A REPORT PREPARED BY THE LEGAL AFFAIRS AND GOVERNANCE COMMITTEE OF THE BARBADOS CRICKET ASSOCIATION ON THE REVIEW OF THE WEHBY REPORT ON GOVERNANCE REFORM OF CRICKET WEST INDIES



March 26, 2021

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1. BACKGROUND

1.1 On 9th June 2019, Cricket West Indies ("CWI") appointed a Task Force under the Chairmanship of Mr. Don Wehby who was invited to co-opt a team of prominent regional persons to undertake a review of the corporate governance framework, standards and practices of CWI and to recommend changes "to enhance stakeholder trust and ensure more transparency and accountability in line with the modern best practices for corporate governance." The Task Force completed its work and produced its report entitled: "**The Wehby Report on Governance Reform of Cricket West Indies, 30th July 2020** ("**The Wehby Report**").

1.2 When the Wehby Report was disseminated to the Territorial Boards of CWI, the Board of Directors of the Barbados Cricket Association ("BCA") mandated its Legal Affairs & Governance Committee ("the Committee") to conduct a comprehensive review of the Wehby Report and the current governance structure of CWI. The Committee was tasked to produce a report on its findings so as to inform the BCA's position on the Wehby Report and its implications for the governance of cricket by CWI.

1.3 The Committee comprises members of the BCA, all of whom are distinguished members from the legal profession in Barbados with considerable years of practice, particularly in the specialties of company law (corporate finance and management), corporate governance, securities law, trusts and estates, international commercial arbitration and public law. The members are:

(i) Mr. Gregory Nicholls, BSc., LLB, LLM, MCIArb, Chairman of the Committee and Secretary of the BCA;

(ii) Mr. Calvin Hope, LLB, MSc. Tourism Marketing, BCA Vice President and CWI Director;

(iii) Mr. Randall Belgrave, Q.C., LLB, FCIArb, Chairman of the Barbados Stock Exchange, BCA Member;

(iv) Mr Philip Nicholls, LLB, LLM, BCA Life Vice President and former Honorary Secretary of the BCA;

(v) Mr. Barry Hunte, LLB, senior credit union executive and corporate director, BCA Member

1.4 The Committee invited the distinguished legal luminary, Sir David A.C. Simmons, K.A., BCH, Q.C., BCA Life Member, a former Chief Justice of Barbados and former Attorney-General of Barbados to join the Committee in its review of the **Wehby Report**. Since the committee began its work, the BCA's longstanding legal counsel, Mr. Patterson K.H. Cheltenham,

Q.C., GCM, BCA Life Member, now Sir Patterson K.H. Cheltenham, K.A., Q.C., was elevated to the most illustrious position of Chief Justice of Barbados. Sir Patterson contributed massively to the early reviews conducted by the Committee prior to his elevation. The Committee formally thanks him for his contribution to this review process and acknowledges the yeoman service he has given to the BCA and to the Committee over many years. The Committee takes this opportunity to publicly wish him the very best in his new role as Chief Justice of Barbados.

1.5 In addition to the members of the Committee, Mr. Condé Riley, President of the BCA and long-standing CWI Director, attended all of the sittings of the Committee and gave critical insight into the process of governance reform undertaken in West Indies Cricket over the last fifteen (15) years. Mr. Jason King, Treasurer & CWI Shareholder Representative also contributed to the review process. Miss Tramaine Ferguson served the Committee in her inimitable role as Recording Secretary.

1.6 In addition to the review of the **Wehby Report**, the Committee thought it incumbent that it should also consider a number of the previous governance reports that had been commissioned by or presented to CWI in order to contextualise the state of governance-reform in CWI. The Committee also did a thorough review of the background to the process which led to West Indies Cricket Board ("WICB") being incorporated as an

international business company in the British Virgin Islands in 1998 under the then leadership of WICB President, the late Mr. Pat Rousseau. The following documents and reports were considered by the Committee in its deliberations:

(i) The Memorandum of Association of West Indies Cricket Board Inc; ("the Memorandum");

(ii) The Articles of Association of West Indies Cricket Board Inc ("the Articles");

(iii) The Committee on Governance of West Indies Cricket, Final Report, October 2007 ("the **Patterson Report**");

(iv) The Recommendations of Governance Committee of West Indies Cricket Board (WICB), Report, January 7th 2012 ("the **Wilkins Report**");

(v) The Final Report of the Review Panel on the Governance of Cricket, October 2015 ("the **Barriteau Report**");

(vi) The case of **Board of Control for Cricket v Cricket Association of Bihar & Ors**[1].;

(vii) Position Paper of the West Indies Cricket Board (in response to the recommendations of the CARICOM Review Panel).

[1] (Unreported decision of the Supreme Court of India, Civil Appeal No. 4235 of 2014);

1.7 The Committee also considered the legal text "**Commonwealth Caribbean Corporate Governance**" edited by Mrs. Suzanne Folkes-Goldson[2] and "**The Principles of Great Governance.**"[3]

2. SUMMARY OF THE WEHBY REPORT

2.1 The Wehby-led Task Force was requested by CWI to review the governance structure of CWI, the procedures of the organization and to assess the findings of the reports produced between 2005 and 2016. The object was to advise CWI on the implementation of the recommendations for corporate governance-reform which are relevant, beneficial and meaningful to the organization and which will result in improved ethical behaviour, effective management practices and corporate accountability.

2.2 The Task Force was also specifically asked to review the roles of the President and Vice President of CWI, the structure of the Board of Directors of CWI and its committee framework. It was also mandated to examine effective ways in which it can bring the strongest possible influence to bear on member associations, with a view to improving their own standards of corporate governance.

[2] Published by Routledge, 2016

[3] Published by the Caribbean Governance Training Institute which prepares candidates for the Chartered Director Program (C.Dir) which is officially recognized by the Eastern Caribbean Central Bank, regional governments and financial services commissions in the Caribbean.

2.3 The Task Force contended that it had recognized the weaknesses in the governance of CWI and the need to enhance the trust of the wide range of stakeholders of West Indies Cricket across the region. It was their conclusion that the failings of CWI have been examined by several committees established by CWI going back 15 years with hardly any significant changes being implemented over the same period. However, no concrete examples were cited by the Task Force in this regard.

2.4 The Task Force contended that the glory days of West Indies cricket (from the 1960s through the 1980s) have been followed for 25 years by a steep decline of performance on the field of play contributed to by weak governance of CWI and limited financial resources. The Task Force claimed that it also took account of the commercial factors within world cricket which have been detrimental to the growth of West Indies cricket but it did not provide any analysis or the empirical basis upon which it concluded that these commercial factors have impacted on West Indies cricket. The Committee has concluded that the main emphasis of the Task Force seems to be on the structure of governance of CWI and the way in which the Board of Directors executes its functions and responsibilities.

2.5 The Task Force contended that it examined the importance of '***cricket as a public good'*** that is administered by CWI as a private company and observed that this is done without due cognizance of the public duty

involved. It found that the standards of governance of CWI fell far short of best governance practices and did not provide the accountability and transparency which are expected of a corporate body exercising an important and influential role in the sport which brings the Caribbean people together and which in essence belongs to the people of the Caribbean. It was the fundamental opinion of the Task Force that the sustainability of CWI, as presently constituted, was seriously at risk.

2.6 The Task Force found that the governance practices of CWI had driven it and its shareholders away from the Governments and other key stakeholders of the game in the region. However, the Committee could not find any concrete examples of this "divide" nor any empirical analysis which led the Task Force to this particular conclusion.

2.7 The Task Force stressed the importance of regional Governments to the development of West Indies cricket and opined that if West Indies cricket is to be revived, it is essential that cordial relations be restored between CWI and the Governments. While this statement is not in and of itself controversial, the Committee was unable to identify any specific recommendation made in the Wehby Report that purports to address this particular area of concern.

2.8 The Task Force indicated that it examined the current composition of the eighteen (18) member CWI Board of Directors. The Board comprises: (i) twelve (12) directors, who are selected by Territorial Boards (2 each); (ii) four (4) independent directors appointed by the CWI Board, and (iii) the President and Vice President who are elected bi-annually at the CWI Annual General Meeting.

2.9 The Task Force recommended that a smaller board of twelve (12) directors should be established for a three-year period comprising: (i) six (6) Territorial Board delegates and (ii) six (6) nominated directors, including the Chairperson and Deputy Chairperson. Notably, it is the recommendation of the Task Force that after a transitional period, the Board should be reduced to nine (9) members regardless of territorial origin and including at least two (2) women.

2.10 In respect of the operation of the committees, the reduction of CWI committees from twelve (12) to five (5) was recommended.

2.11 The Task Force concluded that the weak structures of the Territorial Boards as the shareholders of CWI have contributed to the dysfunction found across CWI. However, the Committee noted that no actual empirical evidence was presented to support this specific conclusion. It also asserted that the fact that each Board had its own structure and management

practices and operated without central oversight from CWI was highly undesirable. The Committee was not able to assess this particular assertion, again for the want of any concrete examples. However, the Committee noted that the Task Force has recommended that there be a comprehensive review by CWI of the governance structures of the Territorial Boards and reform to meet best governance practices and to establish as much uniformity as reasonably possible.

2.12 The Task Force recommended that necessary legal action be immediately taken to revise the governing documents of CWI to achieve the reforms recommended and that CWI establish a Governance Committee to monitor and advise on the implementation of the recommendations in the **Wehby Report**. The Committee noted that the precise nature and extent of the revision of the governing documents were not addressed by the Task Force and no roadmap was outlined as to how this was to be achieved.

2.13 The Committee understands that this particular recommendation purports to enforce a degree of centralization by CWI into the operations and functioning of regional Territorial Boards who make up the foundational structure of West Indies Cricket and to reduce the level of their autonomy within the territories under their auspices.

2.14 The Task Force has made mention of the cricket governance models among major cricket nations and cites Cricket Australia, England & Wales Cricket Board and New Zealand Cricket. The Committee found these references to the governance-reform process in these countries to be scant and superficial as no specific recommendation made by the Task Force, save the reduction in the size of the Board, has been referenced to the reforms undertaken in the countries mentioned. It seems that only tangential references to the governance reforms in these countries were made in the Wehby Report.

2.15 The Task Force considered that it was important to highlight those principles of modern corporate governance which should apply to the Board of Directors of CWI as a corporate entity carrying out a public function. There were sixteen (16) Key Principles of Corporate Governance Applicable to CWI that were identified in the Wehby Report.[4] The Committee did not find that any of these Key Principles were particularly ground-breaking since they all reflect widely accepted standards of corporate governance and were already provided for in the very comprehensive Memorandum and Articles of CWI in any event.

2.16 The Committee found that the Task Force failed to conduct a proper assessment of the governance structure of CWI as contained in the

[4] See: page 16 of the **Wehby Report**

governing corporate documents (the Memorandum and the Articles) with a view to determine their effectiveness, efficacy and continued relevance to the improvement of the standards of governance in West Indies Cricket. It is the unanimous view of the Committee that any criticisms of the existing governance structure should of necessity, come after a detailed analysis of the Memorandum and Articles is conducted with a view to understanding whether the challenges identified by the Task Force were due to a deficiency in these governing documents before a wholesale raft of changes to that structure ought to be considered.

3. THE ASSESSMENT OF THE MAJOR ASSUMPTIONS OF THE TASK FORCE

3.1 It is the assessment of the Committee that there are four (4) main assumptions which have led the Task Force to make the very far-reaching and sweeping recommendations for the reform of the corporate governance of CWI. These assumptions are that:

(1) governance reform can positively impact team performance;

(2) cricket is a public good;

(3) there is a role for Governments in West Indies Cricket; and

(4) the former senior leadership of CWI functioned too autocratically and intrusively as an executive in the management of the organization contained in the findings of the PKF Pannel Kerr Forster Report.

3.2 The Committee undertook an analysis of the Terms of Reference of the Task Force and the Executive Summary of the Wehby Report and observed the nature and extent of the consultations undertaken. The Committee thought it necessary to carefully assess these four (4) assumptions within the context of the facts and information contained in the Wehby Report before it offered any commentary on the specific recommendations for governance-reform in CWI.

4. GOVERNANCE REFORM CAN POSITIVELY IMPACT TEAM PERFORMANCE

4.1 The Task Force contends that West Indies teams have, with few notable exceptions, performed poorly on the field of play for 25 years where it describes the "collapse" as moving from "awesome to awful." The Task Force has even adopted the popular definition of insanity proffered by Albert Einstein (doing the same thing over and over but expecting different results) as the modus operandi of CWI.

4.2 The Task Force referred to governance reform in New Zealand and asserted the view that substantial and genuine governance-reform can exponentially bring similar results to West Indies cricket given the enormous cricket talent that exists in the region which should be harnessed and promoted.

4.3 The Task Force contends that improved governance of CWI will:

(i) Bring greater accountability, transparency, stability and commercial experience to CWI, and

(ii) Minimise the possibility of conflict of interests, and

(iii) Improve the management of the finances of CWI, and

(iv) Bring greater professionalism, and more access to scientific and educational approaches and knowledge, to the administration of the game by CWI and the TCBs, and

(v) Enhance the hiring and retention of the highest quality of staff, and

(vi) Boost morale within the executive and staff of CWI, and

(vii) Restore public confidence in CWI across the region and support for the game among governments and other stakeholders who have been turned off by the dysfunction of the past and,

(viii) Boost the regeneration of support among the players and coaches, and

(ix) Engender greater involvement and tangible support at the local level, and

(x) Generate sponsorship and involvement of the public sector and the private sector, and

(xi) Provide more funding for and better execution of grassroots programmes, high performance training in dedicated centers, and coaching development of players at every level, and

(xii) Improve the standard of regional competitions and incrementally improve performance on the field internationally.

4.4 The Committee recognizes and accepts that **sports governance** is the process by which sporting organizations, particularly, national sporting organizations are directed and managed. This process is actually a sub-set of the broader concept of ***corporate governance***. The Committee agrees wholeheartedly with the view that when sports-governing bodies continually refine their governance structures, they do so in order to be run more efficiently and effectively.

4.5 The Committee also accepts that the process of governance reform in cricket administration can greatly enhance how the organization's objectives are set and how they are to be achieved. This process determines the means of optimizing and monitoring performance and includes how risks are monitored and assessed. Therefore, the refinement of the standards of governance in cricket administration, at any level, ought to be an on-going process.

4.6 The Committee generally concurs with the view that the more enhanced the system of sports governance is, the more it will ultimately lead to better decision-making, greater transparency and accountability in the activities undertaken and how resources are expended. However, one must not

overstate the capacity of an enhanced sports governance system to deliver concomitant on-the-field results, since the precise correlation between governance-reform by sports-governing bodies and on-field high-performances is neither automatic nor synonymous.

4.7 The Committee does not accept that the prolonged decline in West Indies cricket can solely or even be largely attributed to the failure of CWI to reform its governance structure over the last 25 years, or at all. In fact, the rudimentary nature, limited financial base and the absence of a corporate structure within the former West Indies Cricket Board of Control (WICBC) and its successor, the West Indies Cricket Board Inc. (WIBC) could hardly be examples of a governing body that successfully led to the world class team-performances by the West Indies cricket in the "Glory Years".

4.8 The Committee believes that there is room to contend that the "Glory Years" of West Indies Cricket came about notwithstanding the weak corporate structure of those forerunner governing-bodies of West Indies cricket.

4.9 Indeed, the Committee is not alone in the view that there have been wider considerations at play for the systemic decline in West Indies cricket and it wishes to draw immediate attention to the more in-depth and comprehensive assessment proffered in the **Patterson Report**[5] where the

[5] See: The Crisis in West Indies Cricket, page 48 to 51 of the Patterson Report.

failure to modernise cricket administration and to apply modern player-centered management visions and systems were identified as part of, but not the sole cause of, the decline of West Indies cricket.

4.10 The **Patterson Report** appropriately cites ten (10) theories on the possible cause of the phenomenal decline of West Indies cricket that were properly considered in the **CARICOM/UWI Conference 2000**. These ten (10) theories all provide an invaluable insight into the challenges identified in West Indies Cricket more than twenty years ago. These ten (10) theories speak to:

- The notion of natural decline, part of the organic cycle of nature;
- The loss of technical and intellectual competence among players;
- The inadequate social, emotional and intellectual preparation resulting in insufficient discipline in the team;
- A distinct knowledge gap spanning generations of cricketers and poor positioning of veteran players;
- The failure to modernize cricket administration and to apply player-centered management visions and systems;
- Competition from other sports;
- The questioning of the relevance of cricket to our societies;
- Ineffective infrastructural development and planning;

- Growing tension between cricket as part of a national/regional social culture and its role as a commodity in the global economy;
- The clash between the cricket fraternity and cricket administrators.

4.11 The Committee is therefore disinclined to agree that the isolation of any one single factor that was identified by the **CARICOM/UWI Conference 2000** can now be resuscitated and charged as the sole reason for the decline in West Indies cricket and furthermore, that this should be the basis for the radical overhaul of the corporate governance structure of CWI.

4.12 The Committee is inclined to the view that the reform of the governance structure of CWI has to be a holistic undertaking if it is to be impactful and this must also of necessity take into consideration the inequitable distribution of global cricket revenue and the sweat equity of West Indies Cricket in developing the game of cricket on a global scale.

4.13 It is the view of the Committee that the Task Force seems keen to rush to the conclusion that the process of governance-reform in West Indies Cricket must accommodate an enhanced role of stakeholders at the expense of the Territorial Boards on the assumption that this alone will

provide the catalyst for the revival of the fortunes of the game of cricket in the region. There is little empirical evidence provided to support this far-fetched conclusion and the Committee has flagged this as a major flaw in the analysis of the Task Force.

4.14 The Committee has reviewed the proposed Governance Structure in the **Wehby Report** and compared it with that which was recommended by the **Patterson Report**.[6] These Reports both propose a two-tiered system of governing West Indies cricket with the establishment of a ***Cricket West Indies Council*** and a ***Cricket West Indies Board***. The **Patterson Report** proposed that the ***Cricket West Indies Council*** be established to be drawn from a wide range of stakeholders that would meet once a year to review the state of West Indies cricket whose function would be to settle the framework and approve broad strategies for the game in the region. It was to receive an annual report with the relevant financial statements prepared by the executive. It was proposed that the ***Cricket West Indies Council*** would elect the President, the Vice President and three Directors to an executive directorate who were not to be nominated by the Territorial Boards or other designated bodies. The President and Directors of the executive arm will be full members of the Council which will be chaired by the President.

[6] See: page 84 of the **Patterson Report [16.5] to [16.7]**

4.15 The Council proposed by the **Patterson Report** was to be drawn from: (i) the Territorial Boards (6 members); (ii) CARICOM Bureau of the Council for Human and Social Development (1 member); (iii) CARICOM Prime Ministerial sub-committee on cricket (2 members); (iv) WIPA (1 member); (v) Former Players (2 members); (vi) Caribbean Private Sector (1 member); (vii) Caribbean Labour Congress (1 member); (viii) Caribbean Hotel & Tourism Association (1 member); (ix) Caribbean Media Corporation (1 member); (x) Association of Caribbean Media Workers (1 member); (xi) West Indies Cricket Journalists and Commentators (1 member); (xii) West Indies Women's Cricket Organization (1 member); (xiv) West Indies Cricket Umpires Association (1 member); (xv) University of the West Indies (1 member); (xvi) Association of the Caribbean Tertiary Institutions (1 member); and (xvii) CARICOM Youth Representative (1 member).

4.16 The **Patterson Report** also proposed that the CWI Board of Directors continued to function as the executive of West Indies Cricket as opposed to the Council which had stakeholder representation that was designed to function in advisory capacity only.

4.17 One noticeable difference to what had obtained was that the Board was then designed to operate on the core corporate governance principle that once a director was chosen, that director represented CWI and was required to act at all times according to law, in a fiduciary manner that

was in the best interests of the company, and not of any shareholder or stakeholder.

4.18 It is noteworthy that while the **Patterson Report** indicated that it would have preferred a much smaller Board of Directors, it accepted that Territorial Boards would have been reluctant to relinquish their rights, and more importantly, it was also recognized that "**the presence of territorial representation on the Board could serve as a catalyst for the vital development of domestic cricket in order to enhance regional performance**."[7]

4.19 It is the considered assessment of the Committee that the Task Force's approach to the reform of the governance structure is too radical and unnecessarily robust. It unwisely seeks to deemphasize the role and the importance of Territorial Boards from the administrative and executive processes of West Indies Cricket and completely ignores the considerations for the retention of the Territorial Boards as part of the executive and administrative structure of West Indies cricket as set out in the **Patterson Report**. No rationale is given why the representative directorships on the Board of CWI should be suddenly discontinued.

4.20 The Committee considers that the development of cricket in the region has never been undertaken by CWI as a centralized entity. This has always

[7] See paragraph [16.7] b on page 87 of the **Patterson Report**

been the responsibility of the Territorial Boards. The notion that CWI must now be centralized and the role of the Territorial Board be deemphasized does not seem to appreciate the significant investment undertaken by Territorial Boards at the foundational structure of cricket in the Caribbean. This investment has always been funded by resources raised at the national/territorial level where minimal contribution has been made by CWI to the entire process. The Committee has been informed that the annual development grant from CWI of US$150,000.00 to Territorial Boards has all but evaporated in recent years due to the dire financial straits of CWI and if it had been paid by CWI, it would have made up less than 2% of BCA annual revenue.

4.21 The Territorial Boards are largely, and in most cases, singularly responsible for development of all age-group levels of cricket within the territories that they administer and this is not a process that is funded by CWI, nor is it that the BCA expects that this should be the case. The Territorial Boards bear significant responsibility for the expenditure on clubs and schools, the organization of domestic tournaments and competitions which have been undertaken without much financial input or administrative support from any of the mentioned stakeholders identified by the Task Force as being critical to West Indies cricket generally.

4.22 The Committee is neither unaware nor dismissive of the important role that stakeholders play in the development of cricket in general or in the Caribbean in particular. The development of modern stadia by regional governments and the legacy benefits from CWC 2007 are unassailable. But there is no empirical evidence that links the absence of formal stakeholder participation in the executive and administrative functions of CWI to the decline in West Indies Cricket.

4.23 The Committee finds that the Task Force has failed to present any empirical evidence of the divestment of the corporate structure of any sports governing-body to accommodate stakeholders in the corporate boardroom where the existing shareholders would play no formal role in the future management and direction of the organization.

4.24 While the Committee believes that governance-reform in West Indies Cricket should cheerfully accommodate a formal place for the stakeholders in the Caribbean to contribute to the development of the game, this participation should be directed at the territorial level in providing funding, research and development assistance and the development of career pathways for players within the individual countries and across the region where these synergies can be more effectively achieved.

4.25 The Committee is also cognizant of the costs implications for the setting up and administration of a Stakeholders Council which will be required to

meet prior to the Annual General Meeting of CWI to discuss an annual report to the Council. It is not clear in the **Wehby Report** whether this Council is to only take on an advisory or directory role but it is clear that the deemphasis of the Territorial Boards is afoot and that they should have less of a say in the administration of West Indies Cricket.

4.26 The Committee remains unpersuaded that there is any corporate, legal or other basis for the radical divestment of administrative and executive control of cricket by a Board of Directors comprising the directors selected from the Territorial Boards to be vested in a diverse group of stakeholders, particularly based on this assumption set out in the **Wehby Report** that governance-reform *simpliciter* can positively impact team performances and arrest the systemic decline in West Indies Cricket.

5. IS CRICKET A PUBLIC GOOD?

5.1 The Committee understands that a '***public good***' is not a legal concept from which any rights or reasonable expectations can derive. It is not a commercial concept upon which any corporate sports governing body is organized.

5.2 The Committee understands that the notion of a '***public good***' is, and has always been, an economic concept, sometimes referred to as a '***social good***' or '***collective good***'.

5.3 The essential qualities of a '***public good***' in mainstream academia are that it is both non-excludable and non-rivalrous. Users of a '***public good***' cannot be barred from accessing it or using it for failure to pay for it. The use of a '***public good***' by one person neither prevents access by other people nor does it reduce the availability to others. In other words, a '***public good***' can be used simultaneously by more than one person.[8]

5.4 The economist, Paul A. Samuelson is usually credited as the one who first articulated the modern theory of public goods in a mathematical formalism. In his classic paper ***The Pure Theory of Public Expenditure (1954)*** he defined a public good, or as he called it in the paper a "*collective consumption good"* as follows:

"***[goods] which all enjoy in common in the sense that each individual's consumption of such a good, leads to no subtractions from other individual's consumption of that good***."

5.5 Common examples of public goods include knowledge, authorship, clean air, information, official statistics, public television, radio, inventions, herd immunity, national security, and common languages. It is therefore difficult to accept the Task Force's novel transmogrification of an economic concept into seminal legal principle that can be used as the basis for

[8] See: **Oakland, W.H.** (1987), Theory of public goods in: Handbook of Public Economics (Vol., 2, pp.485-535). Elsevier

stakeholders to demand the Territorial Boards to undertake a corporate divestment of CWI in their favour.

5.6 The Task Force has however ignored the economic origins of the concept of a '***public good***' and has now embraced it as foundational, elevating it to *ex cathedra* status of actionable doctrine.

5.7 In the **Wehby Report**, the notion that '***cricket is a public good***' is asserted as the major pretext for the reform of the governance structure in CWI. The Task Force contends that that the elevation of critical stakeholders into the higher echelons of the governance structure of CWI is based on an implicit recognition that in the Caribbean, '***cricket is a public good***', and that accordingly, CWI is only a fiduciary carrying out a ***public function*** on behalf of Caribbean people.

5.8 The Task Force has concluded that this notion that '***cricket is a public good***' lies at the heart of the reason why it was created with the specific mandate to recommend, *inter* alia, the ways in which the structure of CWI can properly reflect that reality.

5.9 In order to further buttress this the self-evident truth, the Task Force sought to don the economic concept of a '***public good***' in the garb of seminal legal authority. The **Wehby Report** cites an extract from a decision of the Supreme Court of India which purportedly held that *cricket*

is a public good in India. However, the extract quoted in the **Wehby Report** does not provide the actual name or case reference of this authority and more importantly, there is no mention of the factual background, the issues contended by the parties, or the legal principles upon which the very case was decided. In other words, the context of this purported legal authority is not considered.

5.10 The Committee has found it passingly strange that the Task Force would seek to ground their recommendation for the complete overhaul of the entire corporate structure of CWI on a principle of law purportedly emerging from the Indian Supreme Court without any citation or case reference for a legal authority upon which so much reliance has been placed.

5.11 A cursory examination of the extract quoted in the **Wehby Report** will demonstrate that there is absolutely no mention of any legal principle that "***cricket is a public good***" in India or elsewhere. The extract quoted clearly sets out a reasoned statement of law, which is that because of the nature of duties and functions of the BCCI, the Indian Supreme Court held it to be a "public body" that was amenable to the writ of jurisdiction of the High Court under Article 226.

5.12 It is clear to the Committee that when taken at its highest, the Task Force has unwittingly misread the case from which the said extract was taken

and has not properly analyzed the reasoning of the Indian Supreme Court or at worse, it has deliberately taken the said extract out of context.

5.13 The Committee cautions that one must be careful not to conflate the economic concept of a '***public good***' with the juridical assessment of the Indian Supreme Court that the BCCI was a "***public body***" that was subject to judicial review and to the principles of 'Public Law'.

5.14 It is clear that the Indian Supreme Court did not hold the BCCI to be subject to the court's supervisory jurisdiction on the basis of the economic concept of a '***public good***' but the decision was based on the judicial consideration of how the sport of cricket was organized in India and the problems in cricket administration that were brought before the court for adjudication.

5.15 The Committee understands that the two concepts of a '***public good***' and a "***public body***" are neither synonymous nor analogous. But that notwithstanding, the decision of the Indian Supreme Court that the BCCI is "***public body***" that is amenable to judicial review seems to have excited the Task Force into the palpable error of elevating an uncomplicated economic concept into a legal principle that could justify demand for the corporate divestment of shares in CWI at the behest of stakeholders who themselves hold or own no shares in the company nor have any legal or equitable rights to the unissued capital of CWI.

5.16 In conducting its own research, the Committee considered the decision of the Indian Supreme Court in the case of **Board of Control for Cricket v Cricket Association of Bihar & Ors**. which it found to be very instructive. In this case, the Indian Supreme Court had to consider allegations of sporting fraud and conflicts of interests leveled against functionaries of the BCCI.

5.17 In India, as a result of the findings of corruption in Indian Cricket, a committee was established (the Justice Lodha Committee) by order of the Court to make recommendations for changes in the rules and regulations of BCCI to safeguard the interest of the public at large in the sport of cricket, improve the ethical standards and discipline in the game, streamline and promote efficiency in the management of BCCI, provide accessibility and transparency, prevent conflict of interest situations and eradicate political and commercial interference and abuse and to create mechanisms for resolution of disputes within BCCI.[9]

5.18 The direction issued by the Indian Supreme Court for all round reform in the working of BCCI and the conduct of its affairs proceeded fundamentally on the juristic foundation that BCCI was discharging public functions and is, therefore, subject to the rigours of 'Public Law' making it

[9] See paragraph 6 of the decision

mandatory for the BCCI to adhere to the principles of reasonableness, fairness, accountability and transparency.[10]

5.19 The Committee considered the signal differences in how CWI and the BCCI have been organized and structured. On the one hand, CWI is incorporated under the International Business Company Act Cap. 291 in the British Virgin Islands[11] whereas, on the other hand, BCCI is registered as a not-for-profit society in Madras (now Chennai) which grew from its original composition of less than half dozen provincial members to have five times that number representing various groups and territorial divisions.

5.20 Prior to the court-directed reform coming out of the recommendations of the Lodha Committee, the BCCI consisted of 30 Full Members, some of which did not field teams, while others did not represent any territory. While twenty (20) States and one (1) Union Territory were included as Members, ten (10) States and six (6) Union Territories were either excluded or disenfranchised. There were Associate, Affiliate and Future Members, including the Services Sports Control Board, the Railways Sport Promotion Board and All India Universities that represented particular national service groups. In addition, two (2) Clubs, the Cricket Club of India at

[10] See paragraph 6 of the decision

[11] Company Number: 302180

Mumbai and the National Cricket Club at Kolkata, also enjoyed full membership of the BCCI. [12]

5.21 The Indian Supreme Court therefore had cause to examine the structure of the BCCI in its determination that it was indeed subject to the supervisory jurisdiction of the Court. It was unearthed that not all States in India were represented on BCCI, some States were over-represented, some Members did not represent territories, some Members neither played matches nor represented territories, Union territories were unrepresented on the Board, there was the ad-hoc creation of membership categories (Future Members) with no legal basis, and the arbitrary addition and removal of associations occurred.[13]

5.22 The Committee accepts that it is not a controversial statement of law that in the application of a legal authority from a different jurisdiction, the facts of the case, the legal issues raised on those facts and the law applied in resolving those issues must all be analogous to the situation in play before any principle can be deemed to be relevant to or persuasive in the consideration of the particular case at bar.

5.23 The Committee understands that BCCI is not structured or constituted in any way that is similar or analogous to CWI. The issues that were decided by the Indian Supreme Court cannot arise in the context of CWI as there

[12] See paragraph 9 of the decision
[13] See paragraph 9 of the decision

is no analogous Caribbean Court that can exercise any supervisory jurisdiction over a private corporate entity like CWI that is incorporated and registered in the any jurisdiction. In other words, CWI is not a public body that is amenable to a court's supervisory jurisdiction but remains a private company.

5.24 The Committee has considered the question of the divestment of CWI at the request of cricket stakeholders in the Caribbean and has resolved that this is not a 'Public Law' issue that would make CWI amenable to the supervisory jurisdiction of any court including the Commercial Court of the BVI, or any other court of competent jurisdiction in the Caribbean.

5.25 The Articles of CWI provide for Members who are registered holders of shares in the capital of CWI. There are three (3) classes of Membership, namely:

(i) Full Members each holding two (2) Class A voting shares;

(ii) Associate Members each holding one (1) Class B non-voting share;

(iii) Special Members each holding one (1) Class C non-voting share.

5.26 The Memorandum provides *inter alia* that all shares in the Board shall be issued as registered shares which are not transferable, and the shares of a Member who ceases to be a Member of the Board shall revert to the Board. It is also provided that the rights conferred upon the holders of the shares of any class issued with preferred or other rights shall not, unless

otherwise expressly provided by the terms of the issue of the shares of that class, be deemed to be varied by the creation or issue of further shares ranking *pari passu* therewith.

5.27 The Committee has considered that no shares in CWI have been issued, and although Territorial Boards have Class A Voting Shares, these are not shares issued in the capital of CWI. The incorporation of CWI in 1998 was clearly intended to provide a capital base for the future growth and development of CWI in a manner that preserved the interests of Territorial Boards which jointly incorporated the company.

5.28 The Committee is not able to understand how a company with no issued share capital can be reorganized in a way that purports to give stakeholders an interest in the direction and control of the company in circumstances where these stakeholders are not subscribing to any shares or equity in the said company.

5.29 The Committee considers that this rather novel notion that cricket is a public good and therefore CWI has a fiduciary responsibility and duty to consider the interests of the mentioned stakeholders is not a sound commercial or legal principle upon which the process of governance-reform of CWI should be contemplated.

6. THE RECOMMENDATIONS OF THE TASK FORCE

6.1 The Task Force proposes a fundamental overhaul of the corporate governance structure of CWI. The major casualty in this process will be the revocation of the right of the six (6) existing Territorial Boards to stand as Full Members of CWI on the Board of Directors and to participate in the governance of CWI.

6.2 The Task Force proposes the establishment of a standing **Stakeholder Council** at the apex of the governance structure with a smaller Board of Directors which is elected from amongst those persons selected by the Nomination Committee in a cyclical process.

6.3 In the main, specific recommendations of the Task Force are as follows:

(i) the establishment of a standing Stakeholders' Council;

(ii) the reduction in the size of the Board of Directors of CWI and the reform of its composition;

(iii) the phasing-out of CWI directors from the Territorial Boards;

(iv) the conversion of the role of the President and Vice President to Chairperson and Deputy Chairperson;

(v) the reduction and renaming of CWI Committees;

(vi) the establishment of a Nominations Committee;

(vii) the mandating of governance standards for Territorial Boards;

(viii) the amendment of CWI corporate governing documents and

(ix) the engaging of the Caribbean Development Bank for grant-funding.

Stakeholders Council

6.4 The Committee does not see any intrinsic merit in the establishment of a regional Stakeholders Council within the Governance Structure of West Indies Cricket on the basis that cricket is a public good. The Committee must reiterate that stakeholder participation in the development and advancement of the sport of cricket at a national, community and grassroots level is ideal and is something which should be engaged upon as the basis for strengthening the player development capacity of the critical foundational institutions in West Indies cricket, such as the schools, the clubs, community-based organizations and the like.

6.5 However, the imposition of a Stakeholders Council at the apex of the governance structure of West Indies Cricket does not advance any of the aims and objectives set out in the Memorandum or Articles of CWI. There is no clarity in the proposed recommendation as to how this Council will be funded and there is no compelling reason why the scarce financial resources of CWI should be further stretched to provide for a Council made up of Stakeholders who inject no equity or capital into CWI as a going-concern.

6.6 The Committee does not endorse a governance structure featuring both a Board of Directors and a Stakeholders Council, with the latter assuming some board-functions and where the Board reports to the Council. CWI is an incorporated entity with a structure that allows for interested parties to invest in and take up equity in CWI. None of the mentioned stakeholders have a corporate interest in CWI or have expressed any such interest and it would be therefore difficult to understand how they can simply be given organizational prominence on the basis that CWI is now not a business or commercial entity but is being redesignated as being in charge of a '***public good***'

6.7 The Committee agrees and accepts that the process of governance needs to be reviewed, not because of the decline in the fortunes of the West Indies team *per se*, but because it is in the nature of an organization's development to undertake and commit to a process of governance reform that enables the strategic guidance of the organization and ensures the effective monitoring of management by the Board of Directors.

The Board of Directors

6.8 The Committee has no fundamental objection to the creation of a smaller Board of Directors for CWI. The process needs full and frank ventilation by all parties concerned before this can be accepted and effectively enforced.

6.9 The Committee harbours grave doubts about the efficacy and objectiveness of the processes to be undertaken by the Nominations Committee. The fact that the Chairperson of CWI Board of Directors sits on the Nominations Committee along with four (4) other directors of the Board is most alarming and concerning. The use of head-hunting firms and designated consultants for the purpose of shortlisting suitable candidates for the Board of CWI smacks of a process of incestuous corporate selection and interlocking directorships that was long thought to be consigned to a past era.

6.10 The Territorial Boards continue to play a fundamental role in the development of the game of cricket in the Caribbean and no reasoned argument has been made out to convince the Committee that the Territorial Boards, who are the biggest stakeholders in West Indies Cricket, ought to be sidelined in the restructuring of the Board of CWI.

6.11 CWI owes millions of dollars in debt to Territorial Boards for the carrying out of its business and without the debt-holding by Boards in the region, CWI could not survive as a going-concern. The Task Force has not given any proper consideration as to the current relationship between CWI and the Territorial Boards, neither has it done any assessment of the actual role played by these Boards in the core business of CWI.

6.12 The Task Force misses the mark by not recognizing that Territorial Boards are pivotal stakeholders in West Indies Cricket quite apart from the essential and vital role they play in the business of CWI and therefore, the Committee cannot accept the model for restructuring of the Board of Directors as recommended by the Task Force.

6.13 The Committee finds it shocking that the Task Force has recommended that the Chairperson of CWI should be nominated by a Nominations Committee (on which the Chairperson also sits along with four (4) other members of the CWI Board) and be elected by the Board and ratified at the CWI AGM for a three-year term on a two-term limit basis. This is a most undemocratic and incestuous process which should be strongly deprecated and rejected by any right-thinking body.

6.14 The Committee does not see any merit in the extension of the term of the existing President and Vice President by one year to allow for implementation of the recommendations of the Task Force simply because in their current roles under the Memorandum and Articles, they have no functional executive capacity within CWI outside of the roles prescribed therein.

6.15 The renaming of the positions of President and Vice President to Chairperson and Deputy Chairperson is a cosmetic and superficial change of title. The Memorandum and Articles already provide for the scope of

these positions and the suggested rebranding and redefinition is only an exercise in window-dressing.

6.16 The Task Force appears to contradict itself when it purports in Recommendation 10 that the role of the Chairperson should be specific and non-executive on the one hand whereas in Recommendation 11 it purports that the Chairperson should be the focal point between the Board and the executive, the Board and the TCBs, the Board and the Council, the Board and the Committees, the Board and the Governments, the Board and the sponsors and the Board and the media.

6.17 The Task Force recommends that the Chairperson should be empowered to appoint a Deputy chairperson from among the Board to deputize for or support the Chairperson in the carrying out of 'his' (sic) duties. The Committee cannot support this recommendation as it is plainly obvious that the Task Force wants to imbue the proposed Chairperson of CWI with prerogative powers that are not contemplated in the current Memorandum and Articles.

6.18 The Committee does not quite understand the concept that directors should be paid commensurately with their responsibilities as opposed to a process where they are paid a corporate director's fee. The language is ambiguous particularly as it relates to the monthly payment of retainers for their respective services as it seems that this is distinguished from the

fees for attendance at meetings, chairmanship of committees, task forces and working groups.

6.19 The power of the Board to terminate at any time the appointment of a director for a breach of the Articles or duties of director, even after due process is in of itself a perniciously draconian power given the manner in which the Task Force has conceived the process of selection onto the Board. The essential elements of the due process protection are not particularized and without this, it seems that the power of termination is intended to keep directors in line more than ensuring the proper functioning of the Board. The Committee specifically highlights this termination power as a major plank of the envisioned governance-reform proposed by the Task Force and it wishes to place on record that this will have no impact on the current state of West Indies Cricket.

Committees

6.20 The Committee does not regard the recommendations of the Task Force on the nature and extent of current CWI Committees as a serious proposal for governance reform of CWI. The Memorandum and Articles already make provision for how the business of the Board of Directors is to be organized and the reduction of the size of CWI Committees is neither here nor there.

6.21 The abolition of the Executive Committee is commended as it functioned as a relic of a past era far too long into the current period.

6.22 The Committee does not support the recommendation for the establishment of a Nominations Committee in the form that has been put forward by the Task Force for the reasons previously highlighted.

Territorial Boards

6.23 The Committee notes that the BCA was established by a 1933 Act of the Barbados Parliament as a body corporate. The BCA Act and the BCA Rules, 2017 govern the administrative processes by which the BCA functions as the leading sports governing body in Barbados. The BCA is made up life members, ordinary members who pay subscriptions and member clubs, all of whom vote annually to elect directors to the Board of the BCA and attend General Meetings of Association.

6.24 The Committee is not persuaded that CWI has any power to mandate the governance standards to the BCA which can override the statutory provisions of BCA Act, 1933 or those in the BCA Rules, 2017, which Rules have been duly authorized as a Statutory Instrument and gazetted.

6.25 The Committee does not accept that CWI has any role in the revision of the BCA Act or BCA Rules, 2017 or that it should have such a role. This is not to say that the BCA should not participate in its own internal process of governance reform along principles agreed at CWI level and acceptable

to the BCA, but the centralization of the administration of cricket in the region and the subordination of the BCA by and according to the dictates of CWI ought to be rejected.

6.26 The Committee considers that the deemphasizing of Territorial Boards in the governance structure proposed by the Task Force and the elevation of stakeholders in lieu of Territorial Boards is flawed and misconceived. It represents a clear and present danger to West Indies Cricket. CWI does not have the institutional or financial capacity to be organized as a central authority with satellites in the territories.

Amendment of Corporate Governing Documents

6.27 In as much as the Committee does not accept the central thesis of the Task Force, it is not the view of the Committee that the BCA should agree to the amendment of the corporate governing documents of CWI to give effect to the recommendations proposed by the Task Force.

Engaging the Caribbean Development Bank

6.28 The Committee is not aware that the Caribbean Development Bank undertakes grant funding to private corporate entities in the region and can make no assessment of this recommendation other than to note that it was contained as the Task Force's final recommendation.