



[2016] JMFC FULL 04

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2014 HCV 04728

BEFORE: THE HON. MS. JUSTICE C. LAWRENCE-BESWICK  
THE HON. MS. JUSTICE C. MCDONALD  
THE HON. MR. JUSTICE F. WILLIAMS

BETWEEN	RURAL TRANSIT ASSOCIATION LIMITED	CLAIMANT
AND	JAMAICA URBAN TRANSIT COMPANY LIMITED	1 <sup>ST</sup> DEFENDANT
AND	THE COMMISSIONER OF POLICE	2 <sup>ND</sup> DEFENDANT
AND	THE ATTORNEY GENERAL	3 <sup>RD</sup> DEFENDANT

IN COURT

Hugh Wildman and Keiva Marshall, instructed by Hugh Wildman & Co. for the Claimant.

Walter H. Scott Q.C. and Mathieu Beckford, instructed by Rattray Patterson Rattray Attorneys-at-Law for the 1<sup>st</sup> Defendant.

Carlene Larmond and Monique Harrison, instructed by the Director of State Proceedings for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Heard: 29<sup>th</sup> & 30<sup>th</sup> June, 1st July 2015, 17<sup>th</sup> June, 2016.

***Declarations - Constitutional Redress –Sections 13(3) (g) & (h) of Charter of Fundamental Rights and Freedoms – Right to equality before the law – Right to equitable and humane treatment by any public authority – Sections 21 & 22 of the Constabulary Force Act – Section 58 of the Road Traffic Act – The Kingston***

***Metropolitan Transport Region Act- alternative/adequate means of redress available –permanent injunction.***

**CAROL LAWRENCE BESWICK J. (DISSENTING)**

- [1]** The 1<sup>st</sup> Defendant's buses have the exclusive use of one of the West Bound lanes of the Mandela Highway (the Highway) at certain times. The Claimant alleges that this exclusivity results from the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and that it inures to its detriment. This is an Application by the Claimant seeking Constitutional Relief in relation to those alleged actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and asking the Court to provide remedy by way of declarations, the grant of an injunction and the award of damages.
- [2]** The Claimant, the Rural Transit Association Limited (RTA), is a company duly incorporated under the Companies Act of Jamaica with the stated purpose of representing and promoting the interest of private individuals who are engaged in the provision of public passenger transportation in Jamaica. The evidence for the Claimant is through the affidavit of Mr. Godfrey James, who avers to be a member of the Claimant and who purports to have the permission of the Claimant to act on its behalf. Mr. James avers to be himself in the business of providing public passenger transport, having been licensed to do so by the Transport Authority. Two of his licences allow him to operate between Linstead and Cross Roads, via Washington Boulevard, Molynes Road and Half-Way Tree, which he asserts, necessitates travel on the Mandela Highway.
- [3]** The 1<sup>st</sup> Defendant, the Jamaica Urban Transit Company Ltd (JUTC), is a company duly incorporated under the Companies Act of Jamaica, having as its sole shareholder the Accountant General of Jamaica. The 1<sup>st</sup> Defendant, also in the business of public passenger transport, is the holder of the Public Passenger (Kingston & Metropolitan Transport Region) Licence 1998. It operates buses that ply between Spanish Town and Kingston, traversing the Mandela Highway.

[4] The 2<sup>nd</sup> Defendant, the Commissioner of the Police, is the head of the Jamaica Constabulary Force, including the Traffic Division. The 3<sup>rd</sup> Defendant is joined by virtue of the Crown Proceedings Act.

## **FACTUAL BACKGROUND**

[5] On the 1<sup>st</sup> November 2013, a project was implemented on the Mandela Highway, whereby the westbound lanes of the Highway were converted to accommodate two-way traffic from Caymanas Bay to the Plantation Heights entrance between the hours of 6:00 a.m. and 8:00 a.m. from Monday to Friday. This had the effect of changing one of the two westbound lanes into a temporary eastbound lane designated for exclusive use by JUTC's buses. The project was originally slated to last for a period of three (3) months, but was extended on more than one occasion, so that, the above-stated changes to traffic continue. It is unclear by whose or what authority the project was devised, however, at all material times, it was put into effect and supervised by the Police Traffic Division of the Jamaica Constabulary Force.

[6] On 12<sup>th</sup> May 2014, the RTA filed an Application for Court Orders for leave to apply for Judicial Review against the Defendants, along with the Office of Utilities Regulation (OUR), seeking several orders of administrative and constitutional relief. The basis of the application was that, inter-alia, the Defendants were unlawfully regulating public passenger transport by way of the aforementioned Mandela Highway Project. It was also asserted that the decisions taken to implement the policy violated the RTA's constitutional right to equitable and humane treatment by any public authority in the exercise of any function.

[7] That Application was heard by Lennox Campbell J.<sup>1</sup>, who found, inter-alia, that the decision maker with regards to the implementation of the Mandela Highway

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<sup>1</sup>Rural Transit Association Limited v Jamaica Urban Transit Company Limited, Commissioner of Police, Office of Utilities Regulation [2014] JMSC Civ. 143

Project had not been sufficiently identified, and consequently, administrative relief was refused. However, that court granted leave to pursue constitutional relief.

**[8]** Subsequently, pursuant to Fixed Date Claim Form filed 8<sup>th</sup> October 2014, as amended at trial on the 29<sup>th</sup> June 2015, the Claimant now seeks the following reliefs:

1. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not empowered by law to designate the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 to 8:00 a.m.
2. A declaration that the restriction of a portion of the right hand side of the West Bound section of the Mandela Highway by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 to 8:00 a.m., is in breach of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, and is therefore null and void and of no effect.
3. A Permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants and or agents or howsoever described from restricting a portion of the right hand side of the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 to 8:00 a.m.
4. Damages to the Claimant to be assessed for the illegal actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in breaching the Claimant's Constitutional rights in restricting the flow of traffic on the right hand side of the West Bound

section of the Mandela Highway allowing buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 to 8:00 a.m.

5. Damages for breach of the Claimant's rights.

[All emphases as in the original].

## THE CLAIMANT'S SUBMISSIONS

- [9] It is the case of the claimant, the RTA, that the JUTC and the police designated a lane of the West Bound Section of the Mandela Highway for exclusive use by JUTC buses, and that the said designation breaches the RTA's Constitutional Rights. The argument is that the action of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are state agencies, directly infringes the RTA's rights to equality before the law and the right to equitable and humane treatment by any public authority in the exercise of any function, as laid out in sections 13(3) (g) & (h) of *The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011*. These rights, the Claimant argues, are part of the bundle of fundamental rights guaranteed and protected by the Constitution, which State agencies are bound to uphold.
- [10] Counsel for the RTA, Mr. Hugh Wildman, contends that the designation provides an advantage to JUTC buses over buses of members of the RTA (including Mr. James, its representative), as well as other providers of public passenger transportation. According to Counsel, the Police and the JUTC are public authorities, and they have singled out the JUTC, which the claimant views as a private company owned by the Government of Jamaica, for special treatment in the use of the Mandela Highway, in preference over other users including members of the RTA, and others who are also in the business of providing public passenger transport along the said Highway.

- [11] Counsel argues that the fact that the JUTC buses have the use of that exclusive lane results in large numbers of passengers commuting on JUTC buses to the detriment of the other providers of public passenger transport. who also use the Highway, including RTA , and has thus caused RTA to suffer significant financial loss.
- [12] Counsel noted that the role of this Court is to ensure that Public Authorities carry out their functions according to the law and are held accountable.<sup>2</sup> He submitted that Section 2 of the Jamaican Constitution speaks to the supremacy of the Constitution and provides that any conflicting law should be rendered void<sup>3</sup>. The policy enabling the exclusive bus lane would be such a conflicting law.
- [13] Mr. Wildman further noted that ‘*law*’ is defined in the Constitution as ‘*any instrument having the force of law*’, and that this definition is wide enough to include any directive with the force of law, including the relevant designation/policy, regardless of the fact that there was no Act of Parliament sanctioning it. He submitted that this point was important having regard to the evidence of Senior Superintendent Lewis that ‘it was the job of the police to enforce the policy even though it was not written law’. Therefore, he asserted, the directive of the police to designate the use of cones on the Highway falls within the meaning of ‘*law*’ and conflicts with the constitution.
- [14] Counsel continued that the onus rests on the State to justify what he describes as the clear infringements of Section 13(3) (g) and (h) of the Charter. For that proposition he relies on the Canadian case of **Andrews v Law Society of British Columbia**<sup>4</sup> where the question that arose for determination was whether

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<sup>2</sup> [R (Beeson) v Dorset Count Council [2002] EWCA Civ 1812 , [2003] UK HRR 353 at [17],

<sup>3</sup> Counsel relies on Collymore v AG of Trinidad & Tobago (1967) 12 WIR 5 and Gairy v AG of Grenada (1999) 59 WIR 174 for this point.

<sup>4</sup> [1989] 1 SCR 143, 1989 Can LI 2 (SCC)

the requirement that an applicant must be a Canadian citizen in order to be admitted to the Canadian Bar infringed or denied the right to equality guaranteed by the Canadian Charter, and if so, whether that infringement was justified.

[15] Mr. Wildman submitted that the Court in that case found that a rule that bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class, and such violation was not justified, as the objective of the legislation was not sufficiently pressing and substantial.

[16] Mr. Wildman continued that similarly, in this case, the government sought to bar the class of public passenger providers other than the JUTC from using the exclusive lane on the basis that they are not a part of the JUTC operation.

[17] Counsel for the Claimant relied, in addition, on the decision of the Judicial Committee of the Privy Council in **Papponette and Others v Attorney General of Trinidad and Tobago**<sup>5</sup>, where the question to be determined also involved public passenger transport. He argued that that case examined equality provisions similar to those in the instant case. There the Board found in favour of the Appellants on the basis that the fact that maxi taxi operators paid a one dollar (\$1) fee for each exit journey to operate whilst operators on other routes did not face a similar requirement, amounted to difference in treatment, that is, inequality. The evidence from the government of Trinidad & Tobago had not provided justification for that inequality.

[18] Mr. Wildman further submitted that the Judicial Committee of the Privy Council examined the same equality provisions in the case of **Central Broadcasting Services Ltd. and others v Attorney General of Trinidad & Tobago**<sup>6</sup>. He

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<sup>5</sup> (2010) UKPC 32

<sup>6</sup> [2007] 2 LRC 19; [2006] UKPC 35

posited that that case demonstrates that to establish infringement of equality provisions of the constitution the Applicant must show that either the law itself or its administration in the Court is inequitable.

**[19]** Mr. Wildman argued that it is the law itself which is inequitable, in that it purports to give the JUTC buses exclusive privilege of travelling on one section of the Highway during peak hours to the exclusion and disadvantage of other persons who are in the business of public passenger transportation. He submitted that for the executive to use its power to single out a company operated by itself at the expense of other users of the Highway who have a legitimate right to use it, amounts to an arbitrary, illegal and oppressive act and an abuse of authority. Mr. Wildman submitted that whether or not the JUTC is a competitor with RTA is of no consequence. However he says, the fact that it is, makes the breach even more egregious.

**[20]** He argued that the evidence that the JUTC has been operating at a loss and had a mandate to become profitable by 2017<sup>7</sup>, does not provide any justification for this difference in treatment of the JUTC and the resulting violation of RTA's constitutional rights. According to Mr. Wildman, this statement by Mr. Finnikin is an affront to democratic rule and amounts to an arbitrary exercise of power by the Executive in total disregard of fundamental rights and freedoms, and in particular sections 13(3)(g) and (h) of the Charter.

**[21]** Further, in describing the Affidavit of Senior Superintendent Andrew Lewis in support of the Commissioner of Police, Mr. Wildman asserted that it "falls woefully short of providing an answer to the clear violation of the Claimant's right" and amounts to a mere denial of responsibility for making the decision to demarcate a bus lane exclusive to JUTC buses on the Highway. He described as 'compelling', the evidence that the Police are a part of the operation. In his view,

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<sup>7</sup>2<sup>nd</sup> Affidavit of Mr. Kirk Finnikin, paragraph 5



the Jamaica Constabulary Force was, and remained, an active participant in the execution of the policy, and no credible explanation had been provided by the police for its participation.

[22] On the issue of Locus Standi, Mr. Wildman submitted that it cannot be said that the claimant had no standing in this case as the test is so broad that any citizen of Jamaica could have brought the Claim.

[23] In relation to Damages, the RTA sought compensatory as well as vindicatory damages.

[24] Counsel relied on the authority of **Durity v Attorney General**<sup>8</sup> in which the Court cited with approval the principles laid down in **Attorney-General v Ramanoop**<sup>9</sup>, that, in appropriate cases of Constitutional violation, an award of monetary compensation in the form of damages is appropriate. Such compensation would be to vindicate the Claimant's constitutional rights, to '...reflect the sense of public outrage, emphasize the importance of the constitutional right that has been violated and to deter further breaches.'<sup>10</sup>

[25] In that regard, Mr. Wildman contended that the RTA is entitled to monetary compensation to sufficiently reflect the extent of the grave and arbitrary violation suffered.

[26] As it relates to compensatory damages, Mr. Wildman admitted that there was no evidence in that regard before the Court, but submitted that that could be dealt with by an Order for Assessment of Damages.

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<sup>8</sup> [2009] 4 LRC 376; [2008] UKPC 59

<sup>9</sup> [2005] UKPC 15

<sup>10</sup> Ibid.

[27] The Claims for aggravated and exemplary damages were discontinued at the hearing.

## THE 1<sup>ST</sup> DEFENDANT'S SUBMISSIONS

[28] Mr. Walter Scott, Q.C. for the 1<sup>st</sup> defendant, the JUTC, submitted that no constitutional right of the Claimant has been breached, and so the reliefs sought should be denied. He also argued that even if a constitutional right of the Claimant had been breached:

- (i) The Claimant has adequate alternative means of redress
- (ii) The person who breached the Claimant's constitutional right is not before the Court.
- (iii) In all the circumstances none of the Orders sought are appropriate and none should be granted."

[29] Mr. Scott contended that the multiple letters from the Minister of Transport, Works and Housing exhibited to the 1<sup>st</sup> Affidavit of Kirk Finnikin<sup>11</sup> show that it was the Minister who made the decision complained of, to permit the project initially, and later to continue it, and that the Claimant has presented no evidence to the contrary. In this vein, Queen's Counsel asked the Court to take judicial notice of the fact that this information contained in the affidavit is almost a carbon copy of that contained in the Affidavit of Kirk Finnikin filed and served on the Claimant in *Claim No. 02278 HCV 2014* (the Judicial Review Application), and therefore, was within the knowledge of the Claimant prior to the filing of this claim.

[30] Counsel further made the point that the JUTC is solely a beneficiary of the impugned decision and not the decision maker. In that regard, if the Minister

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<sup>11</sup> Affidavit of Kirk Finnikin filed 19<sup>th</sup> November, 2014

decides to withdraw permission, JUTC and the police would be constrained to comply and the project would be discontinued.

- [31] Mr. Scott further contended that if this Court accepts that JUTC is a beneficiary, it would follow that the person who is to be found in breach of RTA's rights, if there were a breach, is the public authority who has exercised a function, that is, the Minister of Transport, Works and Housing. However, he observed, the decision maker, the Minister, is not named as a Defendant, nor is he named as an interested party to the Claim.
- [32] According to Mr. Scott, it is the creation of a special privilege that would give rise to any alleged inequitable treatment, and the fact that JUTC benefitted may go towards the extent of the loss or damage, but should not in itself be regarded as the cause of any alleged breach of the Claimant's rights.
- [33] Queen's Counsel also submitted that the considerations for the Court in this matter are to be similar to those in a judicial review matter seeking prerogative remedies, and in that regard, it is important to know the reasons for the impugned decision by the Minister, and to assess whether that decision was reasonable and proportionate.
- [34] Mr. Scott contends further that the project was implemented to fulfill a mandate of national importance, and one that was to benefit Jamaica as a whole. He noted that the evidence of the JUTC is that it has a mandate from the Government of Jamaica to provide at least 25,000 seats for public passenger transport in the Kingston and Metropolitan Transport Region (KMTR), and, to become profitable by the year 2017.
- [35] Consequently, Mr. Scott submitted, this is a matter of national importance because JUTC is the primary source of public passenger transport in the KMTR, which is the largest economic and population hub in Jamaica. The designation of the exclusive lane by the Minister allows for shuttling of thousands of passengers into Kingston during morning peak hours.

- [36] According to Queens Counsel, there should be no competition between JUTC and any other bus operator, as JUTC has an exclusive licence<sup>12</sup> to operate buses within the KMTR and any other operator wishing to operate buses within the KMTR must do so as a sub-franchisee with the consent of the JUTC. The Claimant, RTA, and its members are rural operators licensed to operate outside the KMTR, and though some loading and unloading is permitted within the KMTR, they are not at liberty to pick up or drop off at every bus stop within the KMTR. In that regard, Mr. Scott submitted, the RTA could only suffer losses, or losses to its members as it claims, if it were competing with the JUTC and attempting to pick up passengers along the same routes as JUTC, which they do not have JUTC's consent to do.
- [37] Mr. Scott highlighted section 3 of the *Public Passenger Transport (KMTR) Act* which empowers the Minister to grant an exclusive licence. He further noted that Mr. James' licence to operate stage carriage rurally takes legitimacy from the *Public Passenger Transport (Rural Area) Act* which is clearly a different statutory framework from that which governs the licence of the JUTC.
- [38] He contended that the approach taken in **Pickersgill, Robert et al v The Attorney General and the Director of Public Prosecutions**<sup>13</sup> is helpful in showing that a mere difference in treatment is not a breach. A breach may in fact be permitted by a particular law, and as such is presumed to be constitutional. The Claimant, RTA, would have to show in this case that it has a legal right or privilege to be treated in a particular way or not be treated in a particular way, and thereafter whether or not that difference in treatment could be justified.

