may arise in various ways. For instance, it may arise as a result of the Prime Minister becoming of unsound mind (s.103 (3) (b); or as a result of a successful vote of no confidence against the Prime Minister (s.145); or the Prime Minister resigning (146); or the Prime Minister being dismissed from office (Division 111.2 (Leadership Code); or the Prime Minister upon a report prepared by two medical doctors being declared unfit by the Parliament to perform his duties due to physical or mental incapacity s.142 (5) (c) of the *Constitution* and s. 6 (6) and (8) of *Prime Minister and National Executive Council Act*.

77. Applying s. 142 (2) (3) and (4) to the facts of this case, once an occasion for the appointment of a Prime Minister arose, the next step for the Parliament to take was to appoint a Prime Minister. In my view the processes to invoke by the Parliament when appointing a Prime Minister are those processes prescribed in Subsections (3) or (4), but as to which of the two subsections the Parliament could invoke depended on whether the Parliament was in session or not. Full compliance
with the requirements of Subsection (3) or (4), as the case may be, were the precondition to the valid exercise of power by the Parliament to appoint a Prime Minister. What had to be complied with in the two subsections was that the consideration of the question of the appointment of a Prime Minister had to take place on the next sitting day of the Parliament. That was the precondition to the valid exercise of power by the Parliament to appoint a Prime Minister. It is a

mandatory requirement under both subsections because of the use of the word "shall" in the two subsections. This process takes the two subsections beyond mere procedural requirements. This appears to be the point Mr. Mopio put forward to the Court, which the Court rejected. With greatest of respect, this is where I think the Court in *Mopio* fell into error. The precondition in Subsections (3) and (4) is therefore not the appointment of a Prime Minister on the next sitting day of the Parliament. The decision in *Haiveta v. Wingti* also appears to have fallen into the same error.

78. I find that the primary source of aid in interpreting s. 142 (2) (3) and (4) to give the subsections their intended meaning is the report by the *Constitutional Planning Committee* (CPC), the relevant part is at page 7/3 paragraph 25, which reads:

Appointment of the Prime Minister

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> *25. We recommend that the parliament itself should elect the Prime Minister by means of an ordinary resolution when Parliaments meets after general election. If a vacancy occurs at other times the election of the new Prime Minister by the same procedure would take place* at *the next sitting if the Parliament is in session, or if it is not,* at a *meeting* to *be convened within fourteen days* of *the vacancy.* (my underlining)

79. In my opinion this passage from the *CPC* report puts beyond doubt that the second leg of s. 142 (2) is meant to be read and applied together with s. 142 (3) and (4). Therefore I have no doubt that the processes prescribed for the appointment of a Prime Minister under s. 142 (3) and (4) relate to the appointment of a Prime Minister made pursuant to the second leg of s. 142 (2). The passage from the *CPC* in fact incorporates Subsections (2), (3) and (4) and prescribes the manner in which they may be applied or given effect to.

80. I therefore consider that the decision in *Mopio* has hitherto been the law regarding justiciability, because even two of the most recent Supreme Court decisions in *Haiveta v. Wingti* and *SCR No.1* 1977 *by the Principal Legal Advisor* (supra) were *obita dicta* on the issue of justiciability.

81. I consider that the *decision in Mopio* regarding non-justiciabilty of s. 142

(3) and (4) was based on or influenced by considerations applicable to the laws relating to non-justiciability of the processes relating to the Parliamentary privileges in England. This is evident from Court's reliance on a couple of English cases and the English *Bill of Right* 1688. The Court appears to have applied s. 115 (2) of the *Constitution* rigidly for the same reason. This seems obvious from what the Court said at page 422:

> *"Whilst full recognition is* to *be given* to *the autochthonous nature of the Constitution of Papua New Guinea*, *this passage is helpful in illustrating the meaning of s.* 115 (2)".

82. The passage the Court was referring to here was a passage from a judgment it quoted from an English case of *Bradlaugh v. Gosset* (supra), that passage has been cited in this judgment.

83. In Papua New Guinea, whilst the Parliament is the supreme law making body, unlike in England it has no absolute power because it is made subject to the
Constitution: Application by Gabriel Dusava (1998) SC581; *Re Calling of Meeting of the Parliament* [1999] PNGLR 285 and *Isidore Kaseng v. Rabbie Namaliu (No.1) [1995]* PNGLR 481. This is also made very plain by various constitutional provisions, such as ss. 100,101,108,109, 110,111,112and 114. Section 108 is significant and relevant here, it expressly makes the Speaker and Deputy Speaker subject to the *Constitution* in the performance of their functions and responsibilities.