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<sup>12</sup> Exhibit KF1, Affidavit of Kirk Finnikin filed 19<sup>th</sup> November, 2014

<sup>13</sup> [2013] JMFC Full Crt 4, at paras 90-160

- [39] According to Mr. Scott, in the case at bar, neither the RTA nor any other motor vehicle user of the road, has been deprived of any pre-existing right to traverse the Highway in either direction as the RTA retains the right to travel in the two east bound lanes as usual, as well as the right to travel in a west bound lane. Further, he asserts that the RTA has not identified what right or privilege or licence it has to traverse the exclusive lane, a temporary lane in place for only a few hours. Queens Counsel for the JUTC asks the question, “What has the Claimant been deprived of if it has no right, privilege or licence?”
- [40] He relied on the Privy Council case of **Campbell-Rodrigues & Ors v Attorney General of Jamaica**<sup>14</sup> to argue that the RTA cannot establish a constitutional right or interest over any part of the highway which it is now deprived of, which the Court had required of the Appellant in that case, and that in any event, RTA has failed to plead that it has been deprived in any way.
- [41] Mr. Scott further submitted that the Court ought to determine whether the right to equitable treatment by a Public Authority presupposes that it cannot grant a special privilege to select persons. This he submits is not the case. It is submitted that the very essence of a privilege is that one is not entitled to it as one would be to a right, and as such, there can be no automatic constitutional breach if that privilege is not granted to every person. Essentially, it is argued that all that the requirement of equitable treatment would dictate is that the Public Authority fairly assess each application for the privilege with due process and legitimate consideration and in this instance there is no evidence that the RTA applied to share in the privilege of using the bus lane, thus, he says, it cannot complain of inequitable treatment.
- [42] Moreover, the submission continues, the constitutional right to equitable treatment does not mean equal treatment, and what is required is equity based

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<sup>14</sup> [2007] UKPC 65

on the particular circumstances of each case. In this case, the RTA has not shown by way of evidence that equitable treatment requires that the privilege be extended to itself or its members.

- [43]** In regard to the relief sought, Queens Counsel submitted that there is no basis in law for the granting of any of the reliefs sought against the beneficiaries of a breach of constitutional rights where the beneficiaries are not the persons committing the breach of which complaint is made. He noted that since the purpose of the relief sought is to compensate for and restrain a perceived breach of a constitutional right, then restraining that beneficiary where said beneficiary is not the person committing the breach does not restrain the breach itself. It is further argued that, for that same reason, monetary remedies to compensate the RTA could not properly lie against JUTC, a mere beneficiary.
- [44]** Counsel highlighted that the RTA has not pleaded its case seeking relief specifically against the JUTC, but rather against 'the person(s) responsible for breaching its constitutional rights '. Since the person responsible for the breach, if there is a breach, is not before the Court, none of the remedies sought can flow against the JUTC, a mere beneficiary.
- [45]** As to damages, Mr. Scott submitted that damages is not an appropriate remedy as the RTA appears in a representative capacity, and further, in any event, insufficient particulars have been pleaded, and insufficient evidence adduced with regard to the alleged loss suffered, to enable the Defendants to know the case they have to meet.
- [46]** On the question of whether a permanent injunction should be granted, Counsel for JUTC submitted that it is not appropriate for the Court to order a permanent injunction as injunctions should not be granted directly against the Crown, and as

a matter of policy, should not be readily granted against public authorities or bodies exercising similar functions.<sup>15</sup>

[47] As it relates to the issue of adequate means of redress, Queens Counsel submitted that Section 25 of the Constitution of Jamaica provides that this Court should not exercise its powers if it is satisfied there are adequate means of redress available to the Claimant.

[48] Counsel for JUTC continued that the appropriate path for RTA in this case is by way of Judicial Review, and despite the Judgment of Lennox Campbell J. in the Application for Leave to apply for Judicial Review prior to this case<sup>16</sup>, RTA remains at liberty to renew its application remedying the deficiencies in the previous application. He relies on the Privy Council case of **Smithfield Foods Ltd v Attorney-General (of Barbados)**<sup>17</sup> for the meaning of 'adequate' in the context of the case at bar. Further the remedies that could be ordered at Judicial Review are extensive and thus adequate. Counsel for the 1<sup>st</sup> Defendant contended that the Claimant should seek to appeal before complaining that an appeal would not provide adequate means of redress.

[49] The 1<sup>st</sup> Defendant also relies on the *Pickersgill* case [*supra*] in which the Court found that if it was believed 'that the Judge had no basis in fact and/or law to grant the order he did, or that he erred in law or otherwise, then that would be a question to be resolved by an appeal and not one for constitutional redress'.

## THE 2<sup>nd</sup> and 3<sup>rd</sup> DEFENDANTS' SUBMISSIONS

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<sup>15</sup> Counsel relied on *R v Powell* (1841) 1 Q.B. 352 which was affirmed in *M v Home Office* [1994] 1 A.C. 377 and section 16 of the Crown Proceedings Act.

<sup>16</sup>*Rural Transit Association Limited v Jamaica Urban Transit Company Limited, Commissioner of Police, Office of Utilities Regulation* [2014] JMSC Civ. 143

<sup>17</sup> (1992) 40 WIR 61

[50] [49] The crux of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants case, that is, the case of the Commissioner of Police and the Attorney-General, is that:

- (iv) Section 13(3) (g) of the Charter has not been engaged since the complaint does not relate to “law” but to a temporary policy/project, and accordingly no breach of that provision may be established.
- (v) It has not been established by the evidence that the Commissioner of Police has breached the Claimant’s right to equitable and humane treatment by any public authority in the exercise of any function as contained in Section 13(3)(h).
- (vi) Based on the above there is no basis for the grant of the reliefs sought.
- (vii) The Claimant has alternative means of redress.

[50] Ms. Carlene Larmond, Counsel for both the 2<sup>nd</sup> Defendant (Commissioner of Police) & 3<sup>rd</sup> Defendant (Attorney General), submitted that the approach the Court should take as to the elements necessary to establish a successful constitutional claim is the test laid down in **Banton and Others v Alcoa Minerals of Jamaica Incorporated and Others**<sup>18</sup> as updated in **Maurice Tomlinson v Television Jamaica Ltd, CVM Television Ltd and the Public Broadcasting Corporation of Jamaica**<sup>19</sup>. To succeed the Claimant must show:

“1. He has sufficient standing to bring this claim, that is, he must show that a Charter right has been, is being or is likely to be infringed in relation to him;

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<sup>18</sup> (1971) 17 WIR 275

<sup>19</sup> [2013] JMFC Full 5



2. The act he wishes to do or has done is protected by the Charter, that is, the conduct must be within one or more of the provisions of the Charter;
3. The Defendants are bound by the right(s) claimed;
4. The Defendants' conduct infringed his Charter right;
5. There are no other adequate means of redress."

[51] Ms. Larmond submitted that section 13(3)(g) of the Jamaican Charter is predicated on '*law*' as defined by the Constitution, and that there is no factual substratum that would allow this Court to come to a finding that the RTA's right to equality before the law has been engaged, *moreso*, infringed. She asserted that the '*law*' as contemplated by the Constitution, does not include policies such as the impugned policy in the case at bar, and that there is no basis for Mr. Wildman's classification of the policy as an 'unwritten rule of law'. Ms. Larmond cited **Arthur Baugh v Courts (Ja) Ltd & The Attorney General of Jamaica**<sup>20</sup> and **Matcam Marine Ltd v Michael Matalon**<sup>21</sup>, to show that when Courts are looking at what constitutes an unwritten rule of law they are usually speaking of the Common Law or an Instrument or Order in Council.

[52] [52] Counsel relies on the decision of the Judicial Committee of the Privy Council in **Central Broadcasting Services Limited and Another v Attorney General**<sup>22</sup> for the interpretation the Court ought to give to '*the right of equality before the law*' outlined in section 4(b) of the Trinidadian Constitution. Counsel submits that section 13 (3)(g) of the Jamaican Charter ought to be given the same interpretation having regard to the similarity of the provisions. The Board

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<sup>20</sup> [1997] JMSC, Claim No. CL. B 099 of 1997,

<sup>21</sup> JMSC Claim No. A 0002/2011

<sup>22</sup> [2007] 2 LRC 19; [2006] UKPC 35

found in that case that section 4(b) of the Trinidadian Constitution “*is directed to equal protection as a matter of the law itself and its administration in the courts*”. Therefore, the Defendants submitted that since the complaint in this case does not relate to the law itself or its administration in the courts, there has been no challenge to the constitutionality of any statute or regulation, and accordingly, it does not engage Section 13(3)(g) of the Charter.

[53] Ms. Larmond further submitted that the authority of **Andrews v Law Society of British Columbia** [*supra*] cited by Mr. Wildman in support of his submissions, is unhelpful because:

(1) the section of the Canadian Charter being considered by that Court was substantially different from the section under consideration in this case. There, equality under the Canadian Charter clearly included discrimination on the basis of listed categories whilst the Jamaican Charter treats discrimination as a separate right; and

(2) that Court was considering legislation and therefore any comments from the Court would have been predicated on a law.

[54] In support of her submission that a breach of the right to equitable and humane treatment in section 13(3)(h) has not been established, Counsel relies on the authority of **Hon. Mrs. Portia Simpson-Miller et al v Attorney General of Jamaica & Director of Public Prosecutions**<sup>23</sup> in which it was held that it was necessary for the Claimants to demonstrate that persons behaving in the same manner are treated differently based on having distinguishing characteristics. Counsel for the defendants submitted that ‘in order to establish the breach of the

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<sup>23</sup> [2013] JMFC Full CRT 4

right to equitable and humane treatment, RTA would have had to adduce evidence regarding the nature of the entities/entity which it alleges have been or are being treated differently from it so as to enable the court to compare the entities and consider whether they were in similar circumstances or of the same category as the Claimant'. The submission is that it has failed to do so.

**[55]** Ms. Larmond argued further that the issue to be decided is whether RTA and JUTC are competitors. She said that the question is whether the two are behaving in the same way and yet are being treated differently. She submitted that simply because both entities are providers of public transport is not in and of itself evidence that they are acting in the same way. Ms. Larmond examined the evidence of Mr. Godfrey James in support of RTA, which she submits shows that, at the heart of the complaint is the assertion that the policy gives an unfair advantage to the JUTC by allowing its buses to travel speedily to and from Spanish Town, resulting in disadvantage to the rural operators and their inability to compete.

**[56]** She submitted that the two entities are not however competing as they are operating under two distinct streams. Mr. James' public passenger transport licence for 2015-2019<sup>24</sup> shows that Mr. James is not allowed to pick up passengers within the Kingston Metropolitan Transport Area (KMTR) (which includes Spanish Town), to take them to another destination within the KMTR. This would also apply to other rural operators so licensed. The licence does however allow for the JUTC operator to pick up passengers outside the KMTR who have a destination within the KMTR, and pick up passengers inside the KMTR who have a destination outside the KMTR.

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<sup>24</sup> exhibit 1a

- [57]** Counsel noted however, that, interestingly, Mr. James's public passenger transport licence for 2011-2015<sup>25</sup> does not state the same restrictions of the 2015 – 2019 licence. Instead it refers to the prohibitions to be found in an Act. However, the Act named does not appear to exist. Ms. Larmond stated that the name of the Act was erroneously noted on the licence, but argued that, even if the Court were to find that the licensee would have been subject to an Act that does not in fact exist, the licensee would still be bound by the provisions in the KMTR Act which are in force irrespective of what it is called. Her argument is that the intention was for that licence to bear the same prohibition as the other licence.
- [58]** It was noted that the unchallenged affidavit evidence of Mr. Finnikin is that the JUTC's licence permits it to pick up passengers in Spanish Town (within the KMTR) and take them to destinations within other parts of the KMTR.
- [59]** Counsel further submitted that it is also necessary for the Claim to specify the function which it is alleged that the Commissioner of Police has exercised in breach of RTA's constitutional rights and for the evidence to support that allegation. The submission was that there is no claim and no evidence.
- [60]** In that regard, Ms. Larmond argued that the actions of the members of the Jamaica Constabulary Force were lawful. She highlighted the evidence of Superintendent Lewis denying that the Police Traffic Division issued any directive or designated/ demarcated any portion of the highway, and that having been informed of the arrangement, the police merely directed traffic as they are empowered to do under Sections 21 and 22 of the Constabulary Force Act, and Section 58 of the Road Traffic Act, in the effort to ensure the free flow of vehicles on the highway during the prescribed period.

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<sup>25</sup> exhibit 1b

- [61] In relation to damages, Ms. Larmond adopted the submissions of Mr. Scott Q.C. She noted that RTA owns no buses, and that Mr. James is an affiant and not a party to the proceedings. Unless there was some order by which Mr. James would have been appointed a Claimant in a representative capacity, evidence as to damages specific to him could not translate to an order for damages for the RTA. It was submitted therefore that no damages should be awarded as none have been proven by the RTA. She further submitted that since there is no evidence of loss before the Court, there is no basis on which this matter could proceed to an assessment of damages.
- [62] As to the issue of alternative redress, Counsel submitted that there is an alternative means of redress as the issues before the Court could properly be considered by a Judicial Review Court, as was hinted in the aforementioned judgment of Campbell J in the Judicial Review matter between the parties. There was evidence on which a claim could have been made against the Minister of Transport, who appeared to have been the decision maker of the impugned policy. Her submission was that this option is still open to the RTA.
- [63] In respect of the injunction sought, Counsel submitted that it is not in dispute that in Judicial Review proceedings an injunction may be granted against an officer of the Crown. However, although in **Latibaudiere v The Attorney General**<sup>26</sup>, judicial review proceedings, an injunction was granted against the Minister and others, it had not been granted against the Attorney General. Miss Larmond argued that in the case of **The Jamaican Bar Association v The Attorney General of Jamaica and the General Legal Council**<sup>27</sup>, Sykes J found that the Crown Proceedings Act has no application in Constitutional matters. However, she asserted that the difference between that case and the one at bar is that, (1) in that case the Court was considering legislation whilst in this case there is no

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<sup>26</sup> [2014] JMCA Civ. 22

<sup>27</sup> [2014] JMCA Civ. 179

law as contemplated by the Constitution; and (2) that case was decided in respect of an interim application and not a final hearing as in this case.

## **DISCUSSION**

**[64]** The reliefs sought, as amended, are declarations, a permanent injunction and damages

**[65]** **The first Declaration** sought is:

*“Declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not empowered by law to designate the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Monday to Friday from 6:00 a.m. to 8:00 a.m.” [Emphasis as in original]*

**[66]** It is undisputed that from November 2013 buses of the JUTC were the only vehicles allowed to travel along a specified lane of the westbound section of the Highway on Mondays to Fridays from 6:00 a.m. to 8:00 a.m. The birth of this exclusive bus lane has caused alterations in the manner in which traffic moves on both the east bound and west bound sections of the Highway during that time.

**[67]** Normally traffic travelling from the direction of Spanish Town towards Kingston moves in an easterly direction along the Highway. The arrangement which allows the JUTC buses to travel along the west bound section of the Highway must mean that those buses in the exclusive lane would drive on the portion of the Highway reserved for oncoming traffic, that is, for traffic travelling in the opposite direction of Kingston towards Spanish Town in a westerly direction.

**[68]** The effect of that would be at least two fold:

(a) The JUTC buses travelling towards Kingston would proceed without the impediment of negotiating through traffic and any congestion heading towards Kingston on the Mandela Highway.

(b) Traffic, including RTA buses, travelling away from Kingston would be deprived of a lane on the Highway to which it would otherwise have had access.

### **Authority to designate exclusive bus lane**

[69] A question which immediately arises is under whose authority was the arrangement for an exclusive bus lane made. There is exhibited in evidence a letter purportedly under the hand of Minister The Hon. Dr. Omar Davies of The Ministry of Transport, Works and Housing directed to the Managing Director of the JUTC. It concerns the extension of the period of time designated for the use of the Mandela Highway Exclusive Bus Lane.

[70] The Minister concludes in that letter dated April 22, 2014 that “*having taken all the issues into consideration, I will approve the extension of the exclusive bus lane until December 2014.*” The letter also contains comments by the Minister on the impact of the initiative to have the exclusive bus lane.

[71] Nowhere in that letter does the Minister indicate the source of the power which he purported to exercise to approve the extension of an exclusive bus lane. Neither does he refer to any original empowering legislation which gave rise to the institution of the exclusive bus lane whose extension he was approving.

### **Empowering Legislation**

[72] The Road Traffic Act empowers the Minister to make regulations in certain circumstances. Section 59 provides:

*“The Minister may make regulations for any purpose for which regulations may be made under this Part and for prescribing anything...and generally as to the use of motor vehicles... on roads... and the conditions under which they may be so used... and in particular... may make regulations in respect to...*

*(a) appointing and defining the limits of traffic areas and licensing areas...”*

[73] No evidence has been presented as to the existence of such regulations appointing and defining that exclusive bus lane. Counsel for the Attorney – General conceded that the Minister has no power to extend the use of the bus lane, which is what he had purported to do in that letter. In the absence of evidence to the contrary I must conclude that the Minister made no regulations prescribing, appointing, defining or indeed designating an exclusive bus lane, or extending any purported designation. In any event the Minister is not a party to the suit.

[74] Has anyone been empowered to make such a designation, if so, who? The claimant seeks a declaration that the JUTC and the Commissioner of Police are not so empowered.

#### **Is the JUTC empowered to designate an exclusive bus lane?**

[75] The RTA has provided no evidence that JUTC has purported to have the power to designate an exclusive bus lane. As it concerns the designation of the exclusive bus lane, the RTA relies on the affidavit of its member Mr. Godfrey James.<sup>28</sup> There, Mr. James referred to a policy announced by the Jamaica Constabulary Force (JCF) allowing the JUTC buses exclusive privilege of the use of the lane.<sup>29</sup>

[76] The affidavit describes the involvement of the JUTC where Mr. James states:

*“14. The policy was defended by Mr. Colin Campbell, General Manager of the JUTC both on national radio and television. It was subsequently proclaimed as a success by the JUTC after the initial run in November 2013.*

*15. By so designating the exclusive bus lane on the Mandela Highway, JUTC buses were given an advantage over my buses and other members*

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<sup>28</sup> Filed on October 8, 2014

<sup>29</sup> Ibid. Paragraphs 10, 11, & 12



*of the Rural Transit Association Limited who also use the Mandela Highway to transport passengers to and from the corporate area.”*

**[77]** Paragraph 14 of the affidavit can therefore be seen to speak to the defence of the policy by the JUTC’s General Manager, and paragraph 15 speaks to the result of the policy. Neither paragraph asserts that it was the JUTC that purported to designate the section of the highway as an exclusive bus lane.

**[78]** Mr. James in his affidavit does make further reference to the role of the JUTC. He adds:

*“21. The Association consulted with our attorney Mr. Hugh Wildman, who informed us, and I verily believe, that the action of the police and JUTC is(sic) illegal, and not grounded in law. Further, we have been informed by our Attorney and I verily believe, that the action of the police and the JUTC in commandeering a portion of the Mandela Highway to be used by JUTC buses ONLY (emphasis as in original) for transporting passengers between the designated time, is(sic) unconstitutional as it is in breach of Sections 13 (3) (g) and (h) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.”<sup>30</sup>*

**[79]** Mr. James is here giving evidence of his belief in the opinion of his attorney-at-law concerning “commandeering” a portion of the Highway. Again there is no allegation here that JUTC purported to designate a bus lane.

**[80]** The evidence shows clearly, to my mind, that JUTC gained a benefit from the designation insofar as its buses could traverse the Highway more easily than could other road users. However, there is no evidence that JUTC was involved in the designation of the exclusive bus lane. To make a declaration that the JUTC is not so empowered would be otiose and without purpose, in view of the fact that there is no evidence that JUTC ever purported to make such a designation.

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<sup>30</sup> Affidavit of Godfrey James, filed October 8, 2014

## **Is the Commissioner of Police empowered to designate an exclusive bus lane?**

**[81]** The Constabulary Force Act empowers the Commissioner to regulate traffic in certain circumstances. It provides:

*“21. It shall be lawful for any Constable in uniform to control traffic, and any person disobeying any instruction given or any signal, whether orally or by hand, or mechanical device, shall, upon summary conviction, be liable to a penalty not exceeding one thousand dollars and in default of payment thereof to imprisonment for any term not exceeding one month.*

*22. (1) Whenever in the opinion of the Commissioner, a street is liable or likely to be thronged or obstructed, it shall be lawful for him and for any Constable acting under his authority-*

*(i) to direct the route to be observed by carts which are in use or are being driven or propelled in or near to such street, or by persons riding or driving any animal in or near to such street:*

*(ii) to prevent carts, or persons riding or driving any animal, from going into such street;*

*(iii) to prescribed [sic] the line to be kept by persons riding, driving or walking in any such street, and to compel them to keep to such line;*

*(iv) generally to do all that is necessary to prevent a congestion of the traffic, and to provide for the safety and convenience of the public.*

*(2) In this section –*

*“Commissioner” means the Commissioner of Police for Jamaica, and includes any Officer or Sub – Officer in charge of a division or district.”*

[82] The powers described above in section 21 must be viewed in context. Those powers given to the police under the Constabulary Force Act must refer to temporary control of congestion. Anything more permanent would fall under the purview of legislation from the Minister. Were it otherwise, the law would be uncertain and could fall prey to the whims and fancies of individual police sub-officers. In any event, Counsel for the Commissioner of Police admitted that the powers given by this section to the police are expected to be used after consultation with the appropriate authorities.

[83] Similarly, the power which the police derive from the Road Traffic Act, to my mind, does not empower them to designate an exclusive lane on the Highway for the JUTC buses. Section 58 of the **Road Traffic Act** provides that

*“The driver of a motor vehicle shall obey all directions whether verbal or by signal given by a constable in the execution of his duty to stop the vehicle or to make it slowdown or to pass on any indicated side of the constable or to keep to any indicated line of traffic and any person who fails to obey any such direction shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars. ;,*

[84] In my view this provision could not be properly interpreted to bestow power on the police to consistently and for a protracted period give directions to vehicles belonging to one entity to be the exclusive users of a lane of a public highway. Here again this power could only be for temporary road situations as it would be open to arbitrary implementation, uncertainty and possible abuse.

**[85]** Evidence referring to the role of the Commissioner of Police in designating an exclusive lane is in Mr. James' affidavit. Paragraphs 10 and 12 are as follows:

*"10. Sometime in November 2013, a directive was issued by the Police Traffic Division, headed then by Senior Supt. Radcliffe Lewis, that the Police would be designating a portion of the Mandela Highway, the right hand side of the West Bound section of the Mandela Highway, to allow JUTC buses **ONLY** travelling from Spanish Town to Kingston, to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m to 8:00 a.m [emphasis as in original]*

*12. The policy was announced by then Senior Supt. Radcliffe Lewis who carried out the policy by using members of the Jamaica Constabulary Force who placed cones along the Mandela Highway to create the designated exclusive bus lane in favour of the JUTC. The exclusive bus lane was manned by the Jamaica Constabulary Force."<sup>31</sup>*

**[86]** Paragraph 10 references a directive issued by the police informing that the police would be designating a lane for exclusive use. There is no evidence of the actual directive purportedly issued. Nor do the paragraphs refer to any authority or legislation on which the police stated they relied to empower them to purportedly designate an exclusive bus lane for any protracted period.

**[87]** Senior Superintendent Andrew Lewis in his affidavit<sup>32</sup> acknowledges that he knew that there was an exclusive lane for JUTC buses, commencing November 1, 2013<sup>33</sup> but denied that the Traffic Division had issued any directive or had implemented any policy making that lane open for use by the JUTC buses only.<sup>34</sup> The role of the police he viewed to be to ensure the free flow of traffic during the time when the lane was being used exclusively by JUTC buses<sup>35</sup>.

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<sup>31</sup> Affidavit of Godfrey James, filed October 8, 2014.

<sup>32</sup> filed May 13, 2015

<sup>33</sup> Par. 4

<sup>34</sup> Par.5 and 6

<sup>35</sup> Par. 8

- [88]** The evidence of Mr. Finnikin, Deputy Managing Director of the JUTC, in cross-examination, describes JUTC as being a part of an arrangement for the exclusive bus lane with a request to the police to enforce that arrangement. According to him Senior Superintendent Lewis gave notice to the public that the lane was for the exclusive use of the JUTC. Mr. Finnikin testified that Mr. Colin Campbell, Managing Director of JUTC, also announced what he, Mr. Finnikin, regarded as being a policy concerning the exclusive lane.
- [89]** In my view, the actual designation of the exclusive lane plays too great a role in the implementation of the exclusive lane, to have not been clearly done by one party or by more than one party, acting together. The change in the traffic movement carried with it potential danger as the JUTC buses would be travelling in the opposite direction from which the traffic normally flowed, carrying with it the possibility of a head-on collision involving person(s) unaware of the change. To my mind, a change as fundamental as that would have to be clearly designated by law, and would require the clearest notice to the motoring public that the lane had been designated for exclusive use of the JUTC buses.
- [90]** The evidence from the witnesses for the JUTC and the police recognizes that there was a purported designation but there is no clear, decisive evidence from those witnesses as to who purportedly made the designation. Instead, each in substance denies being the designator. On the other hand, the claimant's witness, Mr. James, clearly asserts that the purported designation would come from the police. The evidence shows that his buses traverse the Highway and I do believe that in that capacity he would have been very alert to changes and attuned to what those changes were and to who was designating those changes.
- [91]** I therefore accept as true the evidence in paragraph 10 of Mr. James' affidavit that it was the Police Traffic Division which in November 2013 issued a directive purportedly designating a lane of the Highway for the sole use of JUTC buses at the prescribed times.

[92] In my view, the designation of an exclusive bus lane cannot be regarded merely as a traffic direction. The exclusive lane is not being used for general control of traffic to reduce congestion which has arisen on a particular occasion. Nor is it being used for the general good of all road users but rather it is designated for exclusive use in order to facilitate one group of persons with the apparent ultimate goal of allowing that group to reach a named target of profitability.

[93] In my view the powers given to the police under the Constabulary Force Act and the Road Traffic Act are for short term control of traffic. There is no legislation empowering the Commissioner of Police to designate a lane on a Highway to be for the exclusive use of one group of persons for any protracted period of time.

[94] **The second Declaration** sought is not with regard to the designation of the exclusive lane. Instead it concerns the **restriction** of a portion of the Mandela Highway by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The claimant seeks:

*“2. A declaration that the restriction of a portion of the right hand side of the West Bound section of the Mandela Highway by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m., is in breach of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, in particular Section 13 (3) (g) and (h) 2011*

[95] The second declaration sought is therefore in essence to state that the restriction of the Highway resulted in a breach of the constitutional rights of the RTA found in section 13 of the Charter of Fundamental Rights and Freedoms (the Charter).

[96] Section 13 of the Charter contains provisions whose purpose is to afford protection to prescribed rights and freedoms of persons to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

[97] Section 13 of the Charter provides:

*“(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society*

*(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; ...*

*(3) The rights and freedoms referred to in subsection (2) are as follows*

*.....*

*(g) the right to equality before the law;*

*(h) the right to equitable and humane treatment by any public authority in the exercise of any function; “.*

### **Right to Equality before the law**

**[98]** The first right that is claimed to have been breached is the right to equality before the law. What is the unequal treatment about which complaint is being made? There is no dispute that the JUTC buses alone are permitted into the exclusive lane of the westbound portion of the Highway between 6 a.m. to 8 a.m. on certain days. Nor is there challenge to the evidence of Mr. James in his affidavit as to the purpose of this exclusive lane. Mr. James depones:

*“11. This was to allow JUTC buses to have exclusive privilege by travelling speedily and without impediment between Spanish Town and Kingston.”*

*“15. By so designating the exclusive bus lane on the Mandela Highway, JUTC buses were given an advantage over my buses and other members of the Rural Transit Association Limited who also use the Mandela Highway to transport passengers to and from the corporate area.”*

[99] [xx] In **Bhagwandeem v The Attorney General of Trinidad & Tobago**<sup>36</sup> the Judicial Committee of the Privy Council was concerned with interpreting section 4(b) – right to equality before the law and protection of the law, and section 4(d)-right to equality of treatment from any public authority, of the Trinidadian Constitution which are comparable to s13(3)(g) and (h) of the Jamaican Charter, respectively. To be determined there was the issue as to whether the appellant had received equality of treatment. There it was observed that

*'a claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or could be treated differently from some other similarly circumstanced person or persons as actual or hypothetical comparators, that comparison being such that the relevant circumstances in one case are the same, or not materially different in the other.'*<sup>37</sup>

[100] In **Papponette**<sup>38</sup> the Board utilized the same test as that in **Bhagwandeem** in finding that the appellants, maxi-taxi operators on routes 2 and 3, were being treated differently from those on routes 1, 4, and 5, in that they were the only taxi operators required to submit to the control of the regulatory body in order to use the taxi stand, and the only ones required to pay a fee. It pointed out that there was no evidence put forward by the government to justify the difference in its treatment of the appellants as compared to other maxi taxi operators. It therefore disagreed with the conclusion of the Court of Appeal that the Government's treatment of the appellants did not amount to unequal treatment.

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<sup>36</sup> [2004] UKPC 21

<sup>37</sup> [2004] UKPC 21

<sup>37</sup> [para 18]

<sup>38</sup> [*supra*]



**[101]** From the authorities, it is apparent that in order to establish the existence of unequal treatment under section 13(3)(g) of the Jamaican Charter, it must be established that the complainant has been treated differently from similarly circumstanced persons or persons behaving in the same manner. The similarly circumstanced person must be a true comparator of the complainant, such that the relevant circumstances in both cases are the same or not materially different. In the case at bar, the parties are all users of the road providing public transportation and in my view the law itself is discriminatory. There was no justification under the law for such difference in treatment.

**[102]** In my view, the effect of the exclusive bus lane is that JUTC buses are receiving preferential treatment in being allowed to traverse the particular exclusive portions of the Highway thereby travelling without being delayed by traffic. The RTA buses, along with other buses, and indeed all other traffic, do not have that privilege. It must follow logically, that westbound traffic, that is, traffic proceeding towards Spanish Town, is also impeded, as one lane is removed from use by westbound traffic in order to allow for its use by the JUTC buses travelling in the opposite eastbound direction.

**[103]** In my view, this amounts to unequal treatment. JUTC, a company in the business of public transportation is afforded the privilege of bypassing any delays there may be in the eastbound lanes of the Highway. However, other members of the travelling public, in particular, the RTA members, who are also in the business of public transportation, albeit in a different region from the JUTC, are subject to the vagaries and delays of the traffic on the Highway.

**[104]** However, there is no evidence that JUTC did any action to cause the unequal treatment. They were the beneficiaries of the designation and cannot be held liable for the unequal treatment which resulted from the creation of the exclusive lane and the consequent restriction of the Highway.

*Are RTA and JUTC competitors?*

- [105]** There was much argument as to whether or not RTA and JUTC are competitors. The argument is based on the premise that it is only if they are competitors that one can assess the effect of the exclusive lane on RTA's rights. Otherwise, it is contended, any such analysis would be inappropriate.
- [106]** I do not agree that the determination as to whether or not they are competitors is a factor in assessing if RTA buses are treated unequally from JUTC buses on the Highway. The RTA is not only an association for the bus drivers who may be potential competitors of JUTC. Rather it is also to be considered simply as an entity existing in Jamaica, entitled to equality of treatment with other entities similar to it. Both the JUTC and RTA are similar to the extent that each provides public transportation.
- [107]** To my mind, the inequality created by the exclusive bus lane would be worse if competitors of the JUTC are involved. This would be so because JUTC would gain unfair economic advantage over a competitor by being able to make quicker, and therefore more frequent trips, with consequent economic advantage.
- [108]** Notwithstanding this, in my view, the relationship of RTA to JUTC does not matter. What matters is that one set of buses is being singled out for what amounts to preferential treatment. It is treatment which allows JUTC to have easy passage through congested traffic in preference to all other users of the road, including the RTA. Any increased revenue is but a consequence of that preferential treatment, so that, whether or not they are competitors is irrelevant in my opinion. The easy passage through the traffic, with at least the resulting saving of time, amounts to preferential treatment, even if there were no obvious economic advantage.
- [109]** In any event, there must be a place where the KMTR ends and at that point the RTA buses are licensed to load and unload passengers. Clearly, at those boundaries a passenger has the choice of travelling on the RTA bus or on the

JUTC bus. At least at those locations the RTA and JUTC buses become competitors. The passenger on the RTA bus would expect to encounter normal traffic on the Highway unlike the passenger on the JUTC bus who would expect to encounter reduced traffic because of the restricted lane of the Highway which the JUTC alone is permitted to use.

*Unequal treatment before which law?*

[110] I turn now to consider the correctness of a declaration that, in essence, the actions of the Commissioner of Police breached the RTA's constitutional right to equality before the law.

[111] It is undisputed that the police officers actually placed cones on the road to restrict the use of the lane for the JUTC buses only<sup>39</sup>. In my view therefore the Commissioner of Police would share responsibility for the resulting unequal treatment of the RTA arising from the restriction of the lane.

[112] The remedy being sought is for a declaration that the right to equality before the **law** was being breached. (Emphasis supplied). What is the law to which reference is being made in the case at bar? In considering this right, Counsel Mr. Wildman invited this Court to adopt the definition of "*law*" found in the Constitution:-

*"1 (i) 'law' includes any instrument having the force of law and any unwritten rule of law..."*

[113] There is no evidence that the police were enforcing any written law when they restricted use of the exclusive lane. The defendants refer to a policy or to directives that created the exclusive lane. In my opinion, that policy or directive

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<sup>39</sup> Paragraph 12, Affidavit of Godfrey James, filed October 8, 2014

must, in these circumstances, be regarded as an instrument having the force of law (if the policy directive were written), or as an unwritten rule of law (if it were oral) within the meaning of the Charter.

[114] I say that because the policy has laid down a particular behavior which has to be obeyed on pain of penalty, that is, the JUTC buses alone must be allowed to traverse the exclusive lane. Although there is no evidence of the penalty for disobedience, the evidence indicates clearly that the police are present to actively enforce adherence to the dictate. The inference is that disobedience will not be tolerated, as the policy or directive has the force of law.

[115] Indeed, Senior Supt. Lewis testified that if a motorist tries to disobey the demarcation the police would have stopped him/her, would give directions, and depending on what happened thereafter, may or may not prosecute under s. 20 of the Constabulary Force Act, for failing to obey a constable's command.

[116] Another issue which would have to be determined is whether upholding the right of others to equality before that law, would prejudice the rights and freedoms of others. That issue is discussed below.

**Right to equitable and humane treatment by any public authority in the exercise of any function**

[117] The other claim is that by restricting the lane of the Highway, the 1<sup>st</sup> and 2<sup>nd</sup> defendants breached the RTA's right to equitable and humane treatment by any public authority in the exercise of any function (section 13(h) of the Charter).

[118] JUTC is a beneficiary of the designation and of its implementation. There is no evidence that the company itself restricted a portion of the Highway. There is no evidence of the JUTC doing anything with regard to the exclusive bus lane apart from being allowed to access it exclusively. JUTC has not breached any constitutional right.

[119] The other portion of the 2<sup>nd</sup> declaration sought is that the police in restricting the use of the lane breached RTA's constitutional right to equitable and humane treatment by any public authority in the exercise of any function. It is undisputed that the police officers actually restricted use of the lane by the JUTC, and that the Commissioner of Police is in charge of the police officers.

[120] One of the first questions therefore must be whether the treatment of RTA by the police was equitable and humane? In my view, "equitable and humane" should be viewed as being very similar descriptions. There is no allegation and certainly no evidence of any inhumane treatment of RTA by either defendant. Nor can it be reasonably argued that the designation which allowed for the implementation of the exclusive lane, in and of itself, prescribed for treatment of the RTA in a manner which would not be equitable and humane.

[121] To my mind the evidence displays unequal treatment of RTA by the police, not inhumane and inequitable treatment.

### **Circumstances under which relief is to be granted**

[122] Several authorities guide the principles under which relief should be granted where constitutional breach is alleged. Recently in **Maurice Tomlinson v TVJ Ltd and others** [*supra*] Sykes J reviewed those principles. There, he said that for the complainant to succeed in a claim for constitutional relief, the claimant must show that:

*"1) he has sufficient standing to bring this claim, that is, he must*

*show that a Charter right has been, is being or is likely to be infringed in relation to him;*

*2) that the act he wishes to do or has done is protected by the Charter, that is, the conduct must be within one or more of the*

*provisions of the Charter;*

*3) the defendants are bound by the right(s) claimed;*

*4) the defendants' conduct infringed his Charter right;*

*5) There are no other adequate means of redress.”<sup>40</sup>*

**[123]** Here, RTA through its member, has provided evidence seeking to show that:

1) the Charter right to equality before the law is being infringed;

2) the 2<sup>nd</sup> defendant is bound by this right;

3) the 2<sup>nd</sup> defendant's restriction of the highway infringed RTAs right to equality before the law; and

4) there are no other adequate means of redress.

**[124]** It is true that the claimant has not joined in this suit the Minister of Government who, the evidence shows, purported to extend the period in which the exclusive lane would continue to exist. The claimant did not do so despite references to that omission by Campbell J when he was considering the application for leave for judicial review in this matter. Had the RTA specifically claimed against the Minister, the claim would have challenged the proverbial root of the infringement. As the suit now stands the remedy can only be against the Commissioner of Police insofar as it concerns the police actually placing items on the road to allow for preferential movement of JUTC buses on the Highway. In my view there are no other adequate means of redress for that particular infringement in the circumstances as presented,

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<sup>40</sup> [2013] JMFC Full 5.

- [125] The argument that the claimant ought to amend this application to add the Minister as a defendant, then to renew the application for judicial review does not find favour with me. There would be a very live challenge of delay to any such amended proceedings, and any such challenge would likely be insurmountable.
- [126] Then too, there has been a submission that RTA ought to apply to be allowed to use the exclusive bus lane, and if that application is refused, thereafter apply for judicial review of that refusal. To my mind, that approach does not provide an adequate alternative means of redress. It is uncontroverted that the bus lane is for the exclusive use of the JUTC. Why then should the RTA be required to make an application which is expected to fail, in order to thereafter use that failure to seek permission to access the Courts for a resolution of the issues?
- [127] In my opinion no good purpose would be served by pursuing that route. It does not provide an adequate alternative means of redress. The additional procedures would only lengthen proceedings. At the same time, the issues of costs to the litigants and the appropriate use of judicial time are of paramount importance. In my view the aim of judicial proceedings is to obtain a fair and just resolution of the issues in accordance with the law, and in a timely manner.
- [128] There is another requirement related in the *Tomlinson* case, [*supra*] concerning relief for a constitutional breach, and that is that “*the act he wishes to do or has done is protected by the Charter, that is, the conduct must be within one or more of the provisions of the Charter.*” That would not be applicable here. In the *Tomlinson* case the claimant wished to perform a particular act. In the matter at bar, the claimant does not wish to perform any particular act. Rather, he wishes the defendants to cease performing the act of restricting the Highway for the sole advantage of the JUTC.

[129] In **Banton and others v Alcoa Minerals of Jamaica Inc and others**<sup>41</sup> Parnell J discussed what needed to be shown before an aggrieved person is likely to succeed with his claim before the Constitutional Court. The learned Judge opined that the claimant should be able to show firstly that he has a right personal to him and guaranteed under the Constitution which has been or is likely to be contravened. Then he must show that he is the proper person to bring the claim, that his complaint is substantial and adequate and that the controversy or dispute which has prompted the proceedings is real.

[130] In discussing the further requirement that there is no other avenue available whereby adequate means of redress may be obtained, the learned judge added, at page 304:

*“...[I]f the complaint is against a private person it is difficult, if not impossible, to argue that adequate means of redress are not available in the ordinary court of the land. But if the complaint is directed against the State or an agent of the State it could be argued that the matter of the contravention alleged may only be effectively redressible in the Constitutional Court.”<sup>42</sup>*

[131] [126] In my view, in the circumstances here, where the contravention is by the police, there is no other adequate avenue of redress available.

### **Prejudice to rights of others**

[132] The Charter’s provisions are for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.<sup>43</sup> The

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<sup>41</sup> (1971) 17 WIR 275

<sup>42</sup> Ibid.

<sup>43</sup> Section 13, The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011



Charter guarantees particular rights, save only as may be demonstrably justified in a free and democratic society.

[133] The Commissioner of Police has not provided evidence to justify the actions of his officers. In order to deprive the RTA of the right to equality before the law it must be shown that if their right is protected the rights of others would be infringed. The Police Commissioner has not asserted or provided evidence that there would be any such infringement of the rights of others. Nor has he provided evidence that the restrictions imposed on the claimant's rights are demonstrably justified in a free and democratic society as the Constitution requires<sup>44</sup>. In my view the need to make the JUTC profitable by 2017 , which was stated as a reason for the exclusive bus lane, would not justify the actions of the police in restricting movement of certain vehicles.

[134] In the absence of showing a legal basis to remove the right to equal treatment before the law, the restriction of the lane by the police can, in my view, be properly regarded as being in breach of s. 13 (3) (g) of the Constitution. The JUTC buses are permitted access to a lane of a Highway restricted exclusively for them whereas the RTA buses are not so permitted.

[135] Consequently I would make the declaration concerning the breach by the 2<sup>nd</sup> defendant, that is, the Commissioner of Police, of the right to RTA to have equal treatment before the law.

[136] **The third relief** sought is for a “permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants and or agents or howsoever described from restricting a portion of the right hand side of the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant **ONLY** travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6 a.m. to 8 a.m.”.

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<sup>44</sup> Ibid

[137] Having declared the breach as per **paragraph 125** above, the relief sought of a permanent injunction as against the 2<sup>nd</sup> defendant would follow. It has come to be accepted that an injunction is now permissible against officers of the Crown.<sup>45</sup>

## **DAMAGES**

[138] Precise evidence of damage suffered was not presented. There was some mention of a nonspecific amount which was personally lost by Mr. James, a director of RTA. No evidence was placed before the court showing any amounts claimed by RTA itself, which should be properly considered for an accurate assessment of damages.

[139] That is perhaps not surprising because the task of garnering such evidence would be herculean. At the very least, what is lost to an RTA member traversing the Highway at the restricted user time, is the value of the difference in time taken to traverse the Highway in the unrestricted lanes at a particular time as opposed to the time taken to traverse that same distance in the restricted exclusive lane at that same time. However, the claim is not by members of the RTA, either individually or as a group. This claim is by the RTA itself. In order to assess damages therefore there would have to be evidence of loss to RTA itself, due to the restriction of a portion of the Highway. There is no such evidence and consequently an award for damages would not be appropriate.

## **CONCLUSION**

[140] The evidence is that from November 2013 a directive was issued by the Police Traffic Division purportedly designating a certain portion of a lane of the Mandela Highway for the exclusive use of JUTC buses from Monday to Friday, 6 a.m. to 8 a.m. Although all other users of the Highway, including RTA buses, can still use the other lanes of the Highway, in my opinion, they are being treated unequally

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<sup>45</sup> In re M [1994] 1AC 377

before the law in that only JUTC buses are permitted to traverse that designated portion of the Highway free of any traffic, apart from the other JUTC buses.

[141] The Police do not have the power to make such a designation nor to consistently and regularly restrict movement of traffic to favour one group of motorists only. In this regard, their actions are, in my view, in breach of the constitutional right of the claimant, the RTA, to equality before the law under section 13(3)(g) of the Charter. In the circumstances I regard a permanent injunction against the Police as being appropriate to prevent further breach.

[142] In my opinion there is no evidence of loss suffered by the RTA itself and damages would therefore not be assessable.

[143] The JUTC is a beneficiary of the exclusive bus lane and is not liable for its effect on other parties' rights. The Minister associated with the designation of the exclusive bus lane was not sued in this matter and I therefore do not consider if he could have been properly sued or should have been sued. My determinations concern the entities which were in fact sued.

[144] I would therefore make the following orders:

1. **Declaration** that the **2<sup>nd</sup> Defendant** is not empowered by legislation to designate the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Monday to Friday from 6:00 a.m. to 8:00 a.m.

2. **Declaration** that the restriction of a portion of the right hand side of the West Bound section of the Mandela Highway by the **2<sup>nd</sup> Defendant** to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m., is in breach of Section 13 (3) (g) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act.

**3. Permanent injunction** restraining the **2nd Defendant**, their servants and or agents or howsoever described from restricting a portion of the right hand side of the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6 a.m. to 8 a.m.

4. One half of the claimant's costs, to be agreed or taxed, is awarded to the claimant to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, that is, the Commissioner of Police and the Attorney-General.

**McDONALD J.**

**[145]** By way of Fixed Date Claim Form filed on October 8, 2014 the claimant seeks constitutional reliefs against the Defendants as follows:-

1. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not empowered by law to designate the West Bound Section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.
2. A declaration that the restriction of a portion of the right hand side of the West Bound Section of the Mandela Highway by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Monday's to Friday's from 6:00 a.m. to 8:00 a.m. is in breach of The Charter of Fundamental Rights and Freedom's Constitutional Amendment Act, section 13(3)(g) and (h) [amendment made on June 29, 2015 in Open Court] and is therefore null and void and of no effect.

3. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants and or agents or howsoever described from restricting a portion of the right hand side of the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.
4. Damages to the Claimant to be assessed for the illegal actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in breaching the Claimant's Constitutional rights in restricting the flow of traffic on the right hand side of the West Bound section of the Mandela Highway allowing buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.
5. Aggravated and exemplary damages for breach of the Claimant's rights.

**[146]** Based on *Durity v Attorney General* (2008) UK PC 59, Mr. Wildman pointed out that the Court in awarding damages in its constitutional jurisdiction ought to avoid expressions such as aggravated or exemplary damages as punishment in the strict sense was not its object, the purpose of the award was to vindicate the right and not to punish the executive. Mr. Wildman withdrew the claim for aggravated and exemplary damages.

**[147]** Evidence of Mr. Godfrey James

The evidence of the Claimant is through Mr. Godfrey James who filed an affidavit in support of the FDCF in which he asserts that he is a bus owner since 1982 and a member of the claimant, the Rural Transit Association Limited.

The claimant is a company incorporated under the Companies Act to promote the interest of private individuals who are engaged in the provision of Public Passenger Transportation in Jamaica. He avers that in November 2013 a

directive was issued by the Police Traffic Division that the police would be designating a portion of the Mandela Highway, the right hand side of the West Bound section to allow JUTC buses ONLY travelling from Spanish Town to Kingston, to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.. Mr. James alleges that this exclusive demarcation allowed the 1<sup>st</sup> Defendants' buses to have exclusive privilege by travelling speedily and without impediment between Spanish Town and Kingston.

**[148]** He alleges that this designation of exclusive bus lane gave the JUTC's buses an advantage over his buses and over those of other members of the Claimant who also use the Mandela Highway to transport passengers to and from the corporate area. The Claimant stated that in transporting passengers into Kingston, the members of the Claimant including himself are unable to compete with JUTC buses because of the unfair advantage given to the JUTC by the said designation resulting in significant loss in passengers. Mr. James states that his business is directly affected by the said policy which has resulted in massive decline in revenue due to this preference that passengers have expressed in travelling on JUTC buses during the designated period.

**[149]** The claimant alleges that the policy was defended by Mr. Colin Campbell, general manager of the JUTC both on national radio and television, and subsequently proclaimed as a success by the JUTC after the initial run in November 2013.

**[150]** In cross-examination Mr. James states that he currently owns five buses, two operate in the Kingston Metropolitan area and three operate from Kingston to the rural areas. Road license for his Toyota Coaster bus PG 4726 was put into evidence as Exhibit I. He said that this license permits him to pick up in the Kingston Metropolitan Transport region and continue through the rural area.

**[151]** He operates this bus strictly in accordance with the terms and conditions he has from the Transport Authority. When shown Exhibit I he stated that it prohibits him from picking up passengers in the KMTR and set down those passengers in

KMTR. During cross-examination it was discovered that Exhibit I contained two licences stapled together, which were separated as Exhibit I (a) and I (b). Mr. James' evidence is that Exhibit I (a) is the licence issued on 2<sup>nd</sup> March, 2015 and in force until 2019 and Exhibit I (b) is the licence from April 2011 in force until March 2015. He said that the difference in the licences is in respect of condition two (2). Condition 2 of Exhibit 1 (b) reads:-

“The approved stopping points at which passengers may be taken up and / or set down shall be such places as specified by the sign “BUS STOP” or where no signs are provided in rural areas, at such places which are convenient along the prescribed route. The operator shall ensure that at all times in setting down and / or picking up the safety of the passenger / road user is the primary consideration. If the Licensee's – route description permits entry into the Kingston Metropolitan Transport Region (KMTR), the operator of the approved motor vehicle shall ONLY set down or pick up passengers at the designated “BUS STOPS” and TERMINAL FACILITIES which are specified in directions one and two of this Road Licence. The operator of the approved motor vehicle shall not pick up a passenger within the KMTR and set down that same passenger within the KMTR.”

Condition 2 of Exhibit I (a) reads:-

“The approved stopping points at which passengers may be taken up and or / set down shall be such places as specified by the sign “Bus Stop” or where no signs are provided at such places.”

**[152]** Mr. James' evidence re condition 2 is that he was not aware of the change, it was when he went and picked up the licence and went home, he realized that there was a change. He asked the transport authority why the change and was told that they had to do the change.

**[153]** It is also noted that there is a difference between condition 10 in both licences.  
Exhibit 1(b) – condition 10 reads:-

“The licensee shall observe and comply with the condition imposed by section 3 subsection 4 Public Passenger Transport (Corporate Area) Act”

No such act appears to exist. Whereas condition 10 of Exhibit 1(a) reads:-

“The licensee shall observe and comply with the condition imposed by Section 3 Subsection 4 Public Passenger Transport (Kingston Metropolitan Transport Region) Act”

Section 3(1) of the Public Passenger Transport (Kingston Metropolitan Transport Region) gives the Minister power to grant exclusive transport licensed to operate in the KMTR by means of stage carriages or express carriages or both.

Section 3(2) provides:

“Subject to the provisions of this section during the continuance in force of any exclusive licence granted under section (1) no person shall hold or be granted a road licence authorizing the use of any stage carriage or express carriage within the Kingston Metropolitan Transport Region and no person except the Licensee shall carry within the Kingston Metropolitan Transport Region any person on any vehicle while that vehicle is being used as a stage carriage or express carriage.”

Section 3(3) provides:-

Nothing in subsection (2) shall prevent



- (c) “the grant of holding of a road licence authorizing, subject to the condition referred to in subsection (4), the operation of any stage carriage service or express carriage service on any route which is partly within the Kingston Metropolitan Region or the carriage of passengers on any licence operated under and in accordance with such licence.....”

Section 3 (4) provides:-

“the condition referred to in paragraph (c) of subsection (3) is that no passenger carried on the service shall be taken up at any point within the Kingston Metropolitan Transport Region or not more than 440 yards beyond the boundary of that area and set down on the same journey at any point within that area or not more than 440 yards beyond the boundary of that area unless the licensee has consented in writing to the taking up and setting down of passengers as aforesaid on such service and for the avoidance of doubt it is expressly declared that any consent given by the licensee for the purpose of this paragraph may be given subject to such conditions as the licensee may think fit.”

Section 3 (5) provides:-

“Every road licence in force at the date of the coming into force after the 31<sup>st</sup> day of May, 1953, of any exclusive licence granted under subsection (1) which authorizes the operation of any stage carriage service or express carriage service on any route partly within the Kingston Metropolitan Transport Region shall be deemed to be subject to the conditions referred to in subsection (4) and have effect in all respects as if that condition had been attached to the road licence.”

The issue that arose concerning the differences between the two licenses can be solved by subsection (4) and (5) Miss Larmond submitted that what is contained

in Condition 2 is something in the nature of a “codification” of Section 3(3) and (4) and the licensee would be bound by the Act, which is in force, irrespective of what it is called. Miss Larmond conceded that the Act was erroneously stated on the licence by the Transport Authority but the licensee would still be bound by the provisions in the KMTR Act in particular subsection (3) and (4). I agree entirely with Miss Larmond’s submission and find that the holder of such road licences must be deemed to be aware of the specific provisions and adhere to same.

**[154] Evidence of Mr. Kirk Finnikin**

Mr. Finnikin filed his affidavit on 19<sup>th</sup> November, 2014 in his capacity of Deputy Managing Director, Operations of the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant is a private limited liability company and its sole shareholder is the Accountant General of Jamaica. He denies that the 1<sup>st</sup> Defendant is an arm of the Government. Paragraph 9 of the Affidavit – states that a rural transport operator would operate outside the Kingston Metropolitan Transport Region (KMTR), and the 1<sup>st</sup> Defendant only operates within the KMTR. Accordingly the 1<sup>st</sup> Defendant would not in the normal course of things have any significant dealings (if any at all) with a rural operator. Paragraph 10 reads:- that the KMTR boundaries go beyond Kingston and the corporate area and extend to and include all of the Mandela Highway and Spanish Town in the middle of Saint Catherine as well as Hellshire in lower Saint Catherine.

**[155]** Paragraph 14 of his affidavit states that the 1<sup>st</sup> Defendant is the holder of the Public Passenger (Kingston Metropolitan Transport Region), Licence 1988 granted pursuant to section 3 of the Public Passenger (Kingston Metropolitan Transport Region) Act 1947 with an executive mandate to provide and keep for the operation of stage and express carriage services, vehicles which offer at least 25, 000 seats for the carriage of passenger in the KMTR.

**[156]** Paragraph 15 states that pursuant to section 3(2) of the Public Passenger (KMTR) Act, the Minister may, with the written consent of the Exclusive Licensee (1<sup>st</sup> Defendant), grant road licence (referred to as sub-franchise licence)

authorizing the operation of stage / or express carriage on a route “wholly within” the KMTR, and the 1<sup>st</sup> Defendant’s consent may be given subject to such terms and conditions determined by the 1<sup>st</sup> Defendant with the Minister’s approval.

**[157]** Paragraph 17 states that the KMTR Act does not empower a rural operator to also operate within the KMTR without the written consent of the Exclusive Licensee (the 1<sup>st</sup> Defendant). Section 3 of the Public Passenger (KMTR) Act states in relation to rural operations that :

“no passenger carried on the service shall be taken up at any point within the Kingston Metropolitan Transport Region or not more than 440 yards beyond the boundary of that area and set down on the same journey at any other point within that area or not more than 440 yards beyond the boundary of that area.”

Mr. Finnikin stated at paragraph 18 of his affidavit that the 1<sup>st</sup> Defendant has not so consented and accordingly Mr. James should not be picking up additional passengers once within the KMTR, such as while in Spanish Town or on the Mandela Highway, or along Washington Boulevard and other roads, and once within the KMTR should not be dropping off passenger except at the termination point within the KMTR, or, if on the return leg, should not be dropping off passengers until outside the KMTR and in the rural area again.

**[158]** At paragraph 29 he said that the 1<sup>st</sup> Defendant does not pick up passengers outside the KMTR and Spanish Town is within the KMTR. The only way that the Claimant and other rural operators can see a decline in passenger’s is if they are picking up passengers in Spanish Town and within the KMTR.

**[159]** It is the Claimant’s contention that the Licence Exhibit 1(B) allows him to operate between Linstead to Cross Roads, via Washington Boulevard, Molyne’s Road and Half-Way-Tree. Mandela Highway is the major thoroughfare for Public Passenger vehicles travelling between the rural areas and the corporate area.

[160] It is the Claimant's case that this licence issued for period 16<sup>th</sup> April, 2011 to 31<sup>st</sup> March, 2015 allows him to pick up along the way. The directive by the police concerning the exclusive designation of Mandela Highway was made sometime in November 2013 during the tenure of licence Exhibit 1(B).

[161] At paragraph 13 of his affidavit Mr. Finnikin addresses this . He states that if Mr. James was issued with licences by the Transport Authority as alleged particularly with licences which allegedly permitted him to operate a route which originated from outside the KMTR and ended within the KMTR, such as Linstead to Cross Roads, or Guanabovale to Papine as stated, the licences should not be so worded so as to permit the Claimant to pick up additional passengers once within the boundaries of the KMTR (save for the termination point for the return trip), and any licence that permits a rural operator to pick up additional passengers within the bounds of the KMTR (save for the termination point for the return trip) would either be erroneously issued by the Transport Authority or the Transport Authority unknowingly acted ultra vires.

[162] In cross-examination Mr. Finnikin said that he was part of an arrangement for the exclusive bus lane along Mandela Highway and the Jamaica Constabulary provided enforcement. The request to the police to put up cones to ensure that this exclusive lane was put in place came out of shareholders deliberations. Part of the purpose for the implementation of the policy was to ensure the profitability of JUTC. He said that the JUTC is owned by the Government of Jamaica. Persons like Mr. James are not competitors of the JUTC, they provide a completely different service. He knows that the announcement made by Mr. Lewis was to give notice to the public that part of the lane was to be designated exclusively to the JUTC. Mr. Colin Campbell – announced the policy and said that it was to be a trial run initiative.

[163] **Evidence of Senior Superintendent Andrew Lewis**

Former Senior Superintendent Lewis states that he headed the Traffic Division since November 1, 2013. In his affidavit filed on 19<sup>th</sup> November, 2014, he stated

that he was aware that a lane on the Mandela Highway was exclusively demarcated for the use of JUTC buses. On taking over from Senior Superintendent Radcliffe Lewis he was fully briefed. The implementation commenced on 1<sup>st</sup> November but the planning was under Senior Superintendent Radcliffe Lewis. He denies that the Traffic Division made any directive or implemented any such policy demarcating any portion of the Highway for the sole occupation of JUTC buses.

He said that the role of the traffic division in the exclusive bus lane operation was to ensure that there was no obstruction or congestion and that there is free flow of traffic on the Highway during the period that the lane is exclusively used for the JUTC buses. The police took their authority to regulate, control and prevent congestion from Section 21 and 22 of the Jamaica Constabulary Force Act.

**[164] General principles in relation to establishing a constitutional claim**

Mr. Wildman submitted that the claim is not confined to Mr. James, any citizen of Jamaica would have standing to bring this claim, a breach of charter. He submitted that the House of Lords case *Inland Revenue Commissioners (1982) AC 617* liberalized the test on standing and standing is now considered as an issue related to merit. He submitted that no one can say this is not a case of substantial merit where the Constitution is being violated with impunity by the police and JUTC.

**[165]** Both *Inland Revenue Commissioner (supra)* and *Farooque v Secretary of the Ministry of Irrigation, Water Resources and Flood Control and others (2000) 1 LRC 1* cited are cases dealing with an application for judicial review and Rule 56.2 CPR gives a definition of “sufficient interest.”

**[166]** Miss Larmond submitted that as far as judicial review is concerned, and the test for sufficient interest she regards *Inland Revenue* as seminal authority, but when dealing with a constitutional claim - Parnell J in ***Banton and Others v Alcoa Minerals of Jamaica Incorporated and Others (1971) WIR*** and Sykes J in

**Maurice Tomlinson v CVM Ltd (TV) and PBC (2013) JMFC Full 5** both spoke of “standing” and defined it.

Sykes J in what may be considered an update version said in order to succeed before the Constitutional Court, the Claimant must show:

- (1) “He has sufficient standing to bring this claim, that is he must show that a Charter right has been, is being or is likely to be infringed in relation to him;
- (2) The act he wishes to do or has done is protected by the Charter, that is, the conduct must be within one or more of the provisions of the Charter;
- (3) The Defendants are bound by the right(s) claimed;
- (4) The Defendants’ conduct infringed his Charter rights;
- (5) There are no other adequate means of redress.”

**[167]** The court therefore has to examine the nature, content and meaning of the right which has been said to be infringed.

**[168]** Section 13 (3) (g) – the right to equality before the law by any public authority in the exercise of any function.

Section 13(2) of the Charter provides the following:

Section 13(2)

“Subject to sections 18 and 49, and to subsection (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –

- (a) This Chapter guarantees the rights and freedom set out in subsections (3) and (g) of this section and in Sections 14, 15 (16) and 17; and
- (b) Parliament shall pass no law and no organ of the state shall take any action which abrogates, abridges or infringes those rights.”

Section 13 (3) (g) and (h) provide:

“the rights and freedoms referred to in section (2) are as follows:-.....

- (g) the right to equality before the law;
- (h) the right to equitable and humane treatment by any public authority in the exercise of any function.”

**[169]** In *Central Broadcasting Services Limited and Another v Attorney General* (2007) 2 LRC, the Judicial Committee of the Privy Council offered guidance on the interpretation of the following similar provisions under Section 4 of the Trinidad and Tobago Constitution.

- “(b) the right of the individual to equality before the law and the protection of the law.....
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions.....”

**[170]** In *Central Broadcasting Services Ltd.* Lord Mance noted at paragraph 20 :

“The Board has, however, one observation to make on the treatment in the courts below of inequality. In both courts it was assumed that the unequal treatment which was established justified a breach both of s4(b) and s4(d) of the Constitution. The Board

does not consider this to be correct. Section 4(d) is the provision covering circumstances such as the present. Section 4(b) is, in the Board's view directed to equal protection as a matter of law in itself and its administration in the Courts"

**[171]** I find that Section 13 (3) (g) of the Jamaica Constitution may be interpreted in the same way as Section 4(b) of the Trinidadian Constitution having regard to the similarity of the provisions.

It is Miss Larmond's submission that the complaint in the case at bar does not relate to the law itself or its administration in the courts but to the operation of a temporary policy / project. She asserted that there has been no challenge to the constitutionality of any statute or regulation. She concluded that Section 13 (3) (g) is not engaged and that no breach of that provision may therefore be established.

Mr. Scott QC for the 1<sup>st</sup> Defendant submitted that Central Broadcasting offers no assistance to the Claimant as it highlights that equal treatment before the law involves the law itself and its administration in the Courts, neither of which is an issue in the present case. The Claimant itself has described the impugned actions as a policy. The right to equal treatment before the law is obviously not engaged.

**[172]** Mr. Wildman referred the Court to Sections 1 and 2 of the Constitution:

Section 1 - A law as being defined in the Constitution includes any instrument having the force of law and any unwritten rule of law and law and lawfully shall be construed accordingly.

Section 2 - provides

“subject to the provisions of Section 49 and 50 of this Constitution, if any law is inconsistent with this Constitution,



this Constitution shall prevail and the other law shall to the extent of its inconsistency be void.”

- [173] Mr. Wildman relied on the definition of law and the unwritten rule of law by which law is defined in the Constitution. The Claimant is saying that the policy being implemented which would be an unwritten law resulted in the demarcation.
- [174] He asserted that Senior Superintendent Andrew Lewis told the Court that the job of the police was to enforce this designation so although there is no written law to this effect, the police have given effect to an unwritten law which conflicts with the Constitution. He said, that the directive of the police to designate Mandela Highway by the use of cones, falls squarely within the ambit of laws that conflict with the Constitution. So it cannot be said that because there is no parliamentary approval, or parliamentary law that there is no law which conflicts.
- [175] Mr. Wildman contends that the policy being implemented resulting in the demarcation is an unwritten law as defined in Section 1 of the Constitution.

I find that there is no basis for that interpretation to be attached to the definition of law in the Constitution.

- [176] Mr. Wildman placed reliance on *Andrews v Law Society of British Columbia* (1989) 1SCR 143, 1989 Can L12 as providing good guidance to the Court in determining the illegality under the Constitution and supporting his submission of equality before the law.
- [177] In *Andrews* case, the Respondent *Andrews*, a British subject permanently resident in Canada, met all the requirements for admission to the British Columbia Bar except that of Canadian citizenship. The constitutional question was whether the Canadian citizenship requirement for admission to the British Columbia bar infringed or denied equality rights guaranteed by Section 15 of the Canadian Charter, and if so whether that infringement was demonstrably justified in a free and democratic society. The court found that there had been an

infringement and further that it was not demonstrably justified in a free and democratic society.

Justice Wilson said this:-

“I agree with my colleague that a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class.”

**[178]** Mr. Wildman said that in the instant case this designation by the police in favour of JUTC is to bar all class of people users of public passenger, providers of public passenger transport that class, solely on the ground that they are not part of the JUTC operation. He contends that government in the affidavit evidence given by Mr. Finnikin and Senior Superintendent Lewis doesn't discharge the burden of proof which rests on the Crown to justify the infringement under Section 13 of the Charter. The test is once the Claimant has determined that the impugned action collides with a guaranteed right, the onus shifts to the Government or state to justify it.

**[179]** I am of the view that Andrews' case does not assist the Claimant's case for two main reasons:

Firstly the section of the Canadian Charter that was considered by that Court is substantially different from the section under consideration in this case. Section 15 of the Canadian Charter provides:

“(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability

- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, natural or ethnic origin, colour, religion, sex, age or mental or physical ability.”

[180] The concept of equality before the law under the Canadian Charter clearly involves discrimination on the basis of natural origin etc. I agree entirely with Miss Larmond’s submission that there would have been a clear basis for the finding that the respondents were being treated differently based on their national origin. The Jamaican Charter however treats discrimination on the basis of sex etc as a separate right.

[181] The second reason is that in any event the Court in Canada was considering legislation, a law and so any comments coming and of that Court would have been predicted on a law and not on some policy which would have the force of law.

[182] In addition it is patently clear from Andrew’s as submitted by Mr. Scott QC that the question of justification of the infringement does not arise unless and until an infringement of the Charter is made out.

[183] Miss Larmond submitted that section 13 (3) (g) of the Charter is predicted on “law” as defined by the Constitution and that there is absolutely no factual substratum that would allow this Court to come to a finding that the Claimants right to equality before the law has been engaged let alone infringed. She submitted that “law” as defined in the Constitution does not include the impugned policy at bar to be classified as an unwritten rule of law.

[184] In **Arthur Baugh vs Curtis et al CL B099 of 1997** and **Matcam Marine Limited v Michael Matalon Claim No. A 0002/2011** cited by Miss Larmond the Court had to address Section 1 of the Constitution.

**[185]** In essence what was happening in Baugh's case was a question as to whether provisions which had existed prior to the appointed date of the Constitution would have been included in the interpretation of law and the court ruled that unwritten rule of law must include the common law as it relates to the Constitution.

At paragraph 12 of the judgment Sykes J said:-

“Since Lord Devlin's advice there has been a revolution in how constitutions are regarded and interpreted. The Judicial Committee of the Privy Council indicated that fundamental rights provisions are to be given a wide and liberal interpretation so that the citizen gets the fullest measure of protection offered by these provisions (He cites *Minister of Home Affairs v Fisher* (1980) AC 319 and *Lambert Watson v R* (2004) 64 WIR 241”

At paragraph 14 Sykes J said:-

“From these passages unwritten law must include the common law. If it were not so then what we would have had is the possibility of the common law prevailing over the constitution – a possibility inconsistent with the position that the Constitution is the supreme law of Jamaica. The effect of Lord Hope's analysis is that the authority of Nasralla has been severely weakened. What was not so vividly expressed in the majority was made plain by the concurring minority.”

**[186]** In the *Matcam Marine Limited* case the Court had to consider the Supreme Courts Jurisdiction in Admiralty cases and there was an Admiralty order in Council of 1962, which would have predated the Constitution. The question was whether it would fall within the meaning of unwritten rule of law.

**[187]** At paragraph 21, Sykes J said Section 1 (1) of the Constitution says 'law' includes 'any instrument having the force of law and any unwritten rule of law.' The Jamaican Admiralty Order in Council of 1962 is an instrument having the

force of law and it has continued in force without amendment or repeal. [Paragraph 22] From all this, it is clear that Admiralty jurisdiction of the Supreme Court of Jamaica is grounded in Section 2(2) of the Colonial Court of Admiralty Act of 1980 as modified by Section 1 of the Administration of Justice Act.”

**[188]** This case illustrates the Court considering what unwritten rule of law means, and the Court refers to an instrument, an order in council. So having regard to the definition contained in Section 1(1) of the Constitution of ‘law’, and the manner in which the Court has interpreted that section, I find that it could not be seen as including a policy that has been made, or a directive that has been given which does not have the force of law as contemplated by these authorities. I would respectfully adopt the observation of my learned colleague Mr. Justice Frank Williams when he states that “the difficulty that the claimant faces in light of the definition of law in Section 1 of the Constitution and the general undertaking of the scope of section 13 (3)(9),” is that the defendants have all described the creation of the exclusive bus lane as a policy or project and there has been no instrument having the force of law put before the court or any reference made to any rule of the common law which the court might consider as the source of the constituted breaches being complained of”.

**[189]** Has the Claimant established a breach of the right to equitable and humane treatment by any public authority in the exercise of any function.

Ms. Larmond submitted that a breach of this right in Section 13 (3) (h) of the Charter has not been established. She relied on two cases, the Hon. Mrs. Portia Simpson-Miller et al v Attorney General of Jamaica & Director of Public Prosecutions (2013) JMFC FULL CRT L, where the Court accepted that it was necessary for the claimants to demonstrate that persons behaving in the same manner are meted out different treatment based on the possession of distinguishing characteristics.

**[190]** She submitted that in order to establish the breach of the right to equitable and humane treatment, the claimant in this case would have had to adduce evidence regarding the nature of the entities/entity which it alleges have been or are being treated differently from it so as to enable the court to compare the entities and consider whether they were in similar circumstances or of the same category as the claimant. She submitted that the claim has failed to do this.

**[191]** It was Miss Larmonds' submissions that the facts demonstrate that the Claimant and JUTC are not behaving in the same way. The fact that they are both public passenger transports does not of itself lead to the conclusion that they are behaving in the same way.

She asserted that the two entities are not competitors as they are operating under two distinct streams. Exhibit 1(a) states that Mr. James a rural operator is prohibited from picking up passengers within the KMTR (which includes Spanish Town) to take them to another destination within the KMTR. On the other hand the licence allows the JUTC operator to pick up passengers outside the KMTR who have a destination within the KMTR and pick up passengers inside the KMTR who have a destination outside the KMTR.

**[192]** Mr. Scott Q.C submitted that there is no evidential material before the Court that JUTC breached the constitutional rights of the Claimant. He said that the evidence is clear that JUTC was the beneficiary of a privilege and this does not elevate it to be the party who breached another ones' Charter Rights.

The evidence of a request by JUTC to the Minister seeking an extension of the exclusive use of the lane for a further 6 months is inconsistent with JUTC having made the decision. See letter dated 29<sup>th</sup> January 2014 attached to affidavit of Mr. Finnikin signed by Mr. Campbell of JUTC and addressed to Minister Omar Davis. See also letter dated 22<sup>nd</sup> April 2014 from Minister Davis to Mr. Collin Campbell in which the Minister approved the extension of the exclusive bus lane until December 2014.

**[193]** I find that based on the unchallenged evidence that it was the Minister of Transport Water and Housing who approved the facility or privilege and the JUTC who became the beneficiary of the privilege and who is not the party who allegedly breached the Charter of Rights of the Claimant the JUTC cannot be held liable for any discrimination which the Claimant alleges to have suffered.

**[194]** It is the evidence of Mr. Finnikn that he was part of the arrangement for the exclusive bus lane along the Highway, however, I find that the Minister is the decision maker. He is not named as a defendant – or even as an intended party to this suit. I agree with Mr. Scott Q.C. assertion that the 1<sup>st</sup> Defendant is sole beneficiary of the decision that was made, should the Minister of Transport Works and Housing have a change of mind and withdraw permission, the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant would be constrained to comply and the project would be discontinued and there would be no exclusive bus lane to be used by the 1<sup>st</sup> Defendant.

**[195]** In his written submission, Mr. Scott, Q.C. raised the question of who had breached the Claimant's right (which is denied) and that this should be resolved at an early stage. The reason being if the person who has breached the Claimant's rights is not before the Court, then this court need to go no further and save judicial time and costs. However, this issue was not raised as a preliminary point and the Claimant's case was fully ventilated.

**[196]** I find that the person responsible for breaching the Claimant's rights if there is a breach, and I find that there is none, is not before this Court, and no relief/remedies sought can be granted against a beneficiary of a decision who has not himself breached the Claimant's rights.

**[197]** I find that the words equitable and inhumane are to be read conjunctively. Guided by the dictionary, I interpreted the word equitable to mean "fair"/"just". It does not mean equal. There is no evidence nor are there any pleadings of inhumane treatment on the part of the Claimant by the Defendants.

I do not find that the Claimant can successfully argue that given the factual circumstances, that the JUTC was granted an exclusive licence in the KMTR that rural operators and JUTC are not competitors, that other lanes are accessible to other road users, it cannot be said that the said policy/ has resulted in inequality and inhuman treatment to the claimant by the Defendants. I find that the claim has failed to meet the evidential threshold and requirements outlined in Banton and Tomlinson.

**[198] Role of Police**

Paragraph 10 of Mr. James' Affidavit makes reference to a directive issued in November 2013 by the Police Traffic Division headed then by Senior Superintendent Radcliffe Lewis. It is unknown whether this directive was oral or in writing.

**[199]** At paragraph 5 of Senior Superintendent Andrew Lewis' Affidavit he denied that the Traffic Division made any decision to so exclusively demarcate the said lane on the Highway for use by the JUTC. He denied in particular paragraph 10 of the James Affidavit and stated that the Traffic Division issued no such directive. At paragraph 6 he stated that he issued no such directive nor has he given any instruction for any such directive to be issued. I accept his evidence as being truthful.

**[200]** He stated that the role of the Traffic Division in the exclusive bus lane operation was to ensure that there was no obstruction or congestion and that there was a free flow of traffic on the Highway during the period that the lane was exclusively used for JUTC buses.

**[201]** The police are saying that they merely carried out their functions of directing traffic pursuant to Section 21 and 22 of the Constabulary Force Act. Section 58 of the Road Traffic Act is also applicable. The Claimant was not prevented from using Mandela Highway.



**[202]** I agree with Miss Larmond's submission that a traffic direction in relation to the use of a particular lane cannot and does not rise to the breach of a human or constitutional right. I also accept her submission that the evidence before the court is that the exclusive bus lane has permitted by the Minister of Transport and Works. The proceedings before the Court do not have to do with the decision or the validity of the decision of the Minister. The proceedings have to do with what is in the Fixed Date Claim Form, which is that the demarcation of the lane is in breach of certain rights, none of those rights have to do with the power or validity of the power exercised by the Minister.

**[203] Does the Claimant have adequate means of alternate redress**

Both Miss Larmond and Mr. Scott Q.C., are of the opinion that the Claimant has an adequate means of redress in the form of judicial review proceedings. Reliance was placed on *Smithfield Roads Ltd. Attorney General* (1992) 40 WIR 61 and *Pickersgill, Robert et al v the Attorney General and the Director of Public Prosecutions* (2013) JMFC FULL Ct 4.

**[204]** Miss Larmond submitted that certain arguments that could have availed the Claimant in Judicial Review proceedings have no place in the jurisdiction of this Court e.g. evidence that there was no notice of change in terms of the licence and that certain conduct had been displayed over a certain period of time and there was a sudden change. She submitted that in another Court, properly constituted judicial review court, those arguments could be properly canvassed. She made this submission against the background that she was asking this Court to disregard such complaints as having less weight in these proceedings.

**[205]** Mr. Scott QC argued that the Claimant clearly believed it had a just case for judicial review, and sought leave to apply for same. Further that the 1<sup>st</sup> Defendant acknowledges that in all the circumstances the appropriate path for the Claimant is by way of judicial review but that the Claimant failed to obtain leave due to deficiencies in its pleadings and that it failed to identify the decision maker and include the decision maker as a party. This is borne out in the

judgment of Justice Lennox Campbell in *Rural Transit Association Limited v Jamaica Urban Transit Company Limited, Commissioner of Police, Office of Utilities Regulation* (2014) JMSC Civ. 143. Additionally the project continues and the state of affairs complained of by the Claimant continues.

**[206]** He submitted that the Claimant remains at liberty to this day to once again file an application for leave to apply for judicial review,, this time properly indentifying the decision maker, and if this is done the Claimant will be all likelihood be granted leave.

He said that the prerogative remedies along with the damage remedies which may be ordered in judicial review are extensive, and are clearly adequate alternative means of redress. This particularly in light of the fact that breaches of constitutional right complained of appears to arise from the taking of a decision (a matter for judicial review) rather than same egregious breach.

I find that in all the circumstances the claimant has an adequate alternative means of redress in the form of judicial review. The issue of delay will arise but may not be an insurmountable hurdle. I find that the in all the circumstances the Claimant has an adequate alternate means of redress in the form of judicial review.

**[207] Injunction**

Having found that there has been no breach of the constitutional rights under Sections 13(3)(g) and (h) of the Constitution I decline to make any declarations in respect of the declarations, injunctive relief sought or order for damages to be assessed.

**[208]** In the event that I am incorrect, I will deal briefly with the issue of the application for the grant of a permanent injunction and that of damages. Section 16(1) of the Crown Proceedings Act provides:-

“In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that –

(a) Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance but may in lieu thereof make an order declaratory of the rights of the parties;...”

**[209]** Mr. Wildman’s position is that an injunction may be granted against the Crown and he relied on *Viralee Bailey-Latibeaudiere v Minister of Finance and Planning & Others – Claim No. 2013 HCV 04292* and *Gairy (Jennifer) v Attorney-General of Grenada (No. 2) (1999) 59 WIR 74*. The former case can be distinguished on the ground that it concerned an application for judicial review, not an application for constitutional redress. In judicial review cases, there is no dispute that an injunction can be granted against an officer of the Crown.

**[210]** In *Gairy’s* case there is a dissimilarity of facts from the initial case and the case dealt mainly with the power of the court to fashion a remedy in circumstances where a constitutional breach had been clearly established.

**[211]** In *Jamaica Bar Association v The Attorney General and The General Legal Council (2014) JMSC Civ. 179*. Sykes J considered whether there is power to grant an injunction or stay of the anti-money laundering regime until the matter is ventilated in the Courts and whether that injunction to issue against the Crown. Sykes J at paragraph 68 stated inter alia “this court is not convinced that the

Crown Proceedings Act has any applications to constitutional matters because at the time of its passage the public law litigation that the statute had in mind was judicial review and not declarations of unconstitutionality (This court was informed that the decision is on appeal). I am of the view that Section 16 of the Crown Proceedings Act would be applicable in the instant case.

**[212] Damages**

The evidence before the Court reveals that the Claimant is a duly incorporated company under the Companies Act of Jamaica, and has given Mr. James, who is a member permission to file an affidavit. Mr. James is an affiant not a party to the suit, he has not been appointed by the Court as a representative of the Claimant. Evidence of damages specific to him cannot translate to damages for the Claimant. (It is also to be noted that evidence of Mr. James' damages set out at paragraphs 18 and 19 of his affidavit are insufficient, sparse and very vague.)

**[213]** The Claimant does not own or operate buses in the public passenger transportation sector; it has not been pleaded that the Claimant claims in a representative capacity on behalf of its members and/or shareholders. No damages should be awarded in this case as none have been proved by the Claimant's.

**[214]** Paragraphs 1 – 4 of the Fixed Date Claim Form refused.

No order as to costs.

**Williams F. J,**

Background

**[215]** Most, if not all, Jamaicans would have some familiarity with the Mandela Highway. If any of us needs reminding, it is that highway that is the main thoroughfare between the corporate area of Kingston and St. Andrew on the one hand; and St. Catherine, on the other. It is a dual-carriageway that is heavily-travelled, with two lanes carrying traffic going from east to west (that is, from

Kingston to the direction of Spanish Town and its environs); and another two lanes carrying traffic travelling in the opposite direction. In recent times it has also become that thoroughfare that feeds the east-to-west leg of what we have come to know as Highway 2000, used by travellers whose journeys take them along the island's south coast.

**[216]** This claim has arisen from a change in the use of one of the lanes of the west-bound section of the carriageway: the northern lane of that section of the carriageway has been converted for the exclusive use (between the hours of 6 a.m to 9 a.m, Mondays to Fridays), of buses operated by the Jamaica Urban Transit Company Limited (the JUTC). The buses using that lane are permitted to travel west to east - that is, towards Kingston from the direction of Spanish Town. This conversion of use applies to that section of the northern lane of the east-to-west section of the dual carriageway, between the entrance to Plantation Heights (near to the area that is commonly referred to as "Six Miles"); and Caymanas Bay. It took effect on November 1, 2013 and is still in force today. So that, the west-bound section of the Mandela Highway has been converted to two-way traffic on those days and for those hours. It is the creation of this special lane for the exclusive use of JUTC buses that has led the claimant to file this claim.

Before proceeding to look at the remedies sought, we may now look at the entities that have been named as parties in this claim.

### The Parties to the Claim

#### The Claimant

**[217]** The claimant, the Rural Transit Association Limited (or RTA), is described in paragraphs 2 and 4 of the affidavit of Godfrey James, sworn to on October 6, 2014 as follows:

“2... a duly incorporated company under the Companies Act of Jamaica, with its registered address at 36 Lyndhurst Road, Kingston 5, in the parish of St. Andrew.

4. ...This Body was incorporated to, inter alia, represent and promote the interest of private individuals who are engaged in the provision of Public Passenger Transportation in Jamaica.”

The sole affiant on behalf of the claimant is Mr. Godfrey James who depones that he has been a bus owner since 1982 and is a member of the claimant.

### The 1st Defendant

**[218]** In the first affidavit of Kirk Finnikin (the affiant on behalf of the 1<sup>st</sup> Defendant), sworn to on November 19, 2014, it is said (at paragraph 11), that:

“11. ...the 1<sup>st</sup> Defendant is a private limited liability company and its sole shareholder is the Accountant General of Jamaica, however, it is denied that the 1<sup>st</sup> Defendant is an arm of the Government...”

### The 2<sup>nd</sup> Defendant

**[219]** In his affidavit sworn to on October 6, 2014, Mr. James indicates that the 2<sup>nd</sup> Defendant is the head of the Jamaica Constabulary Force, including the Traffic Division. (See paragraph 6 of his said affidavit). In paragraph 10 of his said affidavit he gives an indication of why the 2<sup>nd</sup> defendant has been sued. He states:

“10. Sometime in November 2013, a directive was issued by the Police Traffic Division, headed then by Senior Supt. Radcliffe Lewis, that the Police would be designating a portion of the Mandela Highway, the right hand side of the West Bound section of the Mandela Highway, to allow JUTC buses ONLY travelling from Spanish Town to Kingston, to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.”

Mr. James also depones at paragraph 12 of his said affidavit:

“12. The policy was announced by the Senior Supt. Radcliffe Lewis who carried out the policy by using members of the Jamaica Constabulary Force who placed cones along the Mandela Highway to create the designated exclusive bus lane in favour of the JUTC. The

exclusive bus lane was manned by the Jamaica Constabulary Force.”

**[220]** He thus apparently ascribes the creation or implementation of the policy to the then Senior Superintendent in charge of the Traffic Division of the Jamaica Constabulary Force (JCF).

### The 3<sup>rd</sup> Defendant

**[221]** In his said affidavit Mr. James (at paragraph 7) states that the 3<sup>rd</sup> defendant is joined by virtue of the Constitution of Jamaica. From all indications, however, the 3<sup>rd</sup> defendant is actually joined pursuant to the Crown Proceedings Act (section 13 (2)). That section reads thus:

“13 (2) (2) Civil proceedings against the Crown shall be instituted against the Attorney-General.”

### The Relief being Sought

**[222]** By way of its Fixed-date Claim Form filed on October 8, 2014 the claimant has applied for several forms of relief. On its application made on June 29, 2015, during the course of the hearing, the claimant was allowed to amend its claim form. These are the remedies that it now seeks:

“1. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not empowered by law to designate the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.

2. A declaration that the restriction of a portion of the right hand side of the West Bound section of the Mandela Highway by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m., is in breach of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, and in particular, section 13 (3) (G) and (H), and is therefore null and void and of no effect.

3. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants and or agents or howsoever described from restricting a portion of the right hand side of the West Bound section of the Mandela Highway to allow buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.

4. Damages to the Claimant to be assessed for the illegal actions of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants in breaching the Claimant's Constitutional rights in restricting the flow of traffic on the right hand side of the West Bound section of the Mandela Highway allowing buses of the 1<sup>st</sup> Defendant ONLY travelling from Spanish Town to Kingston to have sole occupation of that lane between Mondays to Fridays from 6:00 a.m. to 8:00 a.m.

5. Damages for breach of the Claimant's rights."

#### The Essence of the Claimant's Case

**[223]** The essence of the claimant's case and the foundation or premise on which its claim for the various remedies is built might be seen in paragraphs 15, 17, 18 and 19 of Mr. James' said affidavit. This is how those paragraphs read:

"15. By so designating the exclusive bus lane on the Mandela Highway, JUTC buses were given an advantage over my buses and other members of the Rural Transit Association Limited who also use the Mandela Highway to transport passengers to and from the corporate area.

17. In transporting passengers into Kingston, members of the RTA including myself, are unable to compete with JUTC buses because of the unfair advantage given to the JUTC by the designation of the exclusive bus lane resulting in significant loss in passengers.

18. Large numbers of passengers travelled on the JUTC buses



while my passenger loads diminished.

19. My business is directly affected by this policy which has resulted in massive decline in revenue, due to the preference that passengers have expressed in travelling on JUTC buses during peak hours.”

That is the substance of the factual basis of the claimant’s complaint and case.

### The Issues

**[224]** The issues may conveniently be identified and analyzed in the context of the particular remedies that are being sought.

### The First Declaration Sought

**[225]** Therefore, in relation to the declaration sought to the effect that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not empowered by law to designate the exclusive bus lane for the use of the JUTC, these are the relevant issues:

- (i) Was it the 1<sup>st</sup> and/or 2<sup>nd</sup> defendant(s) who designated the exclusive bus lane?
- (ii) If not, is the party who designated the bus lane before the court?
- (iii) If not, should the relief be granted against the defendants who are before the court?

### Summary of the Submissions

#### For the Claimant

**[226]** The claimant’s contention is that the directive for the implementation of the exclusive bus lane was given by the then head of the Traffic Division (see, e.g., paragraph 10 of the claimant’s skeleton submissions dated June 19, 2015).

Paragraphs 18 and 19 of the said submissions cement this further by stating:

“18...both the Police and the JUTC which are public authorities, have singled out the JUTC, a private company, owned by the Government of Jamaica, for special treatment in the use of the Mandela Highway, a public highway, over and above other users of the road including members of the Rural Transit Association Limited who are in the business of providing Public passenger transport service along the Mandela Highway.

19. The conjoint action of both Public entities has caused the Claimant to suffer significant financial loss....”

For the 1<sup>st</sup> Defendant

**[227]** For the 1<sup>st</sup> defendant it was contended that both itself and the 2<sup>nd</sup> defendant are in fact beneficiaries of the policy designating the bus lane exclusive; and not its implementer(s).

**[228]** The implementer of the policy was the Minister of Transport, Works and Housing. That this is so (according to the submissions) can be seen in letters passing between that Ministry and the 1<sup>st</sup> defendant, that are exhibited to several of the affidavits in the matter. For example there are: (i) letter dated April 22, 2014 from the Minister to the Managing Director of the 1<sup>st</sup> defendant, exhibited to the first affidavit of Kirk Finnikin, sworn to on November 19, 2014 as KF2; (ii) Exhibit KF3, which is made up of two letters dated February 17, 2014 and April 16, 2014 – exhibited to the said affidavit.

**[229]** Additionally, on the part of the 2<sup>nd</sup> defendant, there is a letter dated January 29, 2014, which is exhibit AAL 1 to the affidavit of Andrew A. Lewis, sworn to on the 12<sup>th</sup> day of May, 2015. That exhibit is a letter to the relevant Minister from the 1<sup>st</sup> defendant, under the signature of its managing director, seeking an extension of the project (that is, the continuation of the use of the exclusive bus lane) for a period of six months from February 1, 2014 to July 31, 2014.

[230] The submissions on this point were made mainly by the 1<sup>st</sup> defendant, and later adopted and reinforced by counsel for the 2<sup>nd</sup> defendant.

### Discussion

[231] I wish to commence the discussion of this point with reference to rule 19 of the Civil Procedure Rules (CPR). That rule deals with the addition and substitution of parties. Rule 21 of the CPR might also be mentioned. That rule deals with the appointment of representative parties. It might be useful as well to mention rule 23, which deals with proceedings in respect of minors and patients and the need generally in these matters for the appointment of a next friend.

[232] To my mind it is fair and reasonable to conclude, from the existence of these provisions in the CPR, that the CPR contemplates that the correct naming of parties in civil litigation is of no mean importance. In fact, the law books are replete with cases in which applications have been made (with varying degrees of success), to add or substitute parties. Oftentimes the issues have revolved around the question of whether there had been a misidentification or a misnaming of a party named as defendant. One such case, randomly chosen, is **Parsons v George** [2004] EWCA Civ 912, in which the issue for decision was whether a tenant ought to have been allowed to amend his pleadings to add or substitute a party after the expiration of the time permitted by the Landlord and Tenant Act of 1954. The appeal was allowed primarily on the basis that it would have been manifestly unjust to do otherwise, as the error was obvious and there was no misleading of or prejudice to anyone at all. At paragraph 8 of that judgment, Lord Justice Dyson opined:

“The question of whether to grant permission to add a new cause of action or a new defendant after the expiry of a relevant period of limitation has vexed the courts for many years. Various attempts have been made to balance the competing interests of claimants and defendants.”

[233] However, that case and rule 19 apart, it is generally understood that particular care and attention must be paid to the correctness of the identification of the person suing and the person or persons to be sued in civil litigation. In this regard the following excerpt from paragraph 215 of **Halsbury's Laws of England**, 4<sup>th</sup> edition, is relevant:

“215. ...The subject of parties has always been of great complexity in English law, and it therefore makes it all the more necessary to be careful and circumspect in dealing with the position of any particular party, from the point of view of his capacity to sue and be sued, the nature of the claim made or the relief or remedy sought by or against him and the special procedures applicable to legal proceedings affecting him.”

[234] Considering, as well, that an equitable remedy in the form of an injunction is one of the remedies being sought in this matter, the following statement of the law in paragraph 217 of **Halsbury's Laws of England**, 4<sup>th</sup> edition, is also of relevance:

“217....The proper defendant in an action brought to enforce an equitable right is the person against whom the relief claimed in the action is sought. In such an action all persons whose presence before the court is necessary to enable it to give the relief sought should be made defendants.”

[235] However, it is not only the non-naming of the correct defendant that features prominently in this case. What is of at least equal significance is that the identity of the correct defendant appears to have been known to the claimant for some time – at the very least since the matter first came before the court when leave to apply for judicial review was being sought. This is indicated in paragraph 8 of the 1<sup>st</sup> defendant's written submissions, which is to the effect that the contents of the affidavits of Kirk Finnikin are almost a “carbon copy of the information and exhibits contained in the Affidavit of Kirk Finnikin filed and served on the Claimant in Claim No. HCV 02278 of 2014 where this claimant sought leave to apply for judicial review and constitutional reliefs...”

**[236]** In this connection, paragraph 40 of the written judgment of Campbell, J in the application for leave to apply for judicial review requires quotation in full. It reads thus:

“[40] In the circumstances of this case, there are three Respondents before the Court, regulated by three distinct statutes. The evidence adduced by the Applicant, admits its inability to identify the source of the decision. According to Mr. Wildman the Authority and the JUTC both blame each other and he was unable to locate any Gazetted Order in relation to the decision. Counsel has made no attempt other than the unavailability of the Gazetted Order, to explain his failure to produce. It cannot be sufficient for the Applicant to present to the Court two Respondents and ask the court to select one. In any event there is no evidence before the court that the decision-maker is not (sic) before the court. How can the court judge the lawfulness of the decision, if the decision-maker is not known? All the Court is concerned with is the legality of the decision, was it within the limited powers that Parliament had conferred upon the decision-maker? It was also open to the Applicant to lay before the court, the procedures for the reservation of a bus lane, and the failure to comply with those procedures. Without, the Applicant identifying the source of the decision, who can say if the process is unlawful?”

**[237]** I would adopt these observations made by Campbell, J. The curious thing, however, is that, in spite of these observations having been made in this judgment delivered on September 29, 2014, there was no improvement on the state of this evidence presented before this court several months after. The threshold at the stage of application for leave being lower than the threshold at the substantive hearing, these observations must apply with greater force and *a fortiori* at this, the stage of the substantive hearing.

**[238]** It is important to note at this juncture, as well, the difference between the instant case, on the one hand, and those cases decided along the lines of the matters contained in rule 19 of the CPR. The main difference is this: those cases emanate from actual applications to add or substitute parties. In the instant case no such application has been made (in spite of the observations of Campbell, J

from in September of 2014). Nor would it be possible for such an application to be made now as the matter has been fully argued without any input in the form of affidavits or submissions from the Minister, who, it appears, was the person from whom approval for the project emanated. The 1<sup>st</sup> defendant is a beneficiary or recipient of that decision. Anything done by the 2<sup>nd</sup> defendant would likely have been done at the request or behest of the Minister, the person who gave approval for the implementation of the project.

**[239]** If (in spite of the existence of the letters passing between the Minister and the 1<sup>st</sup> defendant), the true identity of the person from whom the decision emanated was not known to the claimant, this information could have been ascertained by way of a request for information pursuant to Part 34 of the CPR and/or, perhaps, a request for specific disclosure.

**[240]** In relation to this issue, therefore, it is my view that the submissions of Mr. Scott, Q.C on behalf of the 1<sup>st</sup> defendant must be upheld. The non-naming of the proper defendant is fatal to the claimant's claim; and on this basis alone, ought to be result in the claim being dismissed. The three issues that were earlier identified in respect of the first declaration sought, must, therefore, be answered in the negative. So that I will say for the avoidance of doubt that there is no evidence that it was the 1<sup>st</sup> and/or 2<sup>nd</sup> defendant(s) who designated the particular bus lane exclusive to the JUTC; the person who did so is not before the court; and in those circumstances, the remedy sought cannot be granted.

**[241]** In my view as well this point might very well have been taken successfully as a point *in limine* by the defendants. So fundamental is the deficiency caused by the non-naming of the proper party. However, in the event that I am later proven wrong on these conclusions on this issue, I will address at least some of the other issues in this case.

#### Issues in Respect of the Second Declaration Sought

**[242]** It will be recalled that the second declaration sought is to the effect that the restriction of use of the bus lane for the 1<sup>st</sup> defendant only, amounts to a breach of sections 13 (3) (g) and (h) of the Charter of Fundamental Rights and Freedoms (the Charter).

The main issue in respect of this claimed remedy is this:

- i. Whether the claimant has established a breach by the parties before the court of either of these provisions; or, (alternatively put), whether these provisions may at all be applied to the facts and circumstances of this case.

#### Section 13(3) (g) & (h) of the Charter

**[243]** These are the relevant provisions of section 13(3) (g) and (h) of the Charter:

“13. – (1)

.the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

(2) Subject to sections 18 and 49, and to sub-sections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society-

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

(3) The rights and freedoms referred to in subsection (2)

are as follows –

(g) the right to equality before the law;

(h) the right to equitable and humane treatment by any public authority in the exercise of any function...”

### Section 13(3) (g)

### Summary of Submissions

#### For the Claimant

**[244]** It is the claimant’s contention that there has been a breach of its rights under this section of the Charter. The existence of a bus lane that is reserved for exclusive use by the 1<sup>st</sup> defendant means (it was argued) that it (the claimant) is not being dealt with equality before the law. In fact, this is how the kernel of the submissions on this point was put in paragraph 27 of the claimant’s written submissions:

“27. ...the Claimant contends that the action of two State agencies; the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, directly infringes or collides with the Claimant’s right under the Charter of Rights and Fundamental Freedom (sic) to equality before the law; and the right to equitable and humane treatment by any public authority in the exercise of any function.”

**[245]** In support of this submission, counsel for the claimant placed heavy reliance on the case of **Andrews v Law Society of British Columbia** [1989] 1 SCR, 143. In that case, Andrews, who was not a Canadian citizen, otherwise met all the requirements for being admitted to practice at the British Columbia bar. He sought a declaration that the requirement for Canadian citizenship for someone to be admitted to that bar, pursuant to s. 42 of the Barristers and Solicitors Act, 1979, violated s. 15(1) of the Canadian Charter of Rights and Freedoms. His claim was dismissed at first instance. He appealed. It was held on appeal, *inter alia*, that a rule which bars an entire class of persons from certain types of employment, solely on the ground of the lack of Canadian citizenship infringed s.



15 equality rights. It was held also that the objective of the Act was not so pressing and substantial as to warrant overcoming the rights afforded by s. 15.

### For the Defendants

#### The 1<sup>st</sup> Defendant

**[246]** The 1<sup>st</sup> defendant's approach to this matter was mainly to point out the factual background against which the claim is being brought as a means of attempting to show why the claimant would not be entitled to this particular remedy.

**[247]** The 1<sup>st</sup> defendant has exhibited to the first affidavit of Kirk Finnikin as exhibit KF1, an exclusive licence granted to the 1<sup>st</sup> defendant to operate within the Kingston Metropolitan Transport Region (KMTR). It is the Public Passenger Transport (Kingston Metropolitan Transport Region) Licence, 1998, appearing in the Jamaica Gazette Extraordinary of Monday September 7, 1998. According to this licence, another transport operator may only operate within this region pursuant to a sub-franchise system granted with the consent of the 1<sup>st</sup> defendant. No such consent has been given to the claimant, which, at its highest, might be a grouping of rural transport operators. Any plying of a route within the KMTR which involves picking up and setting down passengers within the KMTR would therefore be in breach of this licence, as well as the relevant Act – viz., the Public Passenger Transport (Kingston Metropolitan Transport Region) Act. There could never be any competition between the claimant and the 1<sup>st</sup> defendant, therefore, so that any damage and loss of revenue allegedly suffered by the claimant as a result of the operation of the exclusive bus lane would have to be more imagined than real.

#### The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

**[248]** For the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, it was argued that section 13(3) (g) simply is not applicable to the facts and circumstances of this case, and so no reliance can

reasonably be placed on it. To successfully establish a challenge to this right, it has to be shown that there was inequality as a matter of the law itself and in its administration in the courts (relying on the case of **Central Broadcasting Services Limited and Another v Attorney General** [2006] UKPC 35).

[249] That this is so can be seen (according to the submission) in the case of **Central Broadcasting Services Limited and Another v Attorney General** [2007] 2 LRC 19, a Privy Council decision arising out of Trinidad and Tobago.

[250] In relation to the case of **Andrews**, on which the claimant relies, the submissions made on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by Ms. Larmond, were to the effect that that case might be distinguished from the instant one on these bases: (i) the concept of equality before the law under the Canadian Charter involves discrimination on the basis of national origin, and similar considerations and so there would have been a clear basis for a finding of a breach of the Canadian Charter in that case. The Jamaican Charter, on the other hand, is different. (ii) In any event, one does not need to justify any infringement of the Charter unless the claimant has made out that there was in fact an infringement of the Charter, which was not done in this case.

[251] Additionally, in respect of the actions of the police, all that they did (it was submitted), was to perform their normal functions and exercise their normal powers pursuant to sections 21 and 22 of the Constabulary Force Act, which read as follows:

“21. It shall be lawful for any Constable in uniform to control traffic, and any person disobeying any instructions given or any signal, whether orally or by hand, or mechanical device, shall, upon summary conviction, be liable to a penalty not exceeding one thousand dollars and in default of payment thereof to imprisonment for any term not exceeding one month.”

22.-(1) Whenever in the opinion of the Commissioner, a street is liable or likely to be thronged or obstructed, it shall be lawful for him and for any Constable acting under his authority –

- (iv) generally to do all that is necessary to prevent a congestion of the traffic, and to provide for the safety and convenience of the public.”

Also being relied on is section 58 of the Road Traffic Act:

“58. The driver of a motor vehicle shall obey all directions whether verbal or by signal given by a constable in the execution of his duty to stop the vehicle or to make it slow down or to pass on any indicated side of the constable or to keep to any indicated line of traffic and any person who fails to obey any such direction shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars.”

## Discussion

### The Exclusive Licence

**[252]** A perusal of the exclusive licence and the relevant law confirms in my mind the correctness of the submissions on behalf of the 1<sup>st</sup> defendant in respect of the 1<sup>st</sup> defendant’s right to exclusivity of operation in the KMTR. That right is clearly set out in the licence. The licence defines what is meant by the KMTR as follows:

“Kingston Metropolitan Transport Region (K.M.T.R.) means the Corporate Area as defined under the Kingston and Saint Andrew Corporation Act and the area starting at a point on the 555,000 grid line at the Needles (Coleman’s Bay) and northerly on the same grid line to its junction with grid line 410,000 to a point touching the parish boundary of Saint Catherine and Saint Andrew at a point north westerly of Ferry and south-easterly along the said parish boundary on the west bank of the Fresh River to the sea coast at Hunts Bay, and south-easterly across Hunts Bay to a point on the eastern boundary of the Causeway at Greenwich Town, and south easterly along its south boundary to a point on the coastline at Passage Fort, and south-easterly along the coast line to Fort Augusta, and south-westerly along

the coastline to Old House Point and north- westerly to the starting point at Needles (Coleman's Bay)."

Clause 3(1) of the licence is also of great importance. It reads as follows:

"3.-(1) The Licensee is hereby granted subject to and in accordance with the provisions of the Act and of this Licence an Exclusive Licence to provide public passenger transport services by means of stage or express carriages or both stage and express carriages in the Kingston Metropolitan Transport Region (hereinafter referred to as the Service Area) as defined under the Act." (Emphasis added).

**[253]** The licence is said to be for a period of ten years from the date it took effect (September 7, 1998) and may be extended. There are also two sub-licences exhibited as a part of exhibit KF 1: these are: (i) a sub-licence to Metropolitan Transport Services Limited; and (ii) a sub-licence to National Transport Co-operative Society Limited.

#### The Licences Issued to Mr. James

**[254]** I have underlined the phrase "...as defined under the Act" in clause 3(1) of the licence set out above because of arguments mounted by Mr. Wildman for the claimant consequent on certain documents being tendered through the claimant's representative, Mr. James. These were: exhibits 1a and 1b. Exhibit 1a is a licence (# 840304) issued to Mr. Godfrey James in respect of a 2008 Toyota Coaster motor bus registered PG 4726 to ply the route: "Cross Roads to Linstead (MBT) via Washington Boulevard". It is dated March 2, 2015 and is stated to expire on March 31, 2019. In one of the conditions of the licence (condition # 2), it is specifically stated that:

"The operator of the approved motor vehicle shall not pick up a passenger within the KMTR and set down that same passenger within the KMTR."

**[255]** The issue arose, however, when this licence was compared with exhibit 1b. That exhibit is a licence dated April 16, 2011, to expire on March 31, 2015. It is licence number 640152 and is issued to the same Mr. James in respect of the same motor bus. The major difference between this licence and exhibit 1a is in the wording of condition 2. In this (the earlier) licence, condition 2 is set out thus:

“2. The approved stopping points at which passengers may be taken up and/or set down shall be such places as specified by the sign “Bus Stop” or where no signs are provided at such places”.

Another significant difference between the first licence and the second is that there is a difference between condition 10 in both licences. The first licence (exhibit 1b) has a condition 10 that reads as follows:

“10. The Licensee shall observe and comply with the condition imposed by Section 3 Subsection 4 Public Passenger Transport (Corporate Area) Act.”

On the other hand, this is condition 10 in the second licence (exhibit 1a):

“The Licensee shall observe and comply with the condition imposed by Section 3 Subsection 4 Public Passenger Transport (Kingston Metropolitan Transport Region) Act.”

**[256]** In relation to the Act referred to in the first licence as the “Public Passenger Transport (Corporate Area) Act”, there simply is no such Act; or, at the very least, the Act has been misdescribed. In relation to the Act referred to as the “Public Passenger Transport (Kingston Metropolitan Transport Region) Act”, set out below are the terms of section 3(3) referred to in condition 10, as well as other subsections of section 3 that might be relevant.

**[257]** A summary of section 3(1) is that it empowers the Minister to grant an exclusive licence to operate in the KMTR by means of stage and/or express carriages. A summary of section 3 (2) is that it precludes any person other than the exclusive licensee, from holding or being granted a licence to operate within the KMTR or

operating a stage or express carriage therein. These are now the relevant parts of section 3(3) and (4):

“(3) Nothing in subsection (2) shall prevent –

(c) the grant or holding of a road licence authorizing, subject to the condition referred to in subsection(4), the operation of any stage carriage service or express carriage service on any route which is partly within the Kingston Metropolitan Transport Region or the carriage of passengers on any service operated under and in accordance with such licence;”

Section 3(4), having been expressly mentioned in section 3(3), and the said section 3(3) being subject to it, its terms must assume considerable significance. These are those terms:

“(4) The condition referred to in paragraph (c) of sub-section (3) is that no passenger carried on the service shall be taken up at any point within the Kingston Metropolitan Transport Region or not more than 440 yards beyond the boundary of that area and set down on the same journey at any point within that area or not more than 440 yards beyond the boundary of that area unless the licensee has consented in writing to the taking up and setting down of passengers as aforesaid on such service and for the avoidance of doubt it is expressly declared that any consent given by the licensee for the purposes of this paragraph may be given subject to such conditions as the licensee may think fit.”

**[258]** Section 3(5) is not worded as pellucidly as one might have hoped (especially in the first two lines thereof); but if I understand its gist, it is that after May 31, 1953 (presumably the date of an amending Act), any road licence issued for the operation of a stage or express carriage service that is partly within the KMTR shall be deemed to be subject to the condition in sub-section (4) as if that condition had been attached to the road licence.

**[259]** To my mind sub-sections (4) and (5) are very important in coming to a resolution of the issue that arose on the differences between the two licences. On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants Ms. Larmond submitted that what is contained in condition 2 is something in the nature of a “codification” of section 3(3) and (4). The licensee would be bound by the Act, which is in force, irrespective of what it is called.

**[260]** Mr. Wildman, on the other hand, on behalf of the claimant, sought to highlight the incorrect reference in the first licence to an Act which does not exist. This, he argued, would at the very least have been confusing to the claimant.

**[261]** I tend to agree with the submissions made on behalf of the defendants in this regard. It seems to me that by the reference in condition 10 to the terms of an Act (albeit one that does not exist; or, put another way, an Act that was incorrectly described), the transport operator would be put on notice or on his enquiry as to the terms of the particular sub-section of that Act. A search for the incorrectly-named Act would have revealed the fact of its non-existence (or the incorrect reference), and would have pointed him to the correct Act. (The only difference between them in any event is that in one “Corporate Area” is used in parentheses, whereas in the other “Kingston Metropolitan Transport Region” is used). Indeed, the incorrect use of the term “corporate area” in the description of the Act in the first licence is perhaps understandable, given the definition of the KMTR in section 2 of the Public Passenger Transport (Kingston Metropolitan Transport Region) Act, which is:

““Kingston Metropolitan Transport Region” means the Corporate Area together with the area specified in the First Schedule;”

**[262]** The area specified in the First Schedule is the same as that contained in the definition of the KMTR given in the exclusive licence. Additionally, as is indicated at the end of the two licences, they are issued, not by any of the defendants; but by the Transport Authority. This fact should be borne in mind as well when considering the suggestion made by Mr. Wildman that it was as a result of questions being raised about the creation of the exclusive bus lane that led to the old licence being cancelled and the new one issued. It is not without significance as well, to my way of thinking, that the

two licences are entitled “Licence to Operate Stage Carriage Service (Rural)”. This should be looked at in the context of the expression “rural area” in the Public Passenger Transport (Rural Area) Act, in section 2 of which this definition is given:

““Rural Area” means that part of Jamaica which is not within the Kingston Metropolitan Transport Region.”

**[263]** For me, the cumulative effect of these observations is that for one, (dealing with the last observation first), the claimant’s representative and others like him who operate under a rural licence would not in the normal course of things be expected to operate in the KMTR, except, perhaps, in a limited way. Two, that limited way would have to be delineated and consented to in writing by the exclusive licensee (which was not done in this case). Three, even if through faulty wording of a licence by the Transport Authority (which is not a party to this action) the name of an Act was not clearly set out, the fact of the matter is that the law caused to be included in all such rural-area licences or road licences to operate partially within the KMTR, sub-sections (3) and (4). Holders of such road licences must therefore to my mind be deemed to be aware of those particular provisions and to be bound by them. Four, according to the statutory provisions, the claimant or its members ought not to be or to have been operating in the KMTR by setting down and picking up passengers therein on the same journey. That being the case, the claimant’s area of operation was different from that in which the 1<sup>st</sup> defendant operates. The two were not competitors and so the implementation of the exclusive bus lane policy cannot have caused a loss to the claimant or any rural operator.

**[264]** In relation to the case of **Andrews** as well, I am persuaded by the submissions made by Ms. Larmond as to the bases on which that case might and ought to be distinguished from the instant case. The wording of the particular constitutional provision in Canada (section 15(1)), might also, I believe, when perused, assist in coming to this view. It reads as follows:

“15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race,



national or ethnic origin, colour, religion, sex, age or mental or physical disability.”(Emphasis supplied).

[265] I must observe as well that in relation to the contention of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that this case does not relate to the law itself, the definition of law in section 1 of the Jamaican Constitution seems to be relevant for the court’s consideration. That section defines “law” as:

““law” includes any instrument having the force of law and any unwritten rule of law and "lawful" and "lawfully" shall be construed accordingly;”

[266] The difficulty that the claimant faces in light of this definition and the general understanding of the scope of section 13(3) (g), is that the defendants have all described the creation of the exclusive bus lane as a policy or project and there has been no instrument having the force of law put before the court or any reference made to any rule of the common law which the court might consider as the source of the constitutional breaches being complained of. From all the foregoing, the submissions on behalf of the defendants in respect of section 13(3) (g) of the Charter, must be accepted.

#### Section 13(3) (h) of the Charter

[267] On behalf of the claimant, Mr. Wildman contended that the arrangements in respect of the exclusive bus lane in favour of the 1<sup>st</sup> defendant amount to a breach of the claimant’s right to equitable and humane treatment by a public authority in the exercise of its function. Paragraph 43 of the claimant’s written submissions encapsulates the claimant’s main point in relation to this section:

“43. In the instant case, the Claimant, Rural Transit Association Limited in the person of Mr. Godfrey James, is alleging that the law itself is inequitable in that it purports to give JUTC buses exclusive privilege of travelling on one section of the Mandela Highway during peak hours to the exclusion and disadvantage of other persons such as Mr. James who are in the business of Public passenger transportation. This is the pith and substance of the

Claimant's claim, see also **Bhagwandeem v Attorney General of Trinidad and Tobago** [2004] UKPC 21."

[268] Mr. Wildman also sought to rely on the case of **Paponette and others v Attorney General of Trinidad and Tobago** [2010] UKPC 32, as a basis for submitting that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in clear violation of the provisions contained in section 13(3)(g) and (h) of the Charter. Additionally, he submitted, the matters raised in the two affidavits of Kirk Finnikin (as to the 1<sup>st</sup> defendant's financial challenges and its efforts to attain profitability by 2017), do not amount to a justification for what he said was the violation of the claimant's constitutional rights.

For the 1<sup>st</sup> Defendant

[269] It was submitted on behalf of the 1<sup>st</sup> defendant that mere difference in treatment is not a breach of the particular constitutional provision (citing **Pickersgill, Robert, et al v The Attorney General and the DPP** [2013] JMFC Full 4). If difference in treatment is prescribed or permitted by some law, it is presumed to be constitutional and a direct challenge against the law would have to be mounted (which was not done in this case). The claimant must show that it has a legal right to be treated or not be treated in a particular way.

[270] It was further submitted that neither the claimant nor any other user of the Mandela Highway has been deprived of any pre-existing right to traverse the said Highway in either direction. Further, if the claimant wishes to share the privilege of using the exclusive bus lane, it should apply for such permission; and, if refused, seek judicial review. The constitutional right is to "equitable" and not "equal" treatment.

For the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

[271] The arguments for these defendants were to the effect that: (i) there are several criteria or pre-requisites for establishing a constitutional claim set out in two cases. These are set out in (a) **Banton and others v Alcoa Minerals of Jamaica Inc and others** (1971) 17 WIR 275; and (b) **Maurice Tomlinson v CVM Ltd and others** [2013] JMFC Full 5. These pre-requisites have not been met by the claimant. What the

claimant has done is to have made a mere allegation of a breach of its constitutional rights. (Arguments mounted in respect of section 13(3) (g) were also advanced in relation to this section (13(3) (h)).

## Discussion

### The Threshold

[272] In the **Banton** case, cited by Ms. Larmond for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, these were the pre-requisites for establishing a constitutional claim that Parnell, J outlined (at pages 30 and 31 of the judgment):

“Before an aggrieved person is likely to succeed with his claim before the Constitutional Court, he should be able to show:

- (1) That he has a justiciable complaint; that is to say, that a right personal to him and guaranteed under Cap III of the Constitution has been or is likely to be contravened. For example, what is nothing more than naked politics dressed up in the form of a right is not justiciable and cannot be entertained;
- (2) that he has a “standing” to bring the action; that is to say, he is the proper person to bring it and that he is not being used as the tool of another who is unable or unwilling to appear as the litigant; that his complaint is substantial and adequate and has not been waived or otherwise weakened by consent, compromise or lapse of time;
- (3) that there is no other avenue available whereby adequate means of redress may be obtained. In this connection, if the complaint is against a private person it is difficult, if not impossible, to argue that adequate means of redress are not available in the ordinary court of the land. But if the complaint is directed against the State or an agent of the State it could be argued that the matter of the contravention alleged may only be effectively redressible in the Constitutional Court;
- (4) that the controversy or dispute which has prompted the proceedings is real and that what is sought is redress for the contravention of the

guaranteed right and not merely seeking the advisory opinion of the court on some controversial, arid, or spent dispute.”

**[273]** In the **Maurice Tomlinson** case also cited by Ms. Larmond, Sykes, J (in what Ms. Larmond referred to as “an updated version” of the test in the **Banton** case), stated (at paragraphs 110 and 111 of the judgment) the requirements for establishing a constitutional claim. He indicated that he abstracted these principles from the work edited by Stuart Woolman, Michael Bishop and Jason Brickhill, entitled **Constitutional Law of South Africa**, 2<sup>nd</sup> edition, Juta Law 2008), Part 2, Chapter 34, page 2 – a section entitled ‘Limitations’, by Stuart Woolman and Henk Botha. What Sykes, J said, follows:

“[110] In order to succeed Mr Tomlinson must show that:

- (1) he has sufficient standing to bring this claim, that is, he must show that a Charter right has been, is being or is likely to be infringed in relation to him;
- (2) that the act he wishes to do or has done is protected by the Charter, that is, the conduct must be within one or more of the provisions of the Charter;
- (3) the defendants are bound by the right(s) claimed;
- (4) the defendants’ conduct infringed his Charter right;
- (5) there are no other adequate means of redress.”

**[274]** For the avoidance of any doubt as well, let me state that the approach that I am using in looking at the various constitutional provisions is that stated in **Reyes v R** (2002) 60 WIR 42 at paragraph [26], where Lord Bingham stated:

“A generous and purposive interpretation is to be given to constitutional provisions protecting human rights.”

It is useful to state at this juncture as well that, as I understand the word “equitable”, it means: “fair”. I accept the submission made on behalf of the 1<sup>st</sup> defendant that it does not mean “equal”. And fairness is a concept that must be decided having regard to all the facts and circumstances of a particular case. “Inhumane” means “without compassion for misery or suffering; cruel”.

[275] In this case, the larger background to this matter is the existence of legislation that permits the grant of an exclusive licence in the KMTR, which is enjoyed by the 1<sup>st</sup> defendant. We have as well the consideration that the claimant (or perhaps more accurately, its affiant) is a rural operator and so not permitted to operate within the KMTR – that is, not to pick up and on the same journey set down passengers therein, and so could not reasonably be regarded as being a competitor with the 1<sup>st</sup> defendant. We also have the fact that it is one lane that is being used by the 1<sup>st</sup> defendant and that the other lanes may still be used by all other road users, including the claimant’s affiant and its members. Against this background, I cannot see how the claimant can legitimately claim that it is the victim of inequitable and inhumane treatment within the meaning of the constitutional provision. Neither can I see how the dictionary meaning of “inequitable” or “inhumane” or “inequitable and inhumane” (as I am of the view that the structuring of the provision requires that the two words be read conjunctively), could reasonably apply to the actions attributed to the 1<sup>st</sup> and 2<sup>nd</sup> defendants – even if they had been proven.

[276] Even after giving the generous interpretation to the constitutional provisions that is required, I am decidedly of the view that the claimant has failed to meet the threshold requirements set out in the **Banton** and **Tomlinson** cases. Specifically, it has not convinced me that it has a justiciable complaint; that it has proper standing to bring the matter; that its complaint is substantial or adequate and that this is a controversy of any real substance.

Alternative Remedy

**[277]** In relation to the consideration as to whether there is any adequate means of alternative redress, I am not convinced that it is necessary for me to explore this. The reason for this is that these threshold requirements, as I understand them, are cumulative in effect – so that if an applicant, say, is unable to convince a court that he has a justiciable claim, then the claim must fail and no consideration of the other requirements would be necessary. In other words, if he succeeds on four of the five tests but fails on the fifth, the claim still fails. A claimant would need first to establish that he has standing and a justiciable claim for consideration to be given to whether alternative means of redress exist.

**[278]** However, if I have erred in coming to this conclusion, then it seems to me that the claimant does in fact have (or has had available to it), an alternative remedy – that is, to cure the defects pointed out by Campbell, J in its initial application for leave to apply for judicial review and renew its said judicial-review application. However, the delay that has now been occasioned by the abandonment of that aspect of the application and the pursuit of remedies relating to alleged constitutional breaches in this claim might now adversely affect its chances of success in applying for judicial review.

#### Police Powers

**[279]** Again, with the findings that I have previously made, it does not appear to me to be strictly necessary to make a definitive ruling as to the powers of the police pursuant to sections 21 and 22 of the Constabulary Force Act and section 58 of the Road Traffic Act. However, suffice it to say that it does appear that the activities of the police pursuant to the project could very well be properly grounded in the sections referred to – in particular that part of section 58 of the Road Traffic Act by which the constable might require motorists : “to keep to any indicated line of traffic.”

**[280]** I also accept the submission made on behalf of the defendants that a traffic direction in relation to the use of a particular lane cannot and does not rise to the breach of a constitutional or human right.

[281] In relation to the case of **Paponette**, I must say, respectfully, that I do not find that case to be directly relevant to the facts and circumstances of this case. **Paponette**'s focus was on a claim based on legitimate expectation, which owners and operators of maxi-taxis claimed was frustrated by the government granting control and management of a transportation site to their competitor. The instant case, on the other hand, deals with an entirely different set of factual circumstances. For these reasons, the issues in respect of the second remedy sought must be resolved in favour of the defendants.

[282] In light of these findings, it is my considered opinion that the claimant is not entitled to any of the remedies that he seeks – neither the injunction nor any damages. However, considering that this matter might be the subject of review by a higher court which may take a different view of the matter, I will give some brief consideration to the remaining remedies sought.

#### The Third Remedy – the Permanent Injunction

##### Ought an Injunction to be granted against the Crown?

[283] I am of the view that the true position in relation to this issue is that stated in section 16 of the Crown Proceedings Act, the relevant section of which reads as follows:

“(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the Court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;”

The case of **Jennifer Gairy v The Attorney General (No 2)** (1999) 59 WIR 174, cited on behalf of the claimant, might be distinguished from the instant case on the following bases: (i) the facts are quite different from the instant case; (ii) that case dealt primarily with the fashioning of a remedy for an applicant in circumstances in which a constitutional breach had clearly been established.

So that, in relation to the claim for an injunction, it is my view that none can be granted on the following grounds: (i) no breach of any constitutional provision has been proven; and (ii) it is not permissible to grant an injunction against the Crown, pursuant to section 16 of the Crown Proceedings Act.

### Damages

**[284]** In relation to the claims for aggravated and exemplary damages, these were withdrawn by counsel for the claimant, and permission was granted for the fixed date claim form to be amended accordingly. If that had not been done then the submissions on behalf of all the defendants would have been accepted, as, from all appearances, such claims would not be permissible, based on the authority of **Durity v The Attorney General** [2009] LRC 376.

**[285]** In relation to the order sought for damages to be assessed, because of the paucity of any evidence in relation to any damage and any consequential loss or even that the claimant itself (which apparently is something in the nature of a lobby group), sustained any loss, I would recommend that this court decline to make any such order. We will see that this is so when we remind ourselves of the contents of paragraphs 18 and 19 of the affidavit of Mr. James:

“18. Large numbers of passengers travelled on the JUTC buses while my passenger loads diminished.

19. My business is directly affected by this policy which has resulted in massive decline in revenue, due to the preference that passengers have expressed in travelling on JUTC buses during peak hours.”

That is all.

**[286]** Clearly, that evidence is insufficient and certainly much too vague for the court to make an order of the type sought. Additionally, even though Mr. James depones to having suffered losses, it is to be remembered that he is not the claimant, which is a limited- liability company and so a separate legal entity from Mr. James. In these



circumstances the court is obliged to give effect to the words of Cory, J in **MacKay v Manitoba** [1989] 2 SCR 357, at pages 361-362:

“Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void...”

### Conclusion

[287] One cannot help but be concerned about the apparently informal manner in which this policy creating the exclusive bus lane was created or implemented, with the absence of any gazetted order, regulation, Act of Parliament or other similar document being presented to the court. Be that as it may, however, from a legal standpoint and having given very careful consideration to the cases, arguments and submissions advanced by all counsel in this matter and having had regard to the various pieces of legislation and the Constitution itself, I am of the view that the claimant has not made out its case. This is due to a number of reasons – some procedural; some substantive. It has not, for example, convinced me that the correct party that it should pursue is before the court. It has not convinced me that it has a justiciable claim or that there has been a breach of any of the sections of the Constitution. It has not been able to surmount the threshold requirements. In these circumstances, it is my view that the application should be dismissed in its entirety and that none of the orders sought should be granted.

### Costs

[288] The general rule in matters of this nature is that no order for costs would normally be made unless it is felt that the applicant has acted unreasonably in bringing or prosecuting the claim. This is the substance of the rule set out in rule 56.15(5), which reads as follows:

“(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.”

To my mind, when one considers the earlier observation that in the judgment of Campbell, J at the leave stage he had indicated at least one major deficiency in the claimant’s case; and that this was not rectified, it might reasonably be argued that the claimant has acted unreasonably. For my part, however, in all the circumstances, I would not be minded to depart from the general rule that there be no order for costs.

**Order (By majority. Lawrence-Beswick J. dissenting):**

Claim dismissed. No Order as to costs.