84. In my opinion, the autochthonous nature and the whole scheme of the *Constitution* allows for the decisions of the Parliament, and the Speaker to be amenable to the review jurisdiction of the Court where their decisions raise issues of law, as in this case.

85. Turning again to the interpretation and application of the second leg of s. 142 (2) of the *Constitution,* the phrase *"from time to time"* in the subsection is also significant in its meaning and application, because it helps in the construction of the subsection and gives true meaning to the subsection. This phrase has been judicially construed in a number of cases, and the meaning given to the phrase by these cases reinforces my construction of the second leg of s. 142 (2) and how it is

applied here. In *Bryan v. Arthur* 11A. & E. 117, the court considered the exercise of power by the governor regarding revocation of remissions on prison terms for prisoners pursuant to a statutory provision which provided for the governor to exercise such power "from time to time". In defining the phrase, William J, said this:

> *"! see nothing wrong in the governor having the power, though he might not think* a *remission of the punishment adviseable (sic.),* to *revoke an assignment* to a *master who might turn ou*t to *be* as *bad* as *the convict himself.* <u>*"From time* to *time" means "as occasion* may *arise" for the exercise of the governor's discretion.*</u> *There is nothing in the words of the Act, or the reason of the thing,* to *restrict the power of revocation".* (my underlining).

86. Then in *Boettcher v. Boettecher* [1948] 8 St. R. Qd .74, the court considered s. 2 of *The Deserted Wives and Children Act*, *1840,* which gave power to justices to postpone or adjourn inquiries made under the *Act, "fr*om time to time". At 77, Stanley A.J, said:

> " ... *The complete answer* to *the appellant's submission is* to *be found in the special power of adjournment given* to *justices by* s. 2 *of The Deserted Wives and Children's Act of 1840: "Provided that upon any application by or on behalf of the husband or the wife or for any other cause it shall be lawful for the justices* to *postpone or adjourn the inquiry from time* to *time* as *they shall deem it expedient.*
>
> *"From time* to *time" is* a *well - known phrase which occurs in various statutes and documents. The words have been held to mean "as occasion may arise" - per William* J~ *in Bryan v. Aythur [1839J* 11 A. & *E.* 168, at p. 117; 113 *E.R.* 354~ at *p. 358).*
>
> <u>*"The words '*f*rom time* to *time' are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction." The meaning of the words "from time to time" is that after once acting, the done of the power may act again"*</u>*- per Lord Penzance in Lawrie v. Leeds (1881) 7 App. Cas. 19).*

(my underlining)

87. This statement lends support to the construction I have given to the second leg of s. 142 (2) as well as s. 142 (3) and (4) of the *Constitution.*

88. As I said, whilst s. 142 (3) and (4) prescribe procedures for the Parliament to follow when appointing a Prime Minister under the second leg of s. 142 (2), because the processes under these respective subsections involve a precondition for the exercise of power by the Parliament to appoint a Prime Minister, I consider that the processes under the two subsections are justiciable. It follows that, an appointment of a Prime Minister by the Parliament without these preconditions being complied with would render the appointment unconstitutional and void of any legal effect. This is the essence of what the Court said in *Haiveta v. Wingti* more particularly in *Supreme Court Reference No.1 of* 1997 [1998] PNGLR 453, albeit without deciding the issue of justiciablity. See, also *Hagai Joshua v. Aron Meya* (supra).

89. In the instant case, Sir Michael was appointed Prime Minister after the general election in 2007, pursuant to the first leg of s. 142 (2). Mr. O'Neil's appointment as a Prime Minister on the other hand was made pursuant to the second leg of s. 142 (2) on 2 August 2011, upon a motion being moved by Mr. Namah who at that time was the Leader of the Opposition. Pursuant to the second leg of Subsection (2), one has to assume that the motion was moved after an occasion for the appointment of a Prime Minister had arisen. That was the precondition to the proper exercise of power by the Parliament to appoint a Prime Minister under the second leg of Subsection (2). This precondition raises a point of law, thus it is not a mere procedural requirement.

90. In regard to the onus to prove that an occasion for the appointment of a Prime Minister arose on 2 August, 2011, it was submitted by Mr. John Griffin of counsel for the First Intervener that the onus lies on the Referrer and those aligned with it being the ones who claim invalidity regarding the appointment of Mr. O’Neil as Prime Minister on 2 August, 2011. Mr. Griffin relied on the decision of this Court in *SCR No. 11 of 2008* [2010] SC1057 (the *OLIPPAC* case). That was a case involving a statute affecting basic rights. It was in that context that the Court said the onus is on the party alleging the invalidity. A

passage commencing at paragraph 37 of the judgment in *OLLIPAC* has been cited by Mr. Griffin in support of his contention. In that same passage though, the Court in reiterating the principle also adopted the statement made by Kapi J (as he then was) in *SCR No. 2 of 1982* at page 238, where his Honour in discussing the law on onus of proof said:

"It would be sufficient for the party who alleges that a law is unconstitutional merely to prove that his right is infringed. He is only required to show a prime facie case. Where this is shown, then the onus is on the party who relies on the validity of the law to prove that it is within the limitation Provided by the Constitution." (my underlining).

91. Applying that principle to this case, in my opinion the onus to prove that an occasion arose or that there was a vacancy in the office of the Prime Minister on 2 August, 2011, being the date when Mr. O'Neil was appointed Prime Minister now, lies on the First Intervener and those aligned with him, more particularly Mr. Namah who is the Sixth Intervener in this Reference and who was the mover of the motion on 2 August, 2011, for Mr. O'Neil to be appointed Prime Minister. I consider that the onus has shifted to them because the Referrer and those aligned with it have *prima facie* shown, that the matters which would have constituted or given rise to "an occasion" or a vacancy in the office of the Prime Minister) which would have provided the basis to appoint a Prime Minister on 2 August, did not exist.

92. It is to be noted that when the Members voted on the motion moved by Mr. Namah on 2 August, 2011, which led to the appointment of Mr. Namah, Mr. Sam Abal who was then the Acting Prime Minister and who is the Fourth Intervener in this Reference was one of those who voted against the motion. Mr. Abal has continued to maintain his position that there was no vacancy in the office of the Prime Minister or that no occasion for the appointment of a Prime Minister arose when Mr. O'Neil was appointed Prime Minister on 2 August, 2011.

93. So the key question is – did an occasion for the appointment of a Prime Minister arise on 2 August, 2011? A related question is – was there a vacancy in the office of the Prime Minister, on 2 August, 2011, because Mr. O'Neil could not be

validly appointed as Prime Minister without there being a vacancy in the office of the Prime Minister ?

94. The First Intervener and those aligned with him have to answer these questions to discharge the onus they carry to prove that Mr. O'Neil's appointment was valid and constitutional.

95. The incumbent Prime Minister before the appointment of Mr O'Neil as Prime Minister on 2 August, 2011, was Sir Michael. It was therefore Sir Michael's position that was affected by Mr. O'Neil's appointment as Prime Minister and the "occasion" or the vacancy in the office of the Prime Minister that purportedly arose or existed had to relate to Sir Michael's position as Prime Minister.

96. There is no question that Mr. O'Neil was appointed Prime Minister when Sir Michael was away in Singapore recovering at Raffles Hospital from corrective heart surgery. But that is not a valid ground for Mr. O'Neil to be appointed Prime Minister.

97. The *Constitution* is expressly specific in providing and stating grounds upon which a Prime Minister may be removed from office. In this instance, there are only two possible grounds upon which Sir Michael could be removed as Prime Minister, *viz.* grounds which could constitute an occasion arising for the appointment of a Prime Minister, thus providing a valid basis for the Parliament to appoint a new Prime Minister. The first ground is the Prime Minister being of unsound mind under s. 103 (3) (b) Of the *Constitution.* The second ground is the Prime Minister being declared physically or mentally unfit to carry out the duties of his office under s. 142 (5) (c) of the *Constitution*. The First Intervener and those aligned with him have to demonstrate that one of these grounds existed on 2 August, 2011, in order to prove that Mr. O'Neil's appointment as Prime Minister was constitutionally valid.

98. Section 142 (5) (c) of the *Constitution* is to be considered and applied together with s. 6 of *Prime Minister and National Executive Council, Act,* 2002, for the latter sets out the process to be followed for the removal of the Prime Minister under s. 142 (5) (c). Neither of the two provisions can be considered and applied

separately from the other. They are intended to be read and applied together because when the process under s. 6 of the *Prime Minister and Executive Council Act,* is fully complied with and its requirements are met, that would constitute a ground for the removal of the Prime Minister under s. 142 (5) (c).

99. The Chief Justice has in his judgment set out s. 6 of the *Prime Minister and National Act,* and outlined the process under the section, which I respectfully adopt.

100. Firstly in regard to the issue of being unsound mind as a possible ground for the removal of Sir Michael, Mr. Griffin argued that Sir Michael was of unsound mind and was incapable of managing himself and his affairs. It was therefore submitted that pursuant to s. 103 (3) (b) of the *Constitution,* Sir Michael is not qualified to be or to remain a Member of Parliament. He submitted that the words "unsound mind" in s.103 (3) (b) do not necessarily mean lunacy or idiocy as in the case of a person suffering from mental disorder. He further submitted that the physical and mental condition of Sir Michael at the relevant times did constitute unsoundness mind. Reliance was placed on Cannings J's several findings. Firstly, that Sir Michael was incapable of managing his affairs in the period from 30 March, 2011 to 26 August, 2011, or a significant part of it. Secondly, Sir Michael lacked the capacity to carry out the functions and duties of the office of the Prime Minister from 30 March, 2011, to date (date of his findings) or significant part of it. Thirdly, Sir Michael lacked the capacity during the period (from) 14 April, 2011, to 2 August, 2011, or a significant part of it, to make an informed decision whether to resign as Prime Minister.

101. Mr. Ian Molloy of counsel for the Referrer and those aligned with it on the other hand submitted that proper meaning of "a person of unsound mind" in s. 103 (3) (b) of the *Constitution* is to be found in s. 81 of *Public Health Act*, *Chapter No*. 226, which provides:

> *Person of unsound mind" means* a *person who is found under this Part to be of* ***unsound mind and incapable of managing himself or his affairs****.*

102. .Having considered all the submissions put forward by counsel from both sides, more particularly those by Mr. Griffin, I find the argument put forward by the

Referrer and those aligned with it appealing, for in my opinion a *"person of*

unsound mind" must refer to a person with mental disability. I find the definition given by s. 81 of the *Public Health Act,* to be in harmony with s. 103 (3) (b) of the *Constitution.* It is to be noted that s. 81 of the *Public Health Act,* is a provision under ***PART VIII*** of the *Act,* which is headed - ***MENTAL DISORDERS AND TREATMENT***. ***Division 4*** of the *Act,* is headed - ***Property Generally and Committees***. Sections 93, 94 and 95 are pertinent, they come under ***Division 4.*** Section 93 provides for raising money out of the estate of a person of unsound mind to, for example settle debts on his behalf. See, *Owners- Stata Plan No. 23007 v. Cross – in the matter of Cross [2006] FCA 900;* a case referred to by Mr. Molloy, which I find is a case directly in point and find helpful. Section 94 provides for the appointment of committees to manage properties and affairs of a person who is of - ***"unsound mind and is incapable of managing himself or his affairs".*** Section 95 provides for the powers of committees to manage estates of persons of unsound mind. In my opinion these provisions of the *Public Health Act,* put beyond any doubt that s. 81 of the *Act,* defines "a *person of unsound mind"* for the purposes of s. 103 (3) (b) of the *Constitution.* Thus, having regard to these provisions of the *Public Health Act,* I am not convinced that Sir Michael has ever been of unsound mind.

103. When one looks at s. 103 (3) (b) of the *Constitution,* it is different in its meaning to s. 142 (5) (c) of the *Constitution.* Section 103 (3) (b) refers to the protection of a person of unsound mind and the property of a person of unsound mind. To my mind this makes s. 103 (3) (b) of the *Constitution* to fall within the scheme of the *Public Health Act,* more particularly ***PART VIII*** *of the Act.* Section 103 (3) (b) also refers to a person of unsound not being capable of managing himself or his affairs. The section relates to qualifications for and disqualifications from membership of the Parliament, whilst s. 142 (5) (c) relates specifically to the Prime Minister being *"unfit by reason of physical or mental incapacity, to carry out the duties of his office"*. This difference is fundamental because the two provisions provide two distinct grounds having different features upon which the Prime Minister may be removed from office. The difference between the two provisions is telling and axiomatic from the terms of the two provisions. And when the two provisions are read in their proper context and are given their true meaning, one cannot mean the other. For example, physical or mental disability which are factors stipulated in s. 142 (5) (c) cannot constitute or mean unsound mind under s. 103 (3) (b), which refers to a person

of unsound mind not being able to manage himself and his property or assets. These factors only relate to s. 103 (3) (b).

104. I am also of the firm opinion that the Court would be reading s. 142 (5) (c) out of its proper scope and context, if it was to treat the findings made by Cannings J, that Sir Michael was physically and mentally unfit during the period of his illness to manage his affairs as amounting to unsoundness of mind which is the ground of removal of the Prime Minister under s. 103 (3) (b). As I said, physical or mental disability are factors which are relevant only to s. 142 (5) (c), but even then, Cannings J's findings could not constitute the ground to remove Sir Michael as Prime Minister under s. 142 (5) (c) because s. 6 of *Prime Minister and Executive Council Act,* which sets out the process to follow before Sir Michael could be removed under s. 142 (5) (c) as set out by the Chief Justice in his judgment, was not followed and complied with.

105. It follows that Canning J's findings of Sir Michael being physically and or mentally unfit to manage his own affairs during the period of his illness cannot be treated as a valid ground to remove Sir Michael as Prime Minister.

106. The end result is that I am not convinced that Sir Michael was a person of unsound mind within the meaning of s.81 of the *Public Health Act,* for him to be caught by s. 103 (3) (b) of the *Constitution.* On this point, I respectfully agree with the Chief Justice that statutory definition given to "unsound mind" by s. 81 of the *Public Health Act*, must prevail over any other definition given to it by common law.

107. In regard to the question of whether Sir Michael could be removed from office under s. 142 (5) (c) of the Con*stitution.* I am of the firm opinion that he could not be removed from office because the requirements of s. 142 (5) (c) and s. 6 of *Prime Minister* and *National Executive Council Act,* were not followed and met. The process under s. 6 of *Prime Minister and National Executive Council* is mandatory and had to be followed before Sir Michael could be removed as Prime Minister under s. 142 (5) (c). The preconditions to be met and complied with under this process before Sir Michael could be removed as Prime Minister are set out neatly by the Chief Justice in his judgment and I respectfully adopt them. There is evidence is that a preliminary report compiled by Sir Isi Kevau on Sir Michael's medical condition was gazetted on 1 August, 2011, but that could not

provide a valid basis for Sir Michael to be removed on 2 August, 2011, because that was part of the process under s. 142 (5) (c) and s. 6 of *Prime Minister and National Executive Act,* which was still in progress when Mr O'Neil was appointed Prime Minister on 2 August, 2011.

108. One may argue that the NEC under the leadership of the then Acting Prime Minister should have invoked s. 142 (5) (c) much earlier. Such an argument is not without reason. Here, the country's Prime Minister was seriously ill and the public had the right to know what was happening with their Prime Minister. The people of Papua New Guineans, more so the people of East Sepik whom Sir Michael represented in the Parliament had the right to know even about his medical condition, whether he was likely to return to work, the fate of his political career and so on. The right of the people to know about Sir Michael's condition emanates from s. 141 (b) of the *Constitution*, which makes the collective Ministry in the Executive arm of the Government headed by the Prime Minister answerable to the people; see, *Alois Kingsly Golu v. The National Executive Council and Ors* N4425 and *S.C.R No. 1 of 1982; Re Bouraga* [1982] PNGLR 178. When the Prime Minister became ill, there were two fundamental reasons why the public had the right to know about his illness. Firstly, he was the Prime Minister and the number one public figure who was being treated at the Raffles Hospital in Singapore at the expense of the public, the tax payers. Secondly, he was the Chairman of the NEC which is required by the *Constitution,* s. 149 to be responsible. Obviously, his prolonged absence from the country had created uncertainty and instability in the Government, thus the urgent need to bring back and restore stability and certainty in the government had become imperative and was of paramount importance. The NEC had a constitutional duty to act quickly in addressing these issues in the interest of the people to whom it is expressly made accountable by the *Constitution.*

109.However, that said, the aforesaid matters could not be used as the basis or grounds to remo Minister. The only grounds upon which Sir Michael could be validly removed as Prime Minister and to give legitimacy to Mr. O'Neil's appointment as Prime Minister under the second leg of s. 142 (2) of the *Constitution* are those expressly provided under the Constitution, namely ss. 103 (3) (b) and 142 (5) (c). I am also of the opinion that the then Opposition under the leadership of Mr. Namah was not without remedy. They could have through the court compelled the NEC by way of mandamus to invoke the process under s.6 of the *Prime Minister and*

National Executive Council Act, and s. 142 (5) (c) or seek declaratory orders. Those avenues were open to them. In my opinion this is a case where mandamus would lie against the NEC or declaratory orders been given: *SCR No.1 of 1982; Re; Bouraga* (supra); *Burns Philip (PNG) Ltd v. The Independent State of Papua New Guinea* (1989) N769;*The State v. Phillip Kapal* [1987] PNGLR 417 and *Alois Kingsly Golu v. The National Executive Council and Ors* (supra).

110. Express constitutional provisions which set out mandatory requirements and processes must be fully complied with and given effect to. Considerations outside of those constitutional requirements must not be allowed to stand in the way of such express mandatory constitutional requirements and processes so as to compromise and to circumvent those mandatory constitutional requirements and processes. There are no options to the mandatory constitutional requirements. They must be followed and given effect to. This is the essence of the *Constitution* being the supreme law over any other laws (ss. 9and 10). For the same reason, any other law which is intended to give effect to a process or requirement under such express constitutional provisions must be fully complied with and given effect to. Section 81 of the *Public Health Act*, and s. 6 of *Prime Minister and National Executive Council Act*, are such other laws.

111. The end result is that, no occasion for the appointment of a Prime
Minister arose on 2 August, 2011, under the second leg of s. 142 (2) of the *Constitution*. The First Intervener and those aligned with him, in particular, Mr. Namah have up to now failed to prove that an occasion for the appointment of a Prime Minister arose or that a vacancy in the office the Prime Minister did exist on 2 August, 2011. It therefore follows that the appointment of Mr. O'Neil as Prime Minister on 2 August, 2011, was unlawful and unconstitutional.

112. In the result, I find that Sir Michael is the legitimate Prime Minister.

Answers to the questions posed by the Reference

113. I would answer the thirty eight questions posed by the Reference in the manner set out in the Appendix to the Judgment.

QUESTIONS	Injia CJ	Salika DCJ	Sakora J	Kirriwom J	Gavara-Nanu J
Q1:On 2nd August 2011Was there a vacancy in the Office the Prime Minister within the meaning of constitution section 142?	No	Yes, vacancy created as declared by Parliament on 2 August 2011.		No	No
Q2: If "yes" to Question (1), how and when did that vacancy arise?	Not necessary to answer in view of answer to Q1	As above		Not applicable.	
Q3: Did the resolution of the Parliament on 2	No	Yes, discussion in body of		Decline to answer. Question is	Decline to answer. Question

August 2011 at there is vacancy in the Office of Prime Minister have any (and if so, what) constitutional validity, force or effect?		judgment.		vague.	is too vague.
Q4: Was the Honourable Mr Peter O'Neil validly appointed to the office of Prime Minister on 2 August 2011, pursuant to Constitution section (142), Schedule 1.10 (3) or at all?	No	No, Parliament should have adjourned to the next sitting day- s.142(3).		No	No
Q5: Does Sir Michael	Yes	No		Yes, but whether Sam	Yes, but whether Sam Abal

continue to hold the office if Prime Minister, and does the Honourable Sam Abal continue to be the Acting Prime Minister?				Abal continues to be the Acting Prime Minister depends on whether Sir Michel has returned to work.	continues to be Acting Prime Minister depends on whether Sir Michael has returned to work.
Q6: What meetings of the Parliament have been held since 1 March 2011 within the meaning of s104 (2) (d) of the *Constitution*?	10-13,17-18,20,24-27 May, 14,16-17,21-24 June, 2 & 9 August,6 September, 2011	May, June, August, September 2011		Meetings for May, June, August, September, 2011	May, June and August 2011
Q7: Was Sir Michael Somare absent from the whole of any, and if so which, of those meetings of the	Sir Michael Somare was absent from the whole of the May, June and August 2011	Yes, May, June and August.		No, because leave granted to him for the May meeting was deemed by law to be leave for	No, because leave granted to him for the May meeting was deemed by law to be leave for

Parliament?	meetings of Parliament.			May, June and August, 2011.	May, June and August, 2011.
Q8: Do the meetings of Parliament identified in answer to paragraph (7) above include three consecutive meetings of the Parliament?	Yes	Yes	Yes		Yes
Q9: If the answer to paragraph (8) is "yes", did Sir Michael Somare have leave of the Parliament in respect of any, and if so which, of those three consecutive meetings of the Parliament?	Sir Michael had leave of absence for the whole of the May meeting	Yes – May meeting, he was granted leave of absence by Parliament.		Meetings for May, June and August,2011.	Meetings for May, June and August,2011

Q10: In the event Sir Michael did not have the leave of Parliament in respect of his absence for all three of those consecutive meetings of the Parliament, was he absent without that leave during the whole of three consecutive meetings of the Parliament within the meaning of Section 104 (2)(d) of the *Constitution*?	No	No – he had leave of Parliament for the May meeting.		He had leave of the Parliament.	He had the leave of Parliament.
Q11:Did Sir Michael cease, and if so when, to be a member of	No	No		No	No.

Parliament?					
Q12: What are the laws referred to in s.103 (3) (b) of the *Constitution* as "any law relating to the protection of the persons and property of persons of unsound mind"?	The Public Health Act	Public Health Act 1973 – s.86 S86- Order of Enquiry S87- Notice of Enquiry S88 Examination of person allegedly of unsound mind S89- Questions to be determined by the Court.		Public Health Act 2002	Public Health Act 2002
Q13: What is the meaning of the expression "unsound mind" in the laws identified in answer to paragraph (12)?	A person of unsound mind is defined in s81 of the Public Health Act to be of unsound mind and incapable of	Court found Sir Michael not of unsound mind but found that he was incapable of managing his affairs and		Mentally disturbed mind.	Mentally disturbed mind

	managing himself or his affairs.	affairs of the nation.			
Q14: Has Sir Michael Somare been of "unsound mind" within the meaning of the law referred to in s.103 (3) (b) at any time in the period from April 2011 to the present time?	No	No – he was not found to be of unsound mind but he was found to be incapable of managing his own affairs and the affairs of the Nation.		No	No
Q15: In the event the answer (14) is yes, when in the said period has he been of unsound mind?	Unnecessary to answer in view of answer to Q14.	He was found to be incapable of managing his affairs from 1 April to date or up to the date of the decision of Cannings J, but not of unsound mind.		Not applicable	Not applicable.

Q16: In thelight of the answer to (14) and (15) when did Sir Michael Somare become unqualified to remain a member of the Parliament within the meaning of s103(3)(b) of the Constitution?	At no time was Sir Michael unqualified to be or remain a member of Parliament	He is still a member of Parliament.		Not applicable	Not applicable.
Q17:Did Sir Michael Somare cease to be a member of the O\Parliament on the date indentified in Q16 by reason of s104(2)(f) of the Constitution?	No	No		Decline to answer. Question is vague.	Question is vague.
Q18: Does the office of the Prime Minister become vacant by the operation of s141(a) of the constitution or	The member ceases to be eligible to hold office of Prime Minister if the	Yes, and if Parliament decide not to waive this rule, but here		Decline to answer. Question is hypothetical.	Decline to answer. Question is hypothetical.

otherwise, when the incumbent ceases to be a member of the Parliament by the operation of s104(2)(d)?	National Court makes an order to that effect following procedures laid down in s 135 of the Constitution and the Organic Law on National and Local-Level Government Elections, Part XVIII, Division 2 (ss 228 – 233).	Parliament did grant him leave of absence for the month of May.			
Q19: If the answer to (18) is yes, having regard to (14) and (15) above, did the office of Prime Minister become vacant in August	Save that it is unnecessary to answer this question in view of the answer to (18), the office of Prime Minister	No – not on this occasion because Parliament have him leave for the May sittings.		Decline to answer. Question is vague.	Decline to answer. Question is vague.

2011, and when?	did not become vacant.				
Q20: Does the office of Prime Minister become vacant by the operation of a141(a) of the *Constitution* or otherwise when the incumbent becomes unqualified to be a member of the Parliament pursuant to s.103(3)(b) and s104(2)(f)?	No, only by order of the National Court under the *Public Health Act Chapter 226*	Yes		Decline to answer. Question is hypothetical and vague.	Decline to answer. Question is hypothetical and vague.
Q21: If the answer to (2) is yes, having regard to the answers to (16) and (17) above did the office of Prime Minister become vacant on or prior to 2 August	Save that iIt is unnecessary to answer this question in view of the answer to (20), the answer is 'no'.	Yes, on 2 August, 2011 but not on account of s,103(3) 6 or s104(2)(f) of the Constitution.		Not applicable	Not applicable.

2011?					
Q22: If the answer to (23) is yes. When did it become vacant?	It is unnecessary to answer this question in view of answer to (21).	Not necessary to answer in view of answer to question 2 above,		Decline to answer. Question is vague.	Decline to answer. Question is vague.
Q23: If the answers to (18) and (20) are both no did the Parliament nevertheless have power or authority pursuant to s142(2) and Schedule 1.10(3) of the Constitution or otherwise, to declare that the office of Prime Minister was vacant on 2 August 2011?	No.	Not necessary to answer, my answers to both questions are 'yes'.		Decline to answer. Question is hypothetical and vague.	Decline to answer, question is hypothetical and vague.
Q24: If the answer to (19) and (21) are	No.	Yes		Decline to answer.	Decline to answer, the

both 'no' , was there nevertheless an occasion for the appointment of a Prime Minister within the meaning of s142(2) of the Constitution by 2 August 2011?				Question is hypothetical and vague.	question is vague and hypothetical.
Q25: Was the Parliament required to consider the question of appointment of a Prime Minister on 2 August 2011 under one of s142(3) or 142(2) of the *Constitution?*	No	Yes		No because an occasion for the appointment of a Prime Minister did not arise.	No because an occasion for appointment of a Prime Minister did not arise,
Q26: If the answer to (25) is yes, was the Parliament in session when a Prime	The question does not arise but the Parliament was in session on 2	No			Decline to answer, not applicable.

Minister was to be appointed within the meaning of s142(3) and s142(4) of the Constitution?	August 2011.				
Q27: What is the meaning of the expression "next sitting day" where used in s142(3) of the Constitution?	The words …"the next sitting day"…where used in Section 142(3) of the *Constitution* menas the next sitting day after notification by the Speaker to Parliament that a vacancy exists in the office of Prime Minister as determined in *Haiveta v Wingti (no.3)* [1994] PNGLR 197.	As determined by the *Wingti Case.*		Decline to answer. Question is not necessary.	Decline to answer. Question is not necessary.

Q28: What is the meaning of the expresson ‘next sitting day’ where used in s142(4) of the Constitution?	The words “…the next sitting day..” where used in section 142(4) of the Constitution means the next sitting day after the notification by the Speaker to Parliament that a vacancy exists in the office of the Prime Minister as determined in *Haiveta v Wingti* (No.3) [1994] PNGLR 197.	As determined by the *Wingti Case.*		Decline to answer. Question is not necessary.	Decline to answer. Question is not necessary.
Q29: If the answer to 25 is yes, is the requirement in either, and if so in which, of s142(3) and s142(4) of the constitution	It is unnecessary to answer in view of the answer to Q25. However the requirement in mandatory.	Both		Decline to answer. Question is not necessary.	Question is not necessary.

that the question of the appointment be considered on the "next sitting day" mandatory?					
Q30: Was the appointment of Mr Peter O''Neill as Prime Minister by the Head of State on 2 August 2011 in accordance with a decision of the Parliament?	Assuming the question relates to a valid decision of Parliament, the answer is No.	Yes		Yes, but the decision was unconstitutional.	Yes, but the decision was unconstitutional.
Q31: Is the question whether the consideration of the Parliament to appoint Mr Peter O'Neill to the Office of Prime Minister occurred on the 'next sitting day' within the meaning	Yes	On the question of process and procedure for appointment – yes it is justiciable		Question is not necessary.	Question is not necessary.

of s142(3) or s142(4) of the Constitution justiciable?					
Q32: Is the question whether there was a proper basis for the appointment of the Prime Minister by the Head of State justiciable having regard to S86(4) of the Constitution?	Yes, his appointment was unconstitutional and invalid.	Process of appointment is justiciable but whether there was a proper basis for appointment of the Prime Minister is not justiciable.		Decline to answer. Question is not necessary.	Decline to answer. Question is not necessary.
Q33: Is the question whether there was a proper basis for the appointment of the Deputy Prime Minister by the Head of State justiciable having regard to S86(4) of the	Yes	Process and procedure for appointment of Deputy Prime Minister is justiciable but whether was a proper basis for appointment is		Decline to answer. Question is not necessary.	Decline to answer. Question is not necessary.

Constitution?		not justiciable.			
Q34: Ought the Court to decline to answer any question in the reference pursuant to s19(4)(c) of the Constitution and Order 4 Rule 16 of the Supreme Court Rules having regard to the circumstances including any of the following: (i)The vote of the Parliament on 2 August 2011 deciding to appoint the Honourable Peter O'Neill Prime Minister by a majority of 70 votes to 24;(ii) The answers to any of the	No	Not applicable.		Decline to answer. The question is vague and hypothetical.	Decline to answer. The question is vague and hypothetical.

questions above; (iii)The time by which the next election is to be held in accordance with s105 of the Constitution; the terms of s145 of the Constitution?					
Q35: Whether, on a true construction of the words "without leave of the Parliament during the whole of three consecutive meetings of the Parliament", as such words are contained in Section 104(2)(d) of the Constitution such words mean: (a)Firstly, that the				Decline to answer. The question is vague and hypothetical.	Decline to answer. The question is vague and hypothetical.

grant of leave at any meeting of the Pariament pursuant to such section shall be for the duration of that meeting only, or alternatively; (b) Secondly, that the grant of leave at any meeting of the Parliament pursuant to such section may be for one or more meetings, or alternatively; (c) Thirdly, that the grant of leave at any meeting of the Parliament pursuant to such section shall be for "the whole of three consecutive meetings"?					

Q36: Given the determination of the Speaker and of the Parliament on 6 September 2011, that the East Sepik Provincial seat in Parliament (held by Sir Michael) had become vacant, was Sir Michael nevertheless entitled to remain sitting in Parliament as elected member for the said seat until such time as the Parliament: (a)Had given to Sir Michael a reasonable opportunity, in accordance with Section 59 of the Constitution, to provide a				Decline to answer. The question is not necessary.	Decline to answer. The question is vague and hypothetical.

"satisfactory reason" to the Parliament for his absences; and thereafter;(b) Decided, after considering such reasons, whether to "waive" pursuant to section 104(2)(d) of the Constitution the rule that the said seat was vacant by reason on such absences?					
Q37: If the answer to question 36 is in the affirmative, whether Sir Michael remained a member of Parliament notwithstanding the decisions of the Speaker and the Parliament under				Decline to answer. The question is not necessary.	Decline to answer. The question is not necessary.

Section 104(2)(d) of the Constitution on 6 September 2011.					
Q38: Is the jurisdiction of the National Court to determine any question as to qualifications of a person to remain a member of the Parliament under Section 135 of the Constitution exclusive is is the power to do so shared by the Parliament.				Exclusive	Exclusive